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CALIFORNIA REPORTER

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SECOND SERIES

51 Cal.2d 828

June WILBORN, Petitioner,
v.
SUPERIOR COURT OF HUMBOLDT COUNTY, Respondent.
Sac. 7033.

Supreme Court of California,
In Bank.
April 3, 1959.

Original proceeding on petition for writ of prohibition to restrain Superior Court from proceeding with trial of petitioner who was charged in information with child stealing. The Supreme Court, Spence, J., held that where preliminary examination showed that mother, who had separated from father, had moved with four-month-old child into child's maternal grandfather's home, that petitioner gained entrance to grandfather's home under false pretense, that while father held grandfather, petitioner took the child, and father, petitioner, and child then departed, although father had equal right to custody of child, there was probable cause for holding petitioner to answer for crime of child stealing.

Alternative writ discharged, petition for peremptory writ of prohibition denied.

Opinion, 329 P.2d 714, vacated.

1. Kidnapping ⚷1

Purpose of statute relating to child stealing is to protect parents against worry and grief which necessarily follow decoying away and retaining of their children. West's Ann.Pen.Code, § 278.

2. Parent and Child ⚷2(1)

Whatever may be right of one parent, in absence of order for child custody, to invade possession of other to take or entice away their mutual offspring, such right may not be delegated to agent. West's Ann.Pen. Code, § 278.

3. Criminal Law ⚷238

Where preliminary examination showed that mother, who had separated from father, had moved with four-month-old child into child's maternal grandfather's home, that petitioner who was charged in information with child stealing and who was seeking writ of prohibition against Superior Court from proceeding with trial gained entrance to grandfather's home under false pretense, that while father held grandfather, petitioner took the child, and father, petitioner, and child then departed, although father had equal right to custody of child, there was probable cause for holding petitioner to answer for crime of child stealing. West's Ann.Pen.Code, § 278.

◆

Falk & Falk and Charles V. Moore, Eureka, for petitioner.

Edmund G. Brown, Atty. Gen., Doris H. Maier and William O. Minor, Deputy Attys. Gen., for respondent.

SPENCE, Justice.

Petitioner was charged with child-stealing (Pen.Code, § 278), an offense somewhat similar to the crime of kidnaping (Pen. Code, § 207). She moved to set aside the information on the ground that she had been committed without reasonable or probable cause (Pen.Code, § 995). Her motion was denied, and she now seeks a writ of prohibition to prevent further proceedings against her (Pen.Code, § 999a).

At the preliminary examination the evidence showed that the parents of the child, Mr. and Mrs. James, had separated. Mrs. James had moved into her father's home with the child, a four-month-old baby girl. On the night of March 31, 1958, petitioner gained entrance to the grandfather's house upon the false pretense that she was seeking aid in changing a tire on her automobile. Mrs. James was not at home. The grandfather became suspicious of petitioner because of her answers to some of his questions, and he started to shove petitioner out the door. At that moment, Mr. James, who was standing outside, jumped on the grandfather, cursed him, and threw him to the floor. While Mr. James held the grandfather, petitioner went into the living-room, took the child from bed, wrapped her in a blanket, and left the house with her. Mr. James followed, and all three departed in an automobile. On the following day, Mrs. James obtained an order for the custody of the child pending annulment proceedings. Some days thereafter, she saw petitioner carrying the child into another house. At that time, Mrs. James did not see Mr. James but did see his car.

Section 278 of the Penal Code provides: "Every person who maliciously, forcibly, or fraudulently takes or entices away any minor child with intent to detain and conceal such child from its parent, guardian, or other person having the lawful charge of such child, is punishable by imprisonment in the state prison not exceeding twenty years."

Petitioner argues that since the father, Mr. James, had an equal right to the custody of the child on March 31 (Civ.Code, § 197; Armstrong, California Family Law, vol. 2, p. 955), he could not have been guilty of the crime charged. She then argues that she was only the authorized agent of the father, accompanying and aiding him to gain custody of the child, and therefore she could not have been guilty of the crime. Respondent opposes petitioner's position on two grounds: (1) That the evidence does not necessarily show that petitioner was acting as the father's agent rather than as the principal, with the father merely assisting her. (2) But even assuming that the evidence does show that petitioner was acting as the father's agent, this fact would not absolve her from guilt under the statute. We need not discuss the first ground as we have concluded that the writ should be denied here upon the second ground urged by respondent.

Concededly, petitioner's position stems from the general rule: "In the absence of an order or decree affecting the custody of a child, it is generally held that a parent, or one assisting such parent, does not commit the crime of kidnapping by taking exclusive possession of the child." Annotation: 77 A.L.R. 317; State v. Elliott, 171 La. 306, 131 So. 28, 77 A.L.R. 314; State v. Dewey, 155 Iowa 469, 136 N.W. 533, 40 L.R.A.,N.S., 478; People v. Workman, 94 Misc. 374, 157 N.Y.S. 594; see also People v. Nelson, 322 Mich. 262, 33 N.W.2d 786. However, there is authority holding that although the parent may not be guilty of kidnaping, a person who aids or assists is guilty of the offense, on the theory that the immunity of the parent is personal to such parent. State v. Brandenburg, 232 Mo. 531, 134 S.W. 529, 32 L.R.A.,N.S., 845; Wharton's Criminal Law and Procedure, Anderson, Vol. 1, § 378, pp. 744–745; 51 C.J.S. Kidnapping § 4, p. 441.

[1–3] While the latter is the minority view, it appears more in accord with the object of the statute. The crime is "against the parent and not against the child." People v. Simmons, 12 Cal.App.2d 329, 332, 55 P.2d 297, 299. The statute was apparently designed to protect parents against the worry and grief which necessarily follow the "decoying away and retaining of their children." State v. Brandenburg, supra, 134 S.W. 529, 530. If a child be taken or enticed away from one parent by the other parent, the mental anxiety of the parent who loses the child would not ordinarily be nearly so great as where the child passes into the hands of one having no parental obligations toward the child. Thus, it would seem that whatever may be the right of one parent, in the absence of an order for child custody, to invade the possession of the other to take or entice away their mutual offspring, such right may not be delegated to an agent. To hold otherwise would result in untold confusion and provoke many possible breaches of the peace in that the parent having possession of the child would be at the mercy of persons acting as alleged agents of the other parent and claiming immunity from prosecution under the statute because of the personal right of their principal. See State v. Tillotson, 85 Kan. 577, 117 P. 1030. Such consequences would not promote the interests of the parents, the child or the public welfare. For the reasons stated, we conclude that there was reasonable or probable cause for holding petitioner to answer for the crime charged.

The alternative writ is discharged, and the petition for a peremptory writ of prohibition is denied.

GIBSON, C. J., SHENK, TRAYNOR, SCHAUER and McCOMB, JJ., and WHITE, J. pro tem., concur.

51 Cal.2d 838

In re William Howard CLARK, on Habeas Corpus.

Cr. 6383.

Supreme Court of California,
In Bank.
April 3, 1959.
Rehearing Denied April 29, 1959.

Habeas corpus proceeding. The Supreme Court, McComb, J., held that on application for revocation of probation judge could have extended probationary period, and that therefore order denying application for revocation of probation had conclusively determined that, upon facts before judge, probationary period should not be extended; and held that another judge had thus been without jurisdiction to thereafter predicate probation term extension upon those same facts.

Order accordingly.

Spence, J., dissented.

1. Criminal Law ⚷982.6(4)

An order modifying terms of probation based upon same facts as original order granting probation is in excess of jurisdiction of court, for reason that there is no factual basis to support it.

2. Criminal Law ⚷982.9(2)

On application for revocation of probation, judge could have extended probationary period, and therefore order denying application for revocation of probation conclusively determined that, upon facts before judge, probationary period should not be extended; and another judge was thus without jurisdiction to thereafter predicate probation term extension upon those same facts. West's Ann.Pen.Code, § 288a.

3. Criminal Law ⚷982.9(3)

After expiration of probationary period, court was without jurisdiction to revoke probation.

4. Habeas Corpus ⚷4, 27

As a general rule, writ of habeas corpus cannot serve as substitute for an appeal, but writ will lie where it appears upon face of record that trial court lacked jurisdiction to impose order or judgment pursuant to which petitioner is held in custody.

5. Habeas Corpus ⚷4

Where judge was without jurisdiction to make order extending term of probation or to pronounce subsequent judgment revoking probation, writ of habeas corpus was available, nothwithstanding appealability of order and judgment.

◆

Robert H. Lund, Long Beach, for petitioner.

Edmund G. Brown, Atty. Gen., William E. James, Asst. Atty. Gen., James Don Keller, Dist. Atty., and Claude B. Brown, Deputy Dist. Atty., San Diego, for respondents.

McCOMB, Justice.

This is a proceeding in habeas corpus filed by Robert H. Lund, an attorney, hereinafter referred to as "petitioner," to determine whether the court exceeded its jurisdiction in modifying the terms of probation of William Howard Clark, hereinafter referred to as "defendant."

Chronology

1. May 16, 1952, defendant pleaded guilty in the Superior Court of San Diego County to the crime of violating section 288a of the Penal Code.

2. June 2, 1952, Judge Glen suspended imposition of sentence for five years (un-

til June 1, 1957) and imposed certain conditions of probation.

3. March 27, 1956, defendant was in custody because he had violated probation for a misdemeanor conviction of another violation of section 288a of the Penal Code. On that date Judge Glen held a hearing relative to modification of probation and ordered that defendant be released from custody and that the terms of the original probation order remain in effect.

4. March 28, 1956, Judge Hewicker, ex parte, at the request of the probation officer, purportedly extended the term of the probation three years to June 1, 1960. The facts upon which he acted were the same as those upon which Judge Glen had acted on March 27, 1956.

5. In 1958 defendant suffered another misdemeanor conviction for violating section 288a of the Penal Code and was taken into custody for violation of probation.

6. November 12, 1958, petitioner sought habeas corpus on the ground that the order of March 28, 1956, purportedly extending the term of probation, was made without the court's having jurisdiction and that defendant's probationary period had therefore expired. Judge Glen denied the application for the writ, and Judge Hewicker revoked defendant's probation and imposed sentence.

Defendant is now in the custody of E. J. Oberhauser, Superintendent of California Institution for Men, at Chino.

[1-3] *Questions:* First. *Was Judge Hewicker's order of March 28, 1956 purportedly extending the term of probation, void because the court exceeded its jurisdiction in making it?*

Yes. An order modifying the terms of probation based upon the same facts as the original order granting probation is in excess of the jurisdiction of the court, for the reason that there is no factual basis to support it. (In re Bine, 47 Cal.2d 814, 818 [9], 306 P.2d 445.)

Applying the foregoing rule to the facts of the present case, it appears that Judge Glen, by his order of March 27, 1956, exhausted the jurisdiction of the court to act as to modification of probation upon the facts then before him, and that Judge Hewicker was therefore without jurisdiction to extend the term of probation by his ex parte order of March 28, 1956, predicated upon the same facts.

On the application before him, Judge Glen could have extended the probationary period. Therefore, the question of whether or not, upon the facts before the court on March 27, 1956, such action should be taken was conclusively determined by the order entered on that date.

Since the court was without jurisdiction to make the March 28th order extending the probationary period, it follows that such period expired on June 1, 1957. Therefore, the court lacked jurisdiction or power to revoke the probation and enter judgment on November 12, 1958. (People v. O'Donnell, 37 Cal.App. 192, 196, 174 P. 102.)

[4, 5] Second. *Since defendant could have appealed from the order of March 28, 1956,*[1] *and the judgment of November 12, 1958,*[2] *is a writ of habeas corpus now available to him?*

Yes. It is the general rule that a writ of habeas corpus cannot serve as a substitute for an appeal. (In re Dixon, 41 Cal.2d 756, 759[1], 264 P.2d 513.) An exception to this rule is: A writ of habeas corpus will lie where it appears upon the face of the record that the trial court lacked jurisdiction to impose the order or judgment pursuant to which the petitioner is held in custody. (In re Ballas, 53 Cal.App. 109, 111[1], 199 P. 816; In re Garrity, 97 Cal.App. 372, 376[2], 275 P. 480; see also 24 Cal.Jur.2d (1955), Habeas Corpus, § 13, p. 427.)

The facts in the present case bring it within the exception to the general rule, since the record shows on its face that Judge Hewicker was without jurisdiction to make the order of March 28, 1956, or pronounce the judgment on November 12, 1958.

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[1] In re Bine, 47 Cal.2d 814, 817[6], 306 P.2d 445.

[2] People v. Robinson, 43 Cal.2d 143, 145 [4], 271 P.2d 872; In re Davis, 37 Cal. 2d 872, 875[3], 236 P.2d 579.

The writ is granted. The return to the order to show cause heretofore issued shall stand as the return to the writ. Defendant is discharged from the custody of the Superintendent of California Institution for Men at Chino. This order applies only to the commitment in the instant case.

GIBSON, C. J., and SHENK, TRAYNOR, and SCHAUER, JJ., concur.

SPENCE, Justice.

I dissent.

In my opinion, it does not appear "upon the face of the record" or otherwise "that the trial court lacked jurisdiction" to make the order of March 28, 1956, extending the duration of probation to June 1, 1960. The majority opinion apparently concedes that unless it does so appear, then defendant is properly confined under the sentence imposed on November 12, 1958, following defendant's third conviction for repeated violations of section 288a of the Penal Code.

Upon a prior habeas corpus proceeding instituted in the superior court in 1958, Judge Glen reviewed the record and concluded that "the extension was proper and that the court had a right and jurisdiction to do it." I agree with that conclusion. It appears that the application which had been made by the probation officer to Judge Glen on March 27, 1956, was for *revocation* of probation, and not for *extension* of probation; that Judge Glen then denied revocation by ordering defendant's release from custody of the sheriff and his continuation on probation; that Judge Glen did not pass upon any application for extension; that Judge Glen "probably would have extended it" if such application had been made; that the cause was then returned to the department of the presiding judge where post-sentence proceedings were normally heard; and that thereafter "the probation officer took it into the presiding department as a matter of routine that it be extended." Under these circumstances, I find no inconsistency between the order of March 27, 1956, denying the application for revocation of probation, and the order of March 28, 1956, granting the application for extension of probation.

The majority opinion rests solely upon the authority of In re Bine, 47 Cal.2d 814, 306 P.2d 445, 446, but that case is clearly distinguishable. This court there pointed out that "no problem is here presented as to improper conduct by petitioner or violation of the terms of his original probation"; and that the trial court simply "reached a different conclusion upon the same facts which were before it at the time it imposed the original terms of probation." 47 Cal.2d at pages 816–817, 306 P.2d at page 446. It was therefore held that the order modifying the original order of probation, by adding a jail sentence as a condition thereof without any new facts to support such order of modification, "was made in excess of the jurisdiction of the court for the reason that there was no factual basis to support it." 47 Cal.2d at page 818, 306 P.2d at page 447. Here, however, there was improper conduct by defendant and there was a violation of the original terms of probation, and it is clear that there were ample new facts to support the order of extension. In my opinion, the mere fact that there had been a prior order denying an application for revocation of probation did not affect the jurisdiction of the court to entertain an application for an extension of the duration of probation based upon the same misconduct and violation of the terms of the original probation. To hold otherwise would result in putting an unwarranted and undesirable limitation upon the powers of the trial courts in administering the beneficient provisions of our statutes relating to probation.

In view of the above conclusion, it is unnecessary to discuss the question of whether defendant is foreclosed from raising the point in this proceeding in habeas corpus by reason of his failure to appeal from the judgment of conviction entered on November 12, 1958.

I would deny the petition and remand the defendant to custody.

Rehearing denied; SPENCE, J., dissenting.

51 Cal.2d 832

Alberta WOLFSMITH, Appellant,

v.

Paul King MARSH et al., Respondents.

Sac. 7055.

Supreme Court of California,
In Bank.
April 3, 1959.

Action for alleged malpractice in administering a hypodermic injection of sodium pentathol. The Superior Court, Lake County, Benjamin C. Jones, J., rendered judgment for defendants, and plaintiff appealed. The Supreme Court, McComb, J., held that question whether injuries resulting from injection were of type which ordinarily did not occur in absence of negligent administration of drug was for jury.

Reversed.

Opinion, 333 P.2d 71, vacated.

1. Appeal and Error 🔑928(4)

Where appellant does not question sufficiency of evidence to support judgment but contends that it was error to refuse requested instruction, reviewing court must view evidence in light most favorable to party offering instruction.

2. Negligence 🔑121(2)

Conditions requisite for application of doctrine of res ipsa loquitur are: (1) accident must be of kind which ordinarily does not occur in absence of some one's negligence, (2) it must be caused by an agency or instrumentality within exclusive control of defendant, and (3) it must not have been due to any voluntary action or contribution on part of plaintiff.

3. Evidence 🔑20(1)

It is a matter of common knowledge among laymen that injections in the arm, as well as other portions of the body, do not ordinarily cause trouble unless unskillfully done or unless there is something wrong with serum.

4. Negligence 🔑136(6)

Conclusion that negligence is the most likely explanation of an accident or injury is not for trial court to draw or refuse to draw so long as plaintiff has produced sufficient evidence to permit jury to draw inference of negligence, though court itself would not draw that inference; and court must leave question to jury where reasonable men may differ as to the balance of probabilities.

5. Physicians and Surgeons 🔑18(9)

In action for alleged malpractice in administering hypodermic injection of sodium pentathol, question whether injuries resulting from injection were of type which ordinarily did not occur in absence of negligent administration of drug was for jury.

6. Physicians and Surgeons 🔑18(10)

In action for alleged malpractice in administering a hypodermic injection of sodium pentathol, refusal of res ipsa loquitur instruction was error.

7. Partnership 🔑55

In malpractice action, evidence would support finding that there was a partnership between defendant doctors.

◆

Russell P. Studebaker and Carl B. Munck, Oakland, for appellant.

Joseph F. Rankin, Oakland, Peart, Baraty & Hassard, Alan L. Bonnington, San Francisco, and Richard G. Logan, Oakland, for respondents.

McCOMB, Justice.

From a judgment in favor of defendants after trial before a jury in an action to recover damages for alleged malpractice in administering a hypodermic injection of sodium pentathol, plaintiff appeals.

[1] *Facts:** In 1953 plaintiff, a housewife 46 years of age, consulted defendant Dr. Barr, at which time she was given sodium pentathol on at least four occasions and showed no allergy to it, nor did she suffer harm from the injections. One such injection was given by defendant Dr. Marsh. All were given in her arm.

On August 3, 1954, plaintiff, while under the care of Dr. Barr, was admitted as a patient to a hospital to determine the cause of her obesity. She was nervous and in somewhat poor health, but suffered no particular pain or other discomfort. During the first 12 days of her hospitalization numerous laboratory tests and examinations were made. Finally Dr. Barr ordered that she be given basal metabolism tests. Because of her nervous condition and emotional makeup, he ordered one such test to be given her under sodium pentathol and another without it.

In accordance with the custom at the hospital, any doctor who was free would act as anesthetist. In this case it was Dr. Marsh. According to plaintiff's testimony, Dr. Marsh first endeavored to inject the left arm and being unsuccessful there proceeded directly to inject the inner aspect of her right knee. She stated that at the point where the injection was made there was visible to her a small "raised bubble place," which she characterized as a varicose vein; that although she became a bit "fuzzy" following the injection she did not go to sleep; that there was extreme pain in her leg following the injection but that she was unable to complain vocally because of a rubber apparatus which had been placed in her mouth and which was attached to equipment which was being used; and that upon being returned to her ward she felt "excruciating" pain in her leg.

Dr. Barr stated that when he saw plaintiff approximately an hour after the injection she was complaining of pain in her leg and that he examined it and found a reddened area around the site of the injection which was more firm than the surrounding tissue.

Plaintiff suffered constant pain in her leg during the next 63 days, 55 of which she spent in the hospital undergoing treatment in an attempt to effect a cure of her injury.

Within two or three days after the injection, a thrombosis developed, and shortly thereafter at the site of the injection there appeared a "slough ulcer."

After her dismissal from the hospital in October 1954 she continued to have extreme pain in her leg. In January 1956 she consulted Dr. Kenney, who upon examination of plaintiff's leg found a scar into which ran two visible varicose veins. She was placed in a hospital for nine days, during which time he and other doctors in consultation with him made a further study of her condition. Dr. Kenney concluded that she had phlebitis, an inflammation of the vein; anterior tibial strain due to the manner in which she walked to alleviate the pain; and that at the point of the original injection she was suffering from causalgia, an "irritating type of pain due to some type of irritation within the blood vessel." Under another injection of sodium pentathol, given in her arm, Dr. Kenney performed surgery on the leg and removed the vein, which was diagnosed as varicose, from the groin to the ankle and also removed the scar on her knee. At the same time an incision was made on her right flank and a piece of the sympathetic nerve removed.

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* The evidence is viewed in the light most favorable to plaintiff, since the rule is established that where, as in the instant case, plaintiff (appellant) does not question the sufficiency of the evidence to support the judgment but contends that it was error to refuse a requested instruction, a reviewing court must view the evidence in the light most favorable to the party offering the instruction. (Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 633[1], 255 P.2d 795; Edgett v. Fairchild, 153 Cal.App.2d 734, 738[2], 314 P.2d 973.)

[2-6] *Questions:* First. *Did the trial court err in refusing to give an instruction on the doctrine of res ipsa loquitur, as requested by plaintiff?*

Yes. The following rules are here applicable:

1. The conditions requisite for the application of the doctrine of res ipsa loquitur are: (a) the accident must be of a kind which ordinarily does not occur in the absence of someone's negligence; (b) it must be caused by an agency or instrumentality within the exclusive control of the defendant; and (c) it must not have been due to any voluntary action or contribution on the part of the plaintiff. (Cavero v. Franklin etc. Benevolent Soc., 36 Cal.2d 301, 311 [5], 223 P.2d 471; Ybarra v. Spangard, 25 Cal.2d 486, 489 [1], 154 P.2d 687, 162 A.L.R. 1258; Bauer v. Otis, 133 Cal.App.2d 439, 443 [3], 284 P.2d 133 [hearing denied by the Supreme Court].)

2. In determining whether an accident was of such a nature that it probably was the result of negligence by someone, the courts have relied upon both (a) common knowledge and (b) the testimony of expert witnesses, as well as the circumstances relating to the accident in each particular case. (Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 446 [13], [14], 247 P.2d 344; Bauer v. Otis, supra, 133 Cal.App.2d at page 443, 284 P.2d at page 136.)

3. It is a matter of common knowledge among laymen that injections in the arm, as well as other portions of the body, do not ordinarily cause trouble unless unskillfully done or there is something wrong with the serum. (Bauer v. Otis, supra, 133 Cal.App.2d at page 444, 284 P.2d at page 136.)

4. The conclusion that negligence is the most likely explanation of an accident or injury is not for the trial court to draw or refuse to draw so long as plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence, though the court itself would not draw that inference. The court must leave the question to the jury where reasonable men may differ as to the balance of probabilities. (Seneris v. Haas, 45 Cal.2d 811, 827 [13], 291 P.2d 915, 53 A.L.R.2d 124.)

Applying the foregoing rules to the present case, it is conceded that conditions (b) and (c) under rule 1, supra, were present, thus leaving for our determination this question: Was there evidence from which the jury could find that the requirements of subdivision (a) of rule 1, supra, were present? This question must be answered in the affirmative, for these reasons:

(one) As pointed out under rule 3, supra, today it is a matter of common knowledge that injections in the arm or other portions of the human body do not ordinarily cause trouble unless unskillfully done or there is something wrong with the serum which is injected.

(two) There was testimony of expert witnesses to the same effect, which may be summarized as follows: (a) Dr. Barr testified that in the exercise of the standard of care in that community a physician would not inject sodium pentathol into a varicose vein, since the walls of such veins do not have normal tensile strength, tearing easier and not having the resistance to irritants that normal veins have. (b) Dr. Roberson, a local physician, testified that only in an emergency would he inject a varicose vein and that the standard of practice in the community forbade such an injection. (c) Dr. Marsh stated that he had seen leakage and it had happened to him "scores of times * * * but never a reaction like this patient had." (d) Drs. Barr and Kenney both testified that plaintiff's difficulties were the result of the injection.

In view of the foregoing testimony, under rule 4, supra, the trial judge, under proper instructions, should have left to the jury the determination of the question of fact whether defendant Dr. Marsh was negligent in injecting sodium pentathol into a varicose vein in plaintiff's leg.

Dees v. Pace, 118 Cal.App.2d 284, at page 290, 257 P.2d 756, 759, relied on by defendants, is not here in point, for in such case it was pointed out [3] that "There is no testimony in the record here, either expert or otherwise, that would support the submission of such an issue to the jury."

[7] Second. *Was there a partnership between defendants Dr. Marsh and Dr. Barr?*

This question must be determined by the jury from the evidence presented to it. The record contains evidence which would support a finding that there was a partnership between the doctors.

It discloses that in 1953 Dr. Barr gathered several doctors from various parts of the United States for the purpose of forming a partnership. Dr. Barr specialized in surgery; Dr. Keeton, one of the group selected by Dr. Barr, was a specialist in internal medicine; Dr. Steen was a general practitioner; and the fourth member of the group, Dr. Marsh, specialized in gynecology.

In November or December 1953, in furtherance of Dr. Barr's purpose to form a partnership with the three doctors, the books of the doctors were set up on a partnership basis. In December 1953 Dr. Keeton, the specialist in internal medicine, decided to leave the area and did so in January 1954, entering military service. He returned for a brief period in the latter part of 1954 and then left again. Shortly thereafter Dr. Steen left.

During the year 1954, including August of that year, the doctors, together with a Dr. Faulkner, practiced together in the Mendocino Medical Center in Ukiah. The premises in which the group practiced were owned by Dr. Barr and Dr. Woods as copartners. The fixtures, medical equipment and medical library of the Center were owned by Dr. Barr personally, except that Dr. Steen had an interest therein to the extent of $10,000.

Dr. Marsh first came to the Center in July 1953. For the first six months he had a $1,500 monthly guarantee from Dr. Barr. The guarantee ceased in January 1954. During this period the doctors in the group shared expenses and shared the net return. Bills were sent out on billheads of the Medical Center showing the name of the doctor who rendered the particular services. When the fees were collected, they were placed in one bank account. Expenses were then paid, and the net proceeds were divided each month equally among the members of the group.

The judgment is reversed.

GIBSON, C. J., SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., and WHITE, J. pro tem., concur.

51 Cal.2d 819

ESTATE of Irene I. HART, Deceased.

Lillian A. WORTHINGTON, as Administratrix with the Will Annexed, etc., Respondent,

v.

Fred B. HART, as Administrator, etc., Appellant.

Sac. 6885.

Supreme Court of California,
In Bank.
March 31, 1959.

Proceeding in the matter of the estate of the deceased wife. From an order of the Superior Court, Sacramento County, Jay L. Henry, J., approving a second account of an administratrix with the will annexed of the estate of the deceased, the administrator of husband's estate appealed. The Supreme Court, Shenk, J., held that the administrator of the husband's estate was not bound by an order settling the first account of the wife's estate and allowing attorney's fees, administratrix' commissions and certain costs but was a "person interested in the estate" of the wife who might appear and object to the second accounting and take an appeal from the order settling the second account.

Order reversed in part and affirmed in part.

Opinion, 332 P.2d 317, vacated.

1. Courts 🔑200½

Superior Court sitting in exercise of its probate jurisdiction is without power to determine adverse claims to the properties of an estate in the course of administration when asserted by a "stranger to the estate", and the proper manner of litigating such a question of title is in the Superior Court in the exercise of its general jurisdiction. West's Ann.Prob.Code, § 927.

2. Courts 🔑200½
Executors and Administrators 🔑504(2), 513(9)

A Superior Court in the exercise of its probate jurisdiction cannot adjudicate adverse claims as to title of property claimed by an estate and a stranger thereto and hence one claiming adversely to the estate is not a "person interested" in the estate and is not competent to object to an accounting therein and is not bound by an order of the court settling such an account. West's Ann.Prob.Code, §§ 900, 901, 927.

See publication Words and Phrases, for other judicial constructions and definitions of "Person Interested".

3. Executors and Administrators 🔑504(2), 513(9)

Where husband and wife died within a few days of each other and the administratrix of the wife's estate had taken possession of the assets allegedly belonging to the husband's estate and had commenced an action for their recovery, administrator of the husband's estate was not a "person interested" in the wife's estate and was not competent to object to an accounting therein and hence was not bound by an order settling the first account in the wife's estate and allowing attorney's fees, administratrix' commissions and certain costs. West's Ann.Prob.Code, §§ 900, 901, 927.

4. Executors and Administrators 🔑504(2), 510(3)

Where husband and wife died within a few days of each other and administratrix of the wife's estate had taken possession of assets allegedly belonging to the husband's estate and had commenced an action for their recovery and in the interim between the first and second accounts of the administratrix, the administrator of the husband's estate had obtained a judgment declaring that he was owner of practically the entire estate and to the extent that the administrator was the judgment creditor for his costs of suit, he would have a right to appear and object as would any other creditor whose claim originally arose against the estate during the administration, the administrator was a "person interested" to the full extent of the judgment decreeing his adverse title to be superior and was not entitled to appear and object to the second accounting and take an appeal from an order settling the second account. West's Ann.Prob.Code, §§ 900, 901, 927.

5. Executors and Administrators 🔑495(4)

Where the amount of the estate finally accounted for in the estate of the deceased wife was practically nothing, it was error to allow commissions and fees based on assets not a part of the estate.

6. Executors and Administrators 🔑86(2)

An administratrix must defend against a claim that part of the property, found in the name or in the possession of the decedent, did not in fact belong to the estate.

7. Executors and Administrators 🔑111(1, 4)

Allowing administratrix of deceased wife's estate her ordinary costs of administration and of defending against civil actions claiming that certain assets were not part of the estate, including costs assessed against her by the court as an incident to the judgment was not error where the administratrix acted throughout in good faith and was guilty of no fraudulent conduct. West's Ann.Prob.Code, § 900.

8. Executors and Administrators ⚷504(2)

Where husband and wife died within a few days of each other, the administrator of the husband's estate, although not a person interested in the estate of the wife until he obtained his independent judgment, was not required to stand by while assets in the wife's estate were dissipated in the administration thereof.

◆

Fred B. Hart, Oakland, in pro. per., for appellant.

George Olshausen, San Francisco, as amicus curiae on behalf of appellant.

Frantz & Dopkins and William E. Dopkins, Sacramento, for respondent.

SHENK, Justice.

This is an appeal from an order approving the second account of Lillian A. Worthington, as administratrix with the will annexed of the estate of Irene I. Hart, deceased.

Augustus Loring Hart and Irene I. Hart were husband and wife. Irene died on January 25, 1952, and Augustus died eight days later on February 2, 1952. Neither decedent had parents or issue who survived them, and both died intestate as to the property involved in this proceeding.

The respondent, Lillian A. Worthington, after her appointment and qualification as administratrix of the estate of Irene, proceeded to take possession of property held in the name of and in the possession of Irene at the time of her death. She inventoried the property in the estate of Irene and administered it upon the assumption that the property belonged to that estate.

The appellant herein, Fred B. Hart, was duly appointed and qualified as administrator of the estate of Augustus. He made claim to the property held by the respondent on the ground that it had been either the separate property of Augustus, or that it had been the community property of the spouses and that it had vested in Augustus as the community survivor without administration in Irene's estate. This claim was rejected by the respondent. On July 8, 1953, the appellant commenced an independent civil action in the superior court seeking adjudication as to the rights of the respective parties to the property. The respondent defended in that action, and on May 4, 1956, a judgment was rendered decreeing that the property, except for government bonds, whose maturity value was $225, had been either the separate property of Augustus or that it had come to him as survivor of the community, and that the appellant was entitled to possession.

On November 6, 1953, following the commencement of the action seeking adjudication of title to the property, but before judgment therein, the respondent filed her first account in the estate of Irene, charging herself with all of the property as inventoried together with the income therefrom. On December 29, 1953, the court sitting in probate made its order settling the account and allowing an attorney's fee of $250, an administratrix' commission of $250, and $40.50 as items of expense in probate. The appellant did not appear or object to the account, although he had theretofore claimed his right to the property in the independent civil action. As no appeal was taken from the order allowing the account, it is now final.

The judgment in the civil action included an order that the respondent deliver the property to the appellant. The respondent obeyed that order on December 31, 1956, insofar as she was able to do so, but the value of the assets delivered fell short of the total amount due by $1,479.11. This included $402.27 costs of court assessed against her in the civil action. The respondent on January 3, 1957, filed her second account in the estate of Irene, and sought to credit herself with the commissions, attorney's fees and costs of administration allowed in her first account, and with additional costs and expenses incurred by her in contesting the civil action. The appellant appeared in the proceedings in the estate of Irene for the first time, and asked the court to surcharge the respondent's account with the amount of the deficiency. The court found that the respondent had acted properly and in good faith in the performance of her duties as administratrix of the estate of Irene. She was ordered to liquidate the government bonds she still held as property of the estate of Irene, and to pay the proceeds to the appellant as a credit upon the amount owing from the estate of Irene to the estate of Augustus. The court further found that there were insufficient funds in her hands to fully discharge the order in the civil action and that the estate was insolvent. It refused any further relief to the appellant and approved the account as rendered. This appeal is taken from that order.

The appellant first contends that, although he had filed his civil action claiming almost all of the property inventoried in the estate of Irene before the respondent had filed her first account, he nevertheless had no right to appear in that proceeding and contest the account for the reason that he was not a person "interested in the estate" within the meaning of that phrase as used in section 927 of the Probate Code. It is provided therein in part as follows: "Any person interested in the estate may appear and file written exceptions to the account, and contest the same. * * *"

[1] It is well established in this state that the superior court sitting in the exercise of its probate jurisdiction is without power to determine adverse claims to the properties of an estate in the course of administration when asserted by a "stranger to the estate" as in the present case. The proper manner of litigating such a question of title is in the superior court in the exercise of its general jurisdiction, as such action was commenced and concluded in the present case. See Schlyen v. Schlyen, 43 Cal.2d 361, 273 P.2d 897. Furthermore, this rule has been applied not only to actual contests of title to the assets of an estate, but also to the raising of objections during probate. Thus, in Re Estate of Dabney, 37 Cal.2d 672, 234 P.2d 962, 964, adverse claimants to assets inventoried in the estate had commenced an independent action in equity to recover the same. They also sought to object to the distribution of those assets, claiming that they were "persons interested in the estate" within the meaning of sections 1010 and 1011 of the Probate Code. Those sections are similar in effect to section 927, but relate to the making of objections to distributions rather than accounts in estate proceedings. It was held "that related legal precedent in this state and sound public policy unite to impel a holding that the [claimants] do not have the right, which they seek to establish, of appearing in the probate proceedings and applying directly to the [court sitting in the exercise of its probate jurisdiction] to delay further distributions of the estate pending final outcome of their equity suit. * *"

It was further held in the Dabney case that not only does a court sitting in probate lack jurisdiction to determine an adverse claim, but that neither "is one who is claiming adversely to an estate properties which have been included in the estate bound by the probate court's order of distribution. (See Texas Co. v. Bank of America (1935), 5 Cal.2d 35, 46, 53 P.2d 127; Shaw v. Palmer (1924), 65 Cal.App. 441, 446–449, 224 P. 106, and cases there cited.)" The Texas Company case referred to in the Dabney case did not involve an objection to an order of distribution as in the Dabney case, but an objection to an accounting, as in the present case. The court stated in that case: "Since respondent was not a person interested in the estate, it could not contest the account nor was it bound by the order of settlement. The probate court in the settlement of an account has no jurisdiction to determine the rights of those claiming adversely to the estate. * * *" See also In re Estate of Wilson, 114 Cal.App.2d 468, 250 P.2d 266.

[2, 3] From the foregoing it is apparent that a superior court in the exercise of its probate jurisdiction cannot adjudicate

adverse claims as to the title of property claimed by an estate and a stranger thereto; that it necessarily follows that one claiming adversely to the estate is not "a person interested" in the estate and is not competent to object to an accounting therein, and that such a person is not bound by an order of the court settling such an account. Accordingly, in the present case the appellant was not bound by the order settling the first account and allowing attorney's fees, administratrix' commissions and certain costs.

The respondent seeks, however, to limit such holdings to situations where the assets of the estate are sufficient to offset the demands of those claiming adversely in the event they are successful in their independent actions. It is true that in the Dabney case the court noted that the claims extended "to only some twenty-five to fifty per cent of the assets of the estate" and "there is no suggestion that the distributions here ordered would endanger the ability of the estate to pay the expenses of administration." A similar contention, based on the sufficiency of the estate to meet its expenses of administration, was made in Re Estate of Wilson, supra, 114 Cal.App.2d 468, at page 471, 250 P.2d 266, at page 268, and the court stated: "If, as the In re Estate of Dabney and the many authorities cited therein unite in declaring, one asserting an adverse interest to properties inventoried as assets of an estate is not a person interested therein as those words are used in various sections of the Probate Code, the extent of the adverse claim would appear to be a matter of no consequence. The lack of necessary interest arises from the nature of the claim and not the extent thereof." Upon an examination of the Dabney case it is concluded, as was held in the Wilson case, that a different result would not have followed had the question as to the sufficiency of the estate been present in the Dabney case.

[4] It does not necessarily follow from the foregoing that the appellant is entitled to the relief which he seeks. There remains the question whether at this stage of the proceeding he is such a "person interested in the estate" who might appear and object to the second accounting, and take this appeal from the order settling the second account. The distinction between his right to appear and object to the first account, and his right to appear and object to the second account must be based on the fact that in the interim he had obtained a judgment declaring that he was the owner of practically the entire estate. It is to be assumed that at least to the extent that the appellant is a judgment creditor for his costs of suit he would have the right to appear and object as would any other creditor whose claim originally arose against the estate during administration. See In re Estate of McMillin, 46 Cal.2d 121, 292 P.2d 881, 56 A.L.R.2d 1175. And there appears to be no reason why he should not now be a "person interested" to the full extent of the judgment decreeing his adverse title to be superior. The policy that the court cannot try title in the exercise of its probate jurisdiction, and which precludes a mere claimant as a "person interested" can no longer be invoked after the question of title has been determined in an independent action. After final judgment in that action the court in the probate proceedings should determine only the fact of that judgment and need not determine the merits of the adverse claim.

[5] In the second account the appellant sought to surcharge the respondent's accounts with all items of expense, fees and commissions which had been allowed in the first account. The court in the second account purported to re-examine those allowances and to reapprove them, and it might be deemed that those items, if rightfully allowed, were binding on the appellant as proper in the second account. However, the allowance of $250 as administratrix' fees and a like amount for attorney's fees in representing the administratrix in the ordinary course of administration cannot be deemed to have been properly made. Such fees and commissions are governed

by statute and are based upon the "amount of estate accounted for." Prob.Code, § 901. The amount of the estate finally accounted for in the estate of Irene was, for all practical purposes, nothing, and it was error to allow commissions and fees based on assets not a part of the estate.

[6, 7] The appellant also claims that it was error for the court to allow the respondent her ordinary costs of administration and of defending in the civil action, including costs assessed against her by the court as an incident to the judgment. As stated, the trial court made findings that in all matters in defending against the civil action and in administering the estate the respondent had acted in good faith throughout, and had been guilty of no fraudulent conduct. There is nothing in the record which indicates the impropriety of those findings. An administratrix is bound to defend against a claim, that part of the property found in the name or in the possession of the decedent did not in fact belong to the estate. It is asserted, however, that she is not entitled to utilize funds which do not belong to the estate and which she holds in trust. This court dealt with the question of the duty of an administrator to preserve funds claimed to be held in trust in the case of Elizalde v. Elizalde, 137 Cal. 634, at page 638, 70 P. 861, at page 862, where it said: "It may often happen that an executor or other personal representative takes possession of funds which may be proved to be trust funds, without any knowledge that such is the fact. Not knowing the fact, it would be his duty to resist, on behalf of the heirs, legatees, and creditors of the estate, any attempt to deprive it of a part of its assets. * * *" The administrator's duty to conserve the estate does not require that he advance his own funds for that purpose. The assets of the estate are normally available to that end. In defending in good faith against claims that the assets are trust funds held for the benefit of the claimants, he is entitled to treat the alleged trust fund as an asset, until judicially determined otherwise. See Eggert v. Pacific States Sav. & Loan Co., 53 Cal.App.2d 554, 127 P.2d 999. The prohibition against using such funds may mean that there could be no active defense where the best interests of the heirs, legatees and creditors of the estate, would require such a course. In re Estate of Sidebotham, 138 Cal.App.2d 412, 291 P.2d 965.

In view of the foregoing and of the findings in the present case as to the respondent's good faith, the trial court properly allowed her expenses in defending in the civil action, including reasonable attorney fees which may have been incurred in that defense. The court's allowance of the ordinary costs of administration was also proper for similar reasons. While some items of costs may not be directly attributable to the imposition of the defense against the adverse claim they nevertheless were all necessary costs of the measures undertaken, at least in part, to protect and preserve the estate, and the administratrix was required by law to undertake such measures. Unlike commissions and attorney fees the allowance for such costs is not based on the amount of the estate accounted for, but whether they are "necessary expenses in the care, management and settlement of the estate." Prob.Code, § 900. The court did not err in allowing those in the present case.

[8] It is well to note here that the appellant, although not a "person interested" in the estate until he obtained his independent judgment, was not required to stand by while the assets involved were dissipated in the administration of the estate of Irene. As pointed out in Re Estate of Dabney, 37 Cal.2d at page 682, 234 P.2d at page 969: "'Courts of equity will interfere in the administration of estates where the powers of the courts of probate and their modes of procedure preclude them from doing complete justice. * * *' [Citations.] It is not proper on this appeal to consider what form the equitable relief, if any be merited, could or should take. We must here presume that the equity court could afford appellants any relief to which

they showed themselves entitled. * * *" While the appellant in the present case relied on In re Estate of Dabney as grounds for not appearing at the first accounting, he failed to assert the remedy suggested in that case to minimize depletion of the assets.

The order is reversed insofar as it makes an allowance for statutory attorney fees and commissions to the respondent as administratrix, and is affirmed insofar as it allows ordinary costs of administration and costs of defending in the civil action. Each party shall bear its own costs on this appeal.

GIBSON, C. J., TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., and WHITE, J. pro tem., concur.

169 Cal.App.2d 83

Frank IUSI, Plaintiff and Respondent,

v.

Nell CHASE, Defendant and Appellant.

Edward L. THOMPSON, Plaintiff and Appellant,

v.

Nell CHASE, Defendant and Respondent.

Civ. 17865, 17866.

District Court of Appeal, First District, Division 2, California.

March 25, 1959.

Action by listing broker and middleman against procuring broker for percentage of commission from sale of real estate. The Superior Court, County of Santa Clara, Edwin J. Owens, J., rendered judgment for listing broker and against middleman, and middleman and procuring broker appealed. The District Court of Appeal, Draper, J., held that defense of illegality of contract between listing broker and owner because contract did not specify a definite date of termination was not available to procuring broker and that evidence supported judgment against middleman in favor of procuring broker.

Judgment in favor of listing broker affirmed and judgment in favor of procuring broker against middleman affirmed.

1. Customs and Usages 🔑21

In action by listing broker and middleman against procuring broker for commission allegedly due in sale of real estate, wherein there was evidence that custom called for equal division between listing and procuring brokers with former responsible for satisfying claim of middleman but procuring broker contended that custom required no division unless listing broker had a written exclusive agreement which listing broker did not have, conflict in evidence as to custom was for trial court to resolve.

2. Brokers 🔑66

Statute to effect that agreement authorizing or employing an agent or broker to purchase or sell real estate is invalid unless written, generally does not apply to agreement between brokers unless one of brokers has a binding written contract with principal, and where commission has been paid by principal to one broker, even though there was no written contract between them, the other broker can recover upon oral contract with broker who has received payment. West's Ann. Civ.Code, § 1624, subd. 5.

3. Brokers 🔑66

Rule that statute of frauds does not extend to agreement between brokers is applicable where plaintiff is the listing broker. West's Ann.Civ.Code, § 1624, subd. 5.

4. Brokers 🔑4

Statute authorizing disciplinary proceedings against broker guilty of practice of claiming, demanding, or receiving a fee or commission under any exclusive agreement for sale of real estate where such agreement did not contain a definite, specified date of final and complete termination was not applicable in case in which only one instance was shown where broker and owner had entered into oral listing agreement which did not specify definite date of termination and agreement was not illegal. West's Ann.Bus. & Prof.Code, § 10176(f).

5. Brokers ⚿66

Statute authorizing disciplinary proceedings against broker claiming, demanding or receiving a fee, compensation or commission under any exclusive agreement for sale of real estate where such agreement does not contain a definite specified date of final and complete termination was not designed to protect brokers, clients are the protective class thereunder, and where listing broker and owner entered into oral contract that did not provide a termination date, defense of illegality was not available to procuring broker in action against him by listing broker for part of commission. West's Ann.Bus. & Prof.Code, § 10176(f).

6. Customs and Usages ⚿12(2)

Evidence of trade usage is admissible, although not pleaded, in an action between parties within the trade, on theory that it must be presumed to be known to parties who are specialists in the field.

7. Customs and Usages ⚿18

In action by listing broker against procuring broker for percentage of commission paid to procuring broker, admission of evidence of custom of brokers as to division of commissions was not improper even though custom was not pleaded.

8. Contracts ⚿4

"Contracts implied in fact" arise from mutual agreement, although agreement is not expressed in words, and such contracts are recognized. West's Ann.Civ.Code, § 1621.

See publication Words and Phrases, for other judicial constructions and definitions of "Contracts Implied In Fact".

9. Contracts ⚿175(2)

Extrinsic evidence is admissible to aid in interpretation of conduct which is claimed to constitute a contract implied in fact. West's Ann.Civ.Code, § 1621.

10. Brokers ⚿88(1)

In action by listing broker against procuring broker for commission from sale of real estate, question whether there was an agreement to pay an unspecified share to listing broker was for trier of fact. West's Ann.Civ.Code, § 1621.

11. Customs and Usages ⚿16

In action by listing broker against procuring broker for share of commission from sale of real estate, wherein there was evidence warranting a finding that there was an agreement to pay an unspecified share of commission, evidence of custom among brokers to fix amount of the share was properly admitted.

12. Brokers ⚿86(1)

In action by listing broker and middleman against procuring broker for percentage of commission from sale of real estate, evidence was sufficient to support judgment against middleman in favor of procuring broker.

* * *

Johnson, Thorne, Speed & Bamford, San Jose, for Edward L. Thompson and Frank Iusi.

Walter E. Rankin, San Jose, for Neil Chase.

DRAPER, Justice.

A claimed agreement of real estate brokers for a "three-way split" of commissions has led to this tripartite litigation. Iusi, the listing broker, and Thompson, the middleman or broker's broker, brought separate actions against defendant Chase, the procuring broker. The actions were consolidated and tried to the court without a jury. Judgment was entered in favor of Iusi against Chase for 50% of the commission already paid to Chase, and declaring that half of the remaining commissions, as paid to Chase, should belong to Iusi. In Thompson's action judgment was in favor of defendant Chase, on the theory that Thompson must look only to Iusi for a commission. Defendant Chase appeals from the judgment in favor of Iusi, and plaintiff

Thompson appeals from the judgment denying him recovery.

Each plaintiff's original complaint was on a common count for money had and received. By amended complaint filed to conform to proof, Iusi alleged an oral agreement to pay him 60% of any commission received by Chase, alleging also that he "has * * * reduced his claim * * * to 50%." The amended complaint sought half the commissions already paid, as well as declaratory judgment awarding a like share of commissions later paid. The evidence shows that the owner of a tract of land orally granted Iusi the exclusive right to act as broker in its sale. Iusi asked Thompson to interest other brokers, telling him that the commission would be divided 60% to Iusi and 40% to the broker who procured a sale, with that broker to pay Thompson whatever share Thompson was to receive.

[1] Thompson told Chase of the availability of this property. The evidence conflicts as to what was said about division of commissions. Thompson testified several times that the agreement was for a "three-way split," but also testified that he told Chase of the 60%–40% provision. Chase testified that Thompson asked for a three-way split, without specification of the shares. Under these circumstances, the court could justifiably determine that Chase agreed to divide the commission, but that no percentages were agreed upon. The court could look to custom to fill this gap in the oral agreement. There was evidence that custom of the business calls for equal division between listing and procuring brokers, with the former responsible for satisfying the claim of the middleman. Chase defended upon the ground that custom required no division, unless the listing broker had a written exclusive agreement. Other evidence of the custom contradicted this view, and the conflict was for the trial court to resolve.

[2, 3] Appellant Chase first contends that recovery is barred by the statute of frauds. Of course, an agreement "authorizing or employing an agent or broker to purchase or sell real estate" is invalid unless written. Civ.Code, § 1624, subd. 5. However, the long-established rule is that this provision does not extend to agreements between brokers. Gorham v. Heiman, 90 Cal. 346, 358, 27 P. 289. In general, this rule does not apply unless one of the brokers has a binding written contract with the principal. Aldis v. Schleicher, 9 Cal.App. 372, 99 P. 526. But where the commission has in fact been paid by the owner to one broker, even though there was no written contract between them, the second broker can recover upon his oral contract with the first broker. Johnston v. Porter, 21 Cal.App. 97, 131 P. 69; Jenkins v. Locke-Paddon Co., 30 Cal.App. 52, 57, 157 P. 537. Chase argues that this rule applies only where the plaintiff is the selling broker, whereas Iusi is the listing broker here. But the rule of Johnston and Jenkins has been applied where the listing broker is plaintiff. Daft v. Enos, 155 Cal.App.2d 315, 318 P.2d 66. This decision also holds that the court may award a share of the commission already received by the defendant broker, and by declaratory judgment order payment of a proportion of further commissions if and when they are paid by the principal to defendant.

[4, 5] Chase also asserts that the agreement between Iusi and the owner was illegal because it did not specify a definite date of termination. When the exclusive oral agreement was made, disciplinary proceedings were authorized against a broker who was guilty of "[t]he practice of claiming, demanding, or receiving a fee, compensation or commission under any exclusive agreement * * * where such agreement does not contain a definite, specified date of final and complete termination." Bus. & Prof.Code, § 10176 [f]. As then worded, the statute applied only to the "practice" condemned. Where, as here only one isolated instance is shown, the language of the then statute does not apply. Wilson v. Stearns, 123 Cal.App.2d 472, 479, 267 P.2d 59. By amendment (Stats.1955,

chap. 1467) adopted before the sale was made, the words "the practice of" were eliminated from the statute. There is a question whether this amendment invalidated existing agreements. There is room to distinguish the situation before us on the grounds suggested in Wilson (123 Cal.App.2d at pages 480–481, 267 P.2d at pages 65–66). Additionally, the same reasons which support the rule that one broker can recover from another commissions already paid to the latter by the owner, despite the absence of a written agreement between one broker and the owner, may well be applied equally to the situation here presented. We find no indication in this subdivision of section 10176 that it is designed to protect brokers. Since the clients are the protected class, and the buyer here has in fact paid the commission, the modern rule will not strain to establish illegality as a defense which will permit one broker to retain all the fruits of the transaction. Norwood v. Judd, 93 Cal.App.2d 276, 288, 209 P.2d 24. The defense of illegality is not available to Chase.

[6, 7] Finally, Chase contends that the court erred in admitting evidence of the custom of brokers as to division of commissions. First it is argued that such evidence is inadmissible because custom was not pleaded. It has been held that where a custom is not so general as to be within the presumed knowledge of the parties, it must be pleaded. Tharp v. San Joaquin Cotton Oil Co., 27 Cal.App.2d 554, 561, 81 P.2d 443, 82 P.2d 21. However, trade usage is admissible, although not pleaded, in an action between parties within the trade, on the theory that it must be presumed to be known to parties who are specialists in the field. Associated Lathing & Plastering Co. v. Louis C. Dunn, Inc., 135 Cal.App.2d 40, 48, 49, 286 P.2d 825; Covely v. C. A. B. Const. Co., 110 Cal.App.2d 30, 33, 242 P.2d 87. The latter rule is applicable here.

[8–11] Chase also argues that evidence of custom was inadmissible until the existence of a contract was shown. In this argument, he appears to assume that the contract must be express. But the code recognizes an implied contract as one whose "existence and terms * * * are manifested by conduct." Civ.Code, § 1621. Such agreements, more properly described as contracts implied in fact, arise from mutual agreement, although the agreement is not expressed in words (1 Williston on Contracts [Rev. ed.] § 3), and are recognized in California (Medina v. Van Camp Sea Food Co., 75 Cal.App.2d 551, 171 P.2d 445; see also City of Pasadena v. County of Los Angeles, 118 Cal.App.2d 497, 258 P.2d 28). Clearly, extrinsic evidence is admissible to aid in interpretation of the conduct which is claimed to constitute a contract implied in fact. Here all parties are licensed real estate brokers, and the established custom of their trade is an obvious aid to the determination of what they intended by their conduct. Also, the court impliedly found that there was no express agreement for fixed shares of the commission. As pointed out, the evidence warrants a finding that there was agreement to pay an unspecified share, and in such case evidence of custom would fix the amount of the share. The evidence was properly admitted.

[12] Thompson's appeal is based solely on the claimed insufficiency of the evidence to support the judgment against him and in favor of defendant Chase. But there is flat conflict in the testimony of Thompson and Chase as to an express agreement by the latter to pay Thompson. There is at most a conflict as to the existence of any agreement implied in fact in favor of Thompson. Thus Thompson's appeal must fail.

Judgment in favor of Iusi affirmed, with costs against Chase. Judgment in favor of Chase against Thompson affirmed, with costs to respondent Chase.

KAUFMAN, P. J., and DOOLING, J., concur.

169 Cal.App.2d 294

Russell S. MUNRO, Director of the Department of Alcoholic Beverage Control of the State of California, Petitioner and Respondent,

v.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD of the State of California et al., Respondents,

Gordon Young and Gordon Chinn, dba Ace Cafe, 938 F Street, Fresno, California, Respondents and Appellants.

Civ. 18142.

District Court of Appeal, First District, Division 1, California.

April 1, 1959.

Action by Director of Department of Alcoholic Beverage Control for writ of mandate to set aside decision and order of Appeals Board on ground that it exceeded its jurisdiction. The Superior Court, City and County of San Francisco, John B. Molinari, J., granted writ and licensee appealed. The District Court of Appeal, Hanson, J. pro tem., held that where Director had exercised his discretion in assessing penalty of 30 day suspension after finding licensee guilty of certain counts, Board of Appeals in ordering a reconsideration of penalty on the one count it found sustained by evidence, was attempting to limit and control discretion of the Department and Board went beyond its jurisdiction.

Affirmed.

1. Intoxicating Liquors ⇨108(9)

Amount of penalty to be assessed against a licensee who violates a provision of the Alcoholic Beverage Control Act is solely within the discretion of the Department of Alcoholic Beverage Control. West's Ann.Bus. & Prof.Code, § 23000 et seq.; West's Ann.Const. art. 20, § 22.

2. Intoxicating Liquors ⇨108(10)

Where licensee was found guilty on several counts of violations of Alcoholic Beverage Control Act and liquor license was suspended for 30 days, Board of Appeals in reversing findings on all but one of the counts, and remanding case for reconsideration of penalty on the remaining count, was attempting to limit and control discretion of Department and exceeded its jurisdiction. West's Ann.Const. art. 20, § 22; West's Ann.Bus. & Prof.Code, § 23000 et seq.

L. Kenneth Say, Fresno, for appellant Ace Cafe.

Edmund G. Brown, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for respondent.

HANSON, Justice pro tem.

On the petition of the Director of the Department of Alcoholic Beverage Control, the superior court granted a writ of mandate ordering the respondent Alcoholic Beverage Control Appeals Board to set aside its decision and order thereon which reversed the Director, who had found the licensees guilty as charged in Count II of an accusation of violating the Alcoholic Beverage Control Act, Bus. & Prof.Code § 23000 et seq. and Article XX, section 22, of the State Constitution and as a consequence had suspended their liquor license for 30 days.

The narrow question here at issue in its final analysis is whether the Board of Appeals had the jurisdiction and power to enter the order it did. The superior court said it did not and we are of the same opinion.

Accordingly, we turn to a recital of the material facts upon which our decision must rest.

The accusation against the licensees charged in four counts that for a considerable length of time they had permitted the licensed premises to be used as a disorderly house. Count II with which we are here concerned charged that for such period of time the licensees permitted persons to become intoxicated on the premises and that intoxicated persons were permitted to remain in and about the said premises.

A hearing was held on the charges contained in the accusation before a hearing officer of the department who, upon the submission of the case, found that the fourth count of the accusation was not sustained by substantial evidence, but that the other three counts were sustained in the manner and to the extent found by him. As to Count II he found only that the licensees had during the period in question permitted intoxicated persons to remain in and about the licensed premises. The hearing officer on the basis of his findings reported that cause for disciplinary action against the licensees had been established and recommended that the license be suspended for 30 days as to each of Counts I, II and III; said penalties to run concurrently. The director adopted and approved the proposed decision as recommended by the hearing officer. The licensees thereupon filed an appeal with the Appeals Board. That board concluded after its review of the appeal that Count II was sustained by substantial evidence, but that Counts I and III were not. Accordingly, the board reversed the director on Counts I and III, but instead of merely affirming the director on Count II reversed and remanded the case on that count with a direction to the director that he reevaluate the penalty he had assessed against the licensees on Count II.

The director, being of the view that the board had exceeded its jurisdiction and could not control the discretion vested in him under the Constitution and controlling legislation, filed this original action for a writ of mandate rather than appealing from the decision.

The petition for mandate does not assail the findings of the Appeals Board, but merely challenges that portion of the order of the board which remanded the case for further evaluation by the director as to the penalty assessed on the second count. Accordingly, the only ground which can be urged by the appellant licensees, if any, is limited to a showing that the order of the board reversing and remanding the case was proper and within its jurisdiction. No other issue is or can be before us. Notwithstanding, the licensees—the Appeals Board did not appeal—have endeavored by their briefs and argument to have us review the director's decision, which they could only do on an appeal by them from the decision of the Appeals Board and no such appeal is before us.

The solution of the problem accordingly is exceedingly simple indeed. It is clear that the director was of the view that a penalty of 30 days suspension was merited on the basis of the evidence supporting the second count without reference to the other counts. That being the case he acted within the discretion accorded to him—and on which ground he stands, as evidenced by his petition for a writ of mandate.

The jurisdiction and power of the board in reviewing decisions of the department is specifically limited by Article XX, section 22, of the State Constitution, the pertinent parts of which read as follows: "Review by the board of a decision of the department shall be limited to the questions whether the department has proceeded without or in excess of its jurisdiction, whether the department has proceeded in the manner required by law, whether the decision is supported by the findings, and whether the findings are supported by substantial evidence in the light of the whole record. In appeals where the board finds that there is relevant evidence which, in the exercise of reasonable diligence, could not have been produced or which was improperly excluded at the hearing before the department it may enter an order remanding the matter to the department for reconsideration in the light of such evidence. *In all other appeals the board shall enter an order either affirming or reversing the decision of the department.* When the order reverses the decision of the department, the board may direct the reconsideration of the matter in the light of its order and may direct the department to take such further action as is specially enjoined upon it by law, *but the order shall not limit or control in any way the discretion vested by law in the department.*" (Emphasis added.)

[1, 2] The rule is well established in this state that the amount of penalty to be assessed against a licensee who violates a provision of the Alcoholic Beverage Control Act is solely within the discretion of the department. California Constitution, Art. 20, § 22; Reynolds v. State Board of Equalization, 29 Cal.2d 137, 173 P.2d 551, 174 P.2d 4; Covert v. State Board of Equalization, 29 Cal.2d 125, 173 P.2d 545; Black v. State Personnel Board, 136 Cal.App.2d 904, 289 P.2d 863. From the fact that the department had imposed a specific penalty for each count, it is plainly apparent that the board, by its order to reconsider the penalty on Count II, was attempting to limit and control the discretion of the department. Accordingly, the board went beyond its jurisdiction.

Judgment affirmed.

BRAY and FRED B. WOOD, JJ., concur.

169 Cal.App.2d 396

BONADELLE CONSTRUCTION CO.,
Plaintiff and Appellant,
v.
Rufus HERNANDEZ, Jr., and Carol Hernandez, Defendants and Respondents.
Civ. 5681.

District Court of Appeal, Fourth District, California.
April 6, 1959.

Action for damages or specific performance of contract for defendants' purchase of lot and house to be erected thereon by plaintiff. The Superior Court of Fresno County, George M. DeWolf, J., entered judgment for defendants, and the plaintiff appealed. The District Court of Appeal, Griffin, P. J., held that where the contract provided that the house was to be completed in accordance with plans and specifications submitted to Veterans' Administration which was lending money to defendants, and the stucco was streaked and blotched and did not meet minimum requirements of the Administration, and plaintiff's failure to correct the condition to meet the specifications and minimum requirements, after notice of the condition, was wilful and intentional, defendants were justified in rescinding the contract.

Affirmed.

1. Contracts 🔑261(2)

Where contract for defendants' purchase of lot and house to be erected thereon by plaintiff provided that the house was to be completed in accordance with plans and specifications submitted to Veterans' Administration which was lending money to defendants, and the stucco was streaked and blotched and did not meet minimum requirements of the Administration, and plaintiff's failure to correct the condition to meet the specifications and minimum requirements, after notice of the condition, was wilful and intentional, defendants were justified in rescinding the contract. West's Ann.Civ.Code, §§ 3390–3392.

2. Contracts 🔑260

A partial failure of consideration resulting from wilful failure of plaintiff to perform a material part of contract by which defendants are to purchase a lot and house which is to be erected thereon by the plaintiff is sufficient to justify defendants' rescission of the contract.

◆

Wallace G. Quinlisk, Fresno, for appellant.

Ralph E. Wallace, Fresno, for respondents.

GRIFFIN, Presiding Justice.

[1] This is an action for specific performance or damages. On January 9, 1957, respondents (a young war veteran and his wife) signed a deposit receipt for the pur-

chase of a described lot and of a house to be erected thereon, according to "Plan 3-H" (corner). The foundation had already been laid. It was orally agreed it would be in accord with the requirements of the Veterans' Administration and similar in appearance to a model house located near-by which was shown to defendants by plaintiff's agent. A skeleton escrow instruction was signed and a loan application made at plaintiff's field office. It provided in general for payment of $50 down and an additional $3,300 in fifty days plus the proceeds of a "G. I." loan subject to receiving it, at a total price of $14,850, plus the usual impounds and plus a one per cent of total loan. "Seller hereby agrees with the purchaser that the proposed construction shall be completed in accordance with the plans and specifications submitted to the V. A. under Master C. R. V." Application for the loan was made by defendants and it was duly processed and the house was constructed. Plaintiff executed a grant deed to the property which was placed in escrow about March 15, 1957. Within two days after the exterior color coat stucco of the house had been applied by means of a spray gun defendants noticed it was streaked and blotched over a great area. Defendants notified the salesman of plaintiff company who negotiated the deal that the house was unsatisfactory and not acceptable to them in that condition. The agent told them to wait about a week and it would dry out in even color. They waited and it was still streaked and blotched. No steps were taken by plaintiff to correct the condition. Several demands were made by defendants to have them do so and each time plaintiff insisted defendants take possession and they would correct the condition afterwards, because the time for completion was April 6, 1957, and on that date defendants' loan rights would expire. Plaintiff refused to remedy the unsatisfactory stucco job. Defendants refused to accept and orally rescinded the contract. Plaintiff then brought this action. After trial the court found generally in accordance with defendants' evidence, as above related, and found, in addition, that the defect was a material one; that plaintiff had ample time and ample notice to correct it, and the failure to do so was wilful and intentional.

The evidence fully supports the finding. In fact, a Veterans' Administration Inspector, called by plaintiff, first testified that the stucco finish was "generally uniform" and met minimum requirements of the Veterans' Administration, but upon being questioned by the court he changed his testimony and admitted it did not do so. The color slides in evidence depicting the stucco coloring on the house show a streaked and blotched appearance and fully support the court's finding in this respect.

The argument of plaintiff on this appeal, as we view it, is that sections 3390 and 3391 of the Civil Code set forth the obligations that are not specifically enforceable and that the contract here involved does not fall within the provisions of either section; that by the terms of section 3392 of the Civil Code, as a matter of law, plaintiff should have been given judgment since the evidence conclusively shows that plaintiff *substantially* performed all the provisions of the contract, citing Murphy v. Sheftel, 121 Cal.App. 533, 540, 9 P.2d 568; and Connell v. Higgins, 170 Cal. 541, 556, 150 P. 769.

In this connection it is argued that the failure of a building contractor to comply strictly with construction specifications in some minor matter is not necessarily such failure of performance as would warrant rescission by the owner, and that there is no evidence of plaintiff's failure to perform being wilful or intentional, citing Giberson v. Fink, 28 Cal.App. 25, 151 P. 371; Brown v. Roberts, 121 Cal.App. 654, 9 P.2d 517; and Lifton v. Harshman, 80 Cal.App.2d 422, 182 P.2d 222.

In the instant case it might well appear that the failure of plaintiff to perfom according to the specifications and the Federal minimum requirements, after notice of the condition, was wilful and intentional. Parsons v. Smilie, 97 Cal. 647, 32 P. 702; May v. N. Y. M. P. Corp., 45 Cal.App. 396, 187 P. 785; Davis v. Morris, 37 Cal.App. 2d 269, 99 P.2d 345. Even the testimony of the president of plaintiff company seems to support this finding. It reads:

> "Q. What was wrong with this house? A. Just faded out.
>
> "Q. How long a period of time—A. I have seen it, I am real familiar with it your Honor.
>
> "Q. When was the paint put on? A. Just before we completed it in March.
>
> "Q. And when did you first notice the fading? A. In a week.
>
> "Q. What did you do thereafter? A. We just let her set until we get ready and want to go over it."

As said in Connell v. Higgins, supra [170 Cal. 541, 150 P. 775], relied upon by plaintiff,

> "The definition of substantial performance is difficult to give in general terms. It is usually a question to be determined in each case with reference to the existing facts and circumstances." And quoting from 2 Elliott on Contracts, Par. 1607, it is said at page 912:
>
> "'Substantial performance means that there has been no willful departure from the terms of the contract, no omission of any of its essential parts, that the contractor has in good faith performed all of its substantive terms * * *.' Whether, in any case, such defects or omissions are substantial, or merely unimportant mistakes that have been or may be corrected, is generally a question of fact."

[2] A partial failure of consideration resulting from the wilful failure of plaintiff to perform a material part of the contract is sufficient to justify defendants' rescission. Sterling v. Gregory, 149 Cal. 117, 85 P. 305; Torrey v. Shea, 29 Cal.App. 313, 319, 155 P. 820; Taylor v. United States Fidelity & Guaranty Company, 86 Cal.App. 382, 260 P. 898; El Rio Oils, (Canada) Ltd. v. Chase, 95 Cal.App.2d 402, 212 P.2d 927. The judgment in favor of defendants was justified. The motion for new trial was properly denied.

Judgment affirmed.

MUSSELL and SHEPARD, JJ., concur.

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169 Cal.App.2d 297

In the Matter of the ESTATE of Jane C. NIELSEN, Deceased.

Emil H. NIELSEN, Executor, etc., Petitioner and Respondent,

v.

Elinor H. HANNAFORD, Legatee and Appellant.

Civ. 23262.

District Court of Appeal, Second District, Division 1, California.
April 1, 1959.

Executor's proceeding for instructions. From a decree of the Superior Court of Santa Barbara County, Ernest D. Wagner, J., an appeal was taken. The District Court of Appeal, White, P. J., held that under will making gifts to testatrix' children and codicil thereto containing statements that any moneys advanced by testatrix including loans and gifts to children, whether before or after date of codicil and whether or not such "advances" would constitute valid causes of action, were to be deducted from shares which the borrowers or donees would take had such "advances" not been made, properly construed, both gifts and loans made by testatrix were "advancements" within provisions of Probate Code stating that if amount of advancement exceeds share of heir receiving it, he must be excluded from further portion in division and distribution but that he should not be required to refund any part of advancement.

Reversed and remanded.

1. Wills 🔑470

Where language of testamentary documents was clear and unambiguous, rights and liabilities thereunder were required to be determined from interpretation of four corners of the documents and not from other evidence.

2. Wills 🔑440

In executor's proceeding for instructions, it was function of court to ascertain testatrix' intention as expressed in her will and codicil, and, if lawful, to give it effect.

3. Appeal and Error 🔑1008(3)

Where construction given to an instrument by trial court is reasonable and appears to be consistent with intent of party making it, court of appellate jurisdiction should not substitute another interpretation, even though it may seem equally tenable with that accorded by trial court.

4. Wills 🔑706

Appellate court is not bound by trial court's construction of a will where that construction is based solely upon the terms of the will without the aid of other evidence, but appellate court is under duty to make final determination in accordance with applicable principles of law.

5. Descent and Distribution 🔑93
Wills 🔑758

No certain words or form of writing is required to constitute an advancement, so long as writing was done by decedent and shows that the intent was to charge gift or loan against portion of estate which donee or debtor would otherwise have taken under will or laws of succession. West's Ann. Prob.Code, § 1050.

6. Wills 🔑759(2)

Testatrix' intention as to whether loan to daughter was to be considered an advancement was to be determined from her own words in her will or codicil but her failure to use word "advancement" was not necessarily determinative of the matter.

7. Wills 🔑759(2)

Testatrix' intention as to whether loans were to be treated as advancements was not to be ascertained by isolating from context of will and codicil any individual term or terms or by her failure to use therein any certain words, but from construction of testamentary instruments as a whole and together so that all of their provisions might be given effect.

8. Wills 🔑759(2, 3)

Under will making gifts to testatrix' children and codicil thereto containing statements that any moneys advanced by testatrix including loans and gifts to children, whether before or after date of codicil and whether or not such "advances" would constitute valid causes of action, were to be deducted from shares which the borrowers or donees would take had such "advances" not been made, properly construed, both gifts and loans made by testatrix were "advancements" within provisions of Probate Code stating that if amount of advancement exceeds share of heir receiving it, he must be excluded from further portion in division and distribution but that he should not be required to refund any part of advancement. West's Ann.Prob.Code, §§ 106, 1050 et seq., 1051.

◆

F. Donald Sokol, Santa Barbara, for appellant.

Delger Trowbridge, San Rafael, Trevey, Schwartz & Wood, Santa Barbara, for respondent.

WHITE, Presiding Justice.

Emil H. Nielsen, as executor of the last will of Jane C. Nielson, his deceased mother, petitioned the court for instructions, alleging that among the assets of said estate are promissory notes of decedent's daughter, Elinor N. Hannaford, one dated October 5, 1948, payable on or before testatrix death and the other dated October 14, 1948, payable October 14, 1968, both secured by a deed of trust of certain real property; that said executor is informed that appellant contends that, by the terms of her mother's last will and codicil, appellant is not required to pay the Executor any portion of the amounts of the unpaid principal or interest on her said promissory notes to her mother; and said Executor prays that the court instruct him.

The pertinent provisions of the will dated September 1, 1944, are quoted below:

"Ninth: * * * I hereby give, devise and bequeath an undivided one-fifth (1/5) share in all the rest, residue and remainder of my estate, both real and personal, of whatsoever kind and nature to the children of my son Emil H. Nielsen, who are living at the time of my death, share and share alike, *less any indebtedness of their father, Emil H. Nielsen, owing at the time of my death for moneys borrowed from me or advanced by me to my said son.*" (Emphasis added.)

"Tenth: All of the rest, residue and remainder of my estate, both real and personal, of whatsoever kind and nature, I do hereby give, bequeath and devise in equal shares to my children Fred A. Nielsen, Victor W. Nielsen, Elinor C. Hannaford and Alice J. Lane, *provided, however, that if at the time of my death any of my said children shall be indebted to me for moneys borrowed from me, or if prior to my death I shall have made any gift of property to any of my said children,* there shall first be deducted from the respective share of each such child the amount of such indebtedness or the value of any such gift, which shall be divided among my other children and the children of Emil H. Nielsen per stirpes, * * *." (Emphasis added.)

Decedent's fifth codicil to her will of September 1, 1944, was made April 19, 1949 and reads as follows:

"Any moneys advanced by me including loans and gifts, to any of the legatees mentioned in my will, *whether before or after the date of this codicil,* shall be deducted from the share that such legatee or legatees would take if there had not been any such advances made by me, *whether or not such advances constitute at the time of my death valid causes of action in my favor against such legatee or legatees.*" (Emphasis added.)

This appeal was taken from the "Findings of Fact, Conclusions of Law, and Decree of Instructions" made and entered February 17, 1958. The portions thereof pertinent to the instant appeal are as follows:

Finding III. "That it is true that said decedent did not intend by the provisions of paragraph Tenth of her Last Will and Testament and by the provisions of said Cocidil to said Last Will and Testament of April 19, 1949, to convert the loans to said Elinor N. Hannaford into advancements; that said decedent did not by the use of the words 'advanced' and 'advances' in the Codicil of April 19, 1949, and by the balance of the language contained in said Codicil of April 19, 1949, intend to convert the indebtedness of Elinor N. Hannaford to decedent into advancements; the words 'advanced' and 'advances' as used in said Codicil of April 19, 1949, were used in the sense of 'loans of money' and not in the sense of 'advancements'."

Conclusion I. "The Executor of the above entitled estate, Emil H. Nielsen, should be and he is hereby instructed to collect the full amount of said promissory notes of Elinor N. Hannaford, hereinabove described, including all past due interest, as soon as possible."

Appellant urges that the provisions of the testamentary instruments transformed her indebtedness to decedent into advancements subject to the rule laid down in Section 1051 of the Probate Code that "If the amount of such advancement exceeds the share of the heir receiving the same, he must be excluded from any further portion in the division and distribution of the estate, but he shall not be required to refund any part of such advancement".

Respondent Executor, in his brief, states that "the law is so well discussed and the correct conclusion is so well argued in the trial court's 'Memorandum of Opinion' dated December 20, 1957, * * * that we quote it here verbatim as our exposition of the law applying to this case".

From said Memorandum of Opinion, we quote the following portion which is pertinent to the instant appeal: "* * * A close study of Mrs. Hannaford's (appellant) brief and cases cited therein convinces me that she is confused as to the difference in meaning between the words 'advance' and 'advancement'. Since the will and the codicil in question were both prepared by an attorney, both counsel agree that Section 106 of the Probate Code applies and that 'technical words are to be taken in their technical sense'. The word 'advance' as ordinarily used means 'a loan of money' (see Brock v. Fidelity & Deposit Company, 10 Cal.2d 512 [75 P.2d 605]). The word 'advancements' is a technical word meaning 'a perfect and irrevocable gift made by a parent during his lifetime to his children intending that gift to be a part or the whole of that portion of the parent's estate to which the child will be entitled upon the death of the parent.' See 2 Cal.Jur.2d 482 and cases cited therein.

"I do not feel, from all of the evidence before me, that the testatrix intended to include the loans with the advancements by using the word 'advances'. Had she so intended and in view of the fact that her codicil was prepared by an experienced attorney, it would have been most simple for her to so provide, and in my opinion this she has not done. It should be emphasized that during her lifetime she collected almost regularly the principal and interest payments and never permitted the secured notes to become outlawed by reason of the statute of limitations.

"For the reasons briefly stated the Executor of the above Estate is instructed to collect the full amount of said notes from Mrs. Hannaford including all interest."

Said Memorandum of Opinion appears in the Clerk's Transcript and it also constitutes the respondent's brief, with the addition at the end thereof of the argument next hereafter quoted: "The main thing we are trying to ascertain in cases of this kind is the *intention of the testatrix.* This is usually determined from the words of the testamentary instrument together with the surrounding circumstances.

"Here as the trial court well pointed out the testatrix was not dealing with 'advancements' but with 'advances' and this is where appellant's counsel has become confused.

"This is made clear by the undisputed facts that the testatrix here collected all of the monthly installments of interest as they fell due and never forgave or allowed any portion of the principal or interest of the two notes to become outlawed."

While the document entitled "Findings of Fact, Conclusions of Law, and Decree of Distribution", from which the instant appeal was taken, includes no mention of any ambiguity (or absence thereof) in the testamentary documents, the Memorandum of Opinion, in accordance with which counsel for the Executor was directed to "prepare, serve and file his notice", includes the following: "As I view the situation herein there is no ambiguity as such but only a failure to state specifically whether the loans in this case are to be repaid in full or only to the extent of Mrs. Hannaford's inheritance."

The record before the court on the instant appeal includes the reporter's transcript of testimony taken over the objection of appellant and subject to her motion to strike, which was taken under submission at the end of the trial in November. No formal ruling thereon appears in the record. However, at the hearing in March of appellant's motion to vacate the document entitled "Findings of Fact, Conclusions of Law, and Decree of Instructions", appellant called attention to the court's failure to rule upon her motions to strike, and the following proceedings were had:

> "The Court: If it will clarify the matter at all, on this point I placed no reliance, upon the testimony of Mr. Nielsen, because it had nothing to do, —I took rather complete notes at the time I granted your Motion to Strike Trowbridge's testimony.
>
> "Mr. Sokol (appellant's attorney): Right.
>
> * * * * * *
>
> "The Court: If I didn't, the motion is at this time, granted. I placed no reliance upon it at all.

"Mr. Sokol: The objection is sustained?

"The Court: That is correct.

"Mr. Sokol: And as I understand it, the Court's decision is based upon the language of the Will?

"The Court: Yes, and the other admissible evidence before us. There is other admissible evidence, Mr. Sokol.

"Mr. Sokol: But,—

"The Court: No—I am in error—excuse me. It is as you have stated—based upon the interpretation of the four corners of the will."

[1] This court is convinced, as was the trial court, that the language of the testamentary documents now being considered by us is clear and unambiguous. Therefore, as indicated in the above quoted language of the trial court the instructions given to the executor must be "based upon the interpretation of the four corners of the Will". In re Estate of Salmonski, 38 Cal.2d 199, 214, 238 P.2d 966.

[2] The function of the court is to ascertain the testatrix' intention as expressed in her will and codicil and, if lawful, give it effect. In re Estate of Beldon, 11 Cal.2d 108, 112, 77 P.2d 1052; In re Estate of Lefranc, 38 Cal.2d 289, 296, 298, 239 P.2d 617.

[3] As stated by the court in In re Estate of Northcutt, 16 Cal.2d 683, 690, 107 P.2d 607, 611, "* * * where the construction given to an instrument by a trial court is reasonable and appears to be consistent with the intent of the party making it, courts of appellate jurisdiction will not substitute another interpretation, even though it may seem equally tenable with that accorded by the trial court".

[4] However, an appellate court is not bound by a construction of a will based solely upon its terms without the aid of evidence. "Under these circumstances, there is no issue of fact, and it is the duty of an appellate court to make the final determination in accordance with the applicable principles of law." In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825, 831; In re Estate of Wunderle, 30 Cal.2d 274, 280, 181 P.2d 874; and In re Estate of Fleming, 31 Cal.2d 514, 523, 190 P.2d 611.

Therefore, the real question to be determined on the instant appeal is whether, by the terms of her will and codicil, testatrix intended to and did convert her loans to appellant (evidenced by promissory notes and a trust deed of real property) into an "advancement".

Paragraphs IX and X of testatrix' will made in 1944 do not provide identical treatment as to all legatees, paragraph IX leaving gifts to the children of the Executor from which are to be subtracted only debts of the Executor "owing at the time of my death", while paragraph X leaves the residue to testatrix' four other sons and daughters from which are to be subtracted any indebtedness of said donees to her at the time of her death and any gifts made by her to the respective donees.

Testatrix' codicil made in 1949 expresses her intention that all "loans and gifts" to any of the legatees mentioned in her will whether such loans or gifts were made "before or after the date of this codicil" shall be deducted from their respective shares of her estate *"whether or not such advances constitute at the time of my death valid causes of action in my favor"*.

[5] No gift may be taken as an advancement or as an ademption of a general legacy unless such intention is expressed in the writing of the testator or the donee. Probate Code, sec. 1050. No certain words or form of writing is required to constitute an advancement, rather than a gift or loan, so long as the writing was done by the decedent and shows that the intent was to charge such gift or loan against the portion of the estate which the donee or debtor would otherwise have taken under the will or the laws of succession. In re Estate of Rawnsley, 94 Cal.App.2d 384, 387, 210 P.2d 888; 2 Cal.Jur.2d 485, and cases there cited.

In In re Estate of Hayne, 165 Cal. 568, 133 P. 277, 278, three of testatrix' sons appealed from a judgment that the fourth son, declared by testatrix in her will to have received from her "by way of advancement" certain lands and "at various times certain loans, notes for which I have cancelled", constituting "more than what would be his share of my estate", should share with them in the portion of the estate as to which decedent died intestate. The judgment was reversed, the District Court of Appeal making the following statements concerning advancements:

"* * * It will be sufficient if it appears that the writing was done by the decedent and shows the intent to charge the money or property given as an advancement * * *. There could be no written evidence of the intent to charge an advancement more convincing than an express statement to that effect in the last will of the decedent." 165 Cal. at page 573, 133 P. at page 279.

"* * * It is, of course, true that as a general rule advancements made before the will was executed cannot be considered in making distribution of the estate * * *. But this rule has no place, and reasonably could have none, where the terms of the will itself show the contrary. * * *

"Respondent also invokes the rule followed in many decisions, and which we do not here dispute, that it is the intention of the decedent at the time the property is transferred to the heir apparent that determines whether it is an advancement or a gift * * * (Citing cases.) These decisions, however, all qualify the rule by the additional statement that if the subsequent declaration is contained in a legally executed and probated will, it is competent evidence of the advancement and must prevail. Obviously this must be so, since it then, in effect, becomes a part of the testamentary disposition of the estate and is evidence of the original intent. See [In re] Estate of Tompkins, 132 Cal. [173,] 175, 64 Pac. 268, 165 Cal. at page 574–575, 133 P. at page 279."

In In re Estate of Vanderhurst, 171 Cal. 553, 556, 154 P. 5, 6, where testator in his will provided that "advances" made by him to certain of his beneficiaries as "shown by my books of account" and "advances" to other beneficiaries "represented by their promissory notes now in my possession" were to be deducted from the respective shares of such beneficiaries, it is said: "The language of the will very aptly limits and specifies funds to be charged with payments made in the testator's lifetime as advancements. * * * By no method of construction which we are able to discover may the language be given any other meaning."

Likewise, in In re Estate of Tompkins, 132 Cal. 173, 64 P. 268, testatrix' statement in her will that money had been "loaned" to certain sons and should be deducted from their respective shares was held to convert said loans into "advancements" and to prevent their taking of any portion of her estate even though said loans had been outlawed and uncollectible for many years.

In re Estate of Dodge, 9 Cal.App.2d 650, 50 P.2d 839, was a proceeding by an executor for instructions that a loan of decedent to his wife (evidenced by her promissory notes and a trust deed of real estate) was not an "advancement" and should be collected by him. The will provided that "if at the time of my death, I shall hold the written obligation for the payment of money to me of any beneficiary under this will * * * such obligation * * * shall be treated as an advancement in the distribution of my estate * * *". The decree that the notes constituted an advancement to the wife under the will and that the executor "cannot require payment of the notes" was affirmed.

[6, 7] In the instant action, testatrix' failure to use the word "advancement" in her codicil does not conclusively establish an intent by her that her loans to her sons and daughters were not to be treated the same in every respect as her gifts to them and/or other sons and daughters. Her intention is the determining factor, and it is to be determined from her own words used in her said will and codicil. In re Estate of Marre, 18 Cal.2d 184, 188, 114 P.2d

586; In re Estate of Peabody, 154 Cal. 173, 178, 97 P. 184. Her intention is not to be ascertained by isolating from the context of said will and/or codicil any certain term or terms used by her, or by her failure to use therein any certain word or words, but from the construction of said testamentary instruments as a whole and together, so that all of their provisions may be given effect. Moore v. Wood, 26 Cal. 2d 621, 629, 160 P.2d 772; 2 Cal.Jur.2d 485 and cases there cited; In re Estate of Hayne, supra.

[8] From the language of the codicil now engaging our attention, hereinbefore quoted at length, it is clear that testatrix intended to and did direct that any and all gifts made by her to the legatees shall be deducted from their respective shares of her estate. Therefore, such gifts are "advancements" under the provisions of section 1050 et seq. of the Probate Code of California. Testatrix' direction for such deduction is that "any moneys advanced by me including loans and gifts" shall be deducted. The language clearly expresses testatrix' intention that loans and gifts be treated in exactly the same manner. The gifts being advancements, the loans are also advancements. The testatrix' direction for such treatment of "loans and gifts", "whether or not such advances constitute at the time of my death valid causes of action in my favor against such legatee or legatees", in our opinion, was a clear expression of testatrix' intention that the secured notes of appellant were to be placed in the same category with all gifts or unsecured or outlawed loans made by her to the other legatees.

Appellant's obligations to testatrix, by the express terms of said codicil, have been converted into "advancements", and, as such, must be taken by appellant toward her share of decedent's estate. If the amount of such advancement exceeds appellant's share, she "must be excluded from any further portion in the division and distribution of the estate", but she "shall not be required to refund any part of such advancement". If the amount so received is less than her share, she is entitled to so much more as will give her her full share of the estate of the decedent. Probate Code, sec. 1051.

In the absence of any showing that the estate in the hands of the executor is insufficient to pay the decedent's debts and the costs of administration, appellant should not be required to pay to the executor all or any portion of said advancement to her. The decree is reversed and the cause remanded with instructions to the court below that the executor be instructed in accordance with the views herein expressed.

FOURT and LILLIE, JJ., concur.

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169 Cal.App.2d 269

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ginger PROCTOR, Defendant and Appellant.

Cr. 6406.

District Court of Appeal, Second District, Division 1, California.

March 31, 1959.

Defendant was convicted in the Superior Court of Los Angeles County, Clement D. Nye, J., for grand theft, and she appealed. The District Court of Appeal, White, P. J., held that defendant's claim of proceeds of check as an offset against a debt due for overtime wages was not defense contemplated by Penal Code section making it defense to embezzlement charge that property was appropriated openly and avowedly and under claim of title preferred in good faith.

Affirmed.

1. Embezzlement 🔑47

In prosecution for grand theft by taking of cashier's check, whether defendant had taken check openly, in good faith, and under claim of title, as she claimed, was question of fact for determination by duly constituted arbiter of facts. West's Ann. Pen.Code, § 511.

2. Embezzlement 🔑5

In prosecution for grand theft by taking of cashier's check, claim that defendant had taken check openly, in good faith, and under claim of title did not depend solely on whether defendant had had belief that she was acting lawfully, and it was also necessary that surrounding circumstances reasonably indicate good faith. West's Ann.Pen.Code, § 511.

3. Criminal Law 🔑260(11)

Credibility of witnesses is matter committed to trial court.

4. Embezzlement 🔑5

Where defendant had not told owner of check, it could not be said that the check had been appropriated "openly and avowedly", for purposes of Penal Code section making it a defense to embezzlement charge that property was appropriated openly and avowedly and under claim of title preferred in good faith. West's Ann.Pen.Code, § 511.

See publication Words and Phrases, for other judicial constructions and definitions of "Openly and Avowedly".

5. Embezzlement 🔑23

Defendant's claim of proceeds of check as an offset against a debt due for overtime wages was not defense contemplated by Penal Code section making it defense to embezzlement charge that property was appropriated openly and avowedly and under claim of title preferred in good faith. West's Ann.Pen.Code, § 511.

6. Criminal Law 🔑1159(2)

An appellate tribunal is not authorized to reverse conviction upon ground of insufficiency of evidence unless it be made clearly to appear that upon no hypothesis is there sufficient substantial evidence to support conclusion reached in court below.

7. Embezzlement 🔑4

The elements of the crime of embezzlement are: (1) the accused must be the agent of the bailee or prosecuting witness in holding the allegedly embezzled property; (2) the property must actually belong to the allegedly embezzled party; (3) it must be lawfully in possession of the accused at the time of the alleged embezzlement; (4) the accused must have been guilty of conversion which statute denounces; and (5) there must be shown an intent on the part of the accused to deprive owner of his property unlawfully. West's Ann.Pen.Code, § 503.

8. Criminal Law 🔑409

Corpus delicti must be proved aside from extrajudicial admissions of accused; but slight or prima facie proof of the corpus delicti is all that is necessary.

9. Criminal Law 🔑563

Corpus delicti must be proved by circumstances shown in evidence or by inferences drawn from facts shown.

10. Criminal Law 🔑680(2)

Order of proof is discretionary with court and, where corpus delicti is finally established, a mere variation in the order of proof cannot be said to result in any prejudice to the defendant's rights with record to admission of incriminatory statements.

11. Criminal Law 🔑406(1)

In prosecution for grand theft, circumstances in evidence established a prima facie showing of corpus delicti sufficient to allow court to consider defendant's admissions in determining question of her guilt. West's Ann.Pen.Code, § 487, subd. 1.

12. Embezzlement 🔑36

Intent necessary to embezzlement may be inferred from act itself together with its surrounding circumstances. West's Ann.Pen.Code, § 21.

13. Embezzlement 🔑44(2)

In prosecution for grand theft by taking of cashier's check, facts were adduced at trial from which trial judge could reasonably infer criminal intent. West's Ann. Pen.Code, § 503.

14. Criminal Law 🔑351(10), 406(1)

In prosecution for grand theft by taking of cashier's check, court was entitled to consider defendant's contradictory statements, and admissions on her part.

15. Criminal Law ⚷351(10)

Guilty knowledge, as well as intent to violate law, may be shown by conduct of accused, including false or misleading statements made to police officers or others with regard to material facts.

◆

Joseph T. Forno, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., John M. Huntington, Deputy Atty. Gen., for respondent.

WHITE, Presiding Justice.

In an information filed by the District Attorney of Los Angeles County, defendant was accused of the crime of grand theft (Penal Code, Sec. 487, subd. 1), in that on or about August 8, 1957 she did wilfully, unlawfully and feloniously take a cashier's check of the value of $1,500.00, the personal property of T. W. Abernathy.

Defendant pleaded not guilty, waived trial by jury and pursuant to stipulation the cause was submitted on the transcript of the proceedings had at the preliminary examination, with the right to offer additional evidence reserved by both the prosecution and defense. Following a reading of the aforesaid transcript and the consideration of additional evidence, the court adjudged defendant guilty as charged. Her motion for a new trial was denied and conditional probation granted. From the judgment and the order denying her motion for a new trial defendant prosecutes this appeal.

As to the factual background surrounding this prosecution the record reflects that T. W. Abernathy was President of Pacific Rolling and Engineering Corporation, operating a manufacturing business. E. W. Richardson was Vice President of said corporation. It appears that Messrs. Abernathy and Richardson were also operating a business known as Precision Rolled Products, Inc. On March 25, 1957 defendant entered the employ of the last named company. She was employed by the aforesaid Mr. Richardson in a secretarial capacity. After working there for about a day and a half she was informed that, "We have another small company that you're to take care of—It's Pacific Rolling & Engineering". Defendant continued in this employment until August 9, 1957. She was employed by Mr. Richardson who was her immediate superior. About a month and a half after her employment commenced defendant told Messrs. Richardson and Abernathy that she felt she was entitled to more salary and was informed that they would give her an increase. Her starting salary had been $350.00 per month, and about three months after she had been there her salary was raised to $400.00 monthly. Mr. Abernathy testified he had seen a cashier's check issued by the Sun Valley Bank on June 21, 1957 in the sum of $1,500.00, and which check was introduced into evidence and hereinafter referred to as People's Exhibit 1. There were three cashier's checks purchased in the name of the witness. Two for $1,500.00 each, and one for $1,250.00. Four were purchased in Mr. Richardson's name. Three for $1,500.00 and one for an odd amount which he did not remember. They were purchased with money from the Pacific Rolling & Engineering, Inc. account. He purchased the checks that were in his name, and Richardson purchased the checks that were in his name. The checks were given to defendant, and she kept them in a file. They were not endorsed.

People's Exhibit 1 was not deposited by the corporation. It was found to be missing on September 16. The witness did not give anyone permission to take this check. When defendant left on August 9, he did not go over her account with her.

E. W. Richardson, Vice President of Pacific Rolling & Engineering, Inc., had seen the cashier's check. He purchased the check through the business. The check was turned over to the bookkeeper, who was defendant. Aside from giving the check to her as bookkeeper, he did not give her the check to be used for her personal use. The check was not taken with his permission from the business. He purchased a number of checks at the same time in June. The checks were not endorsed. The bookkeeper took care of keeping the correct amount in the bank to cover checks. The checks at various times were put on his desk for signature to cover the account as it was needed. He did not recall when he endorsed this check. It was sometime between June 21 and August 9. Deposits were made to the account on the other checks, except People's Exhibit 1. He did not endorse this check and give it to defendant shortly before she left his employment. He endorsed it for deposit in the bank.

Frank Cortese, a builder and land developer, knows the defendant. On September 8, 1957, he took this cashier's check as a deposit on a home. He sold appellant a "package,—property and a home to be constructed on that property". The check marked People's Exhibit 1 was given to him by defendant as a down payment on this transaction. His signature is on the back as he endorsed the check for deposit. He made out a deposit receipt which states he received from Lloyd G. and Ginger Proctor the sum of $1,500.00. On the back of the deposit receipt is a notation, "I authorize G. C. Builders to give Mr. Richardson $1,500.00, Lloyd G. Proctor and Ginger Proctor". Mr. and Mrs. Proctor placed the notation on this document and signed it. This was done one week after the transaction. The transcript is not too clear as to the reason for or purpose of the notation on the back of the deposit receipt. In that regard we find the following testimony given by Mr. Cortese who received People's Exhibit 1 from defendant Proctor and her husband:

"The Court: What reason did they give you for entering it. That is the question. Did they give you any reason? The Witness: Did they give me a reason for entering into it?

"The Court: That is the question. What reason did they give you? While they are there with you putting the signature on the back of the check. Keep on following down the line, if any at all. The Witness: Well, yes, there was a reason.

"The Court: Did they tell you about the reason? That is what he wants to know, what they told you. The Witness: Well, Mr. Proctor had called me after he had a call from Sergeant Yocham and Sergeant Grant.

"Mr. Forno: If he is going into a conversation with Mr. Proctor this would be hearsay, your Honor.

"The Court: I will strike the answer. The Witness: All right. Well, then—

"The Court: What reason did they give you to authorize you to enter into this transaction? The Witness: Well, they gave me their authorization to give him the money.

"The Court: Give who the money? The Witness: Mr. Richardson; so they gave me a release; actually, this was supposed to be a release.

"The Court: Release of what? The Witness: Of the deal, and I gave Mrs. Proctor my check for $1,500.00 because the cashier's check had already cleared, so that's actually—

"The Court: It wasn't all done at the same time, then, was it? The Witness: Pardon me, sir?

"The Court: That notation, that reason you are giving me, is after the transaction. The Witness: One week later.

"The Court: When they returned the $1,500.00 over to you. The Witness: One week later.

"The Court: One week later."

On September 18, 1957 Mr. Abernathy had a conversation with defendant. He called her on the telephone at her home. He asked her if she knew anything about the check. She denied that she knew anything about it. He asked her if she knew a Mr. Cortese, and she said no. He told her that Cortese cashed a $1,500.00 check of theirs which Cortese claims she gave him. Defendant said she knew nothing about the check and had not purchased a home from Mr. Cortese. She asked him if Woody (Mr. Richardson) knew anything about it, and he said, "Yes, he is on the phone". She asked where she could contact Mr. Cortese and he gave her his telephone number. She was to call him and then call them back.

John Grant, investigating officer for the Los Angeles Police Department, had two conversations with defendant. On September 20, Sergeant Yocham and Officer Grant went to Mrs. Proctor's home. They asked her if she would care to tell them about the check. She said, "You didn't see my name on it, did you?" They told her it was not necessary for her name to be on the check and they wanted to get her side of it. She said, "I want to call Joe". She dialed a number to someone known as Joe. Later she stated it was Attorney Joe Forno and she didn't want to say anything until she could talk to her attorney. A little later she finally said, "Well, I've got enough on those guys to close their doors", "We'll just see what happens". They asked, "Well, what do you mean?" She said, "Some of their shady deals". They said they would like her to come down to the station, and they would contact Mr. Richardson and Mr. Abernathy.

They did so and waited for Mrs. Proctor's husband to come home. They went to the Valley Police Station. Mr. Richardson, Mr. Abernathy, Mr. and Mrs. Proctor, Sergeant Grant and Detective Yocham were present. Defendant confronted Mr. Richardson stating, "You gave me that check for some of your shady deals". Richardson denied this. The conversation continued about Mr. Richardson giving her the check. The officers told all present that they had a wire recorder going. They asked defendant and Mr. Richardson if they would care to talk in another room. They then had defendant and Mr. Richardson go into another room. They also recorded that conversation.

Richardson testified to having the conversation when he and Mrs. Proctor were in the room alone. The discussion was that this money was company funds and under no circumstances would he have any authority to dispense any funds; that defendant's charge that he gave it to her was ridiculous. She said, "Well, if I confess to this will the charges be dropped?" He said, "I cannot promise anything". He did not tell defendant not to say anything to Mr. Abernathy about giving her this check and endorsing the check to her. He was aware that the conversation was recorded.

Officers Grant and Yocham brought coffee up to Mr. Richardson and defendant. Officer Grant said, "Now, look, Mrs. Proctor, I want to know the truth. How did you get the check?" Defendant then said, "All right, I'll tell you. I took it. In a moment of temptation, as they were before me". "I took one of them. What are you going to do about it?"

Sworn as a witness in her own behalf, defendant testified regarding her employment as hereinbefore narrated; that she requested pay for overtime and extra working hours, but Messrs. Abernathy and Richardson told her they did not feel that their business warranted payment for the extra hours overtime she worked each day. That while she was employed as aforesaid, and about June 21, some cashier's checks were purchased. She did not recall the exact amounts thereof. It was close to $7,000.00. Part of the checks were drawn to Mr. Richardson and part to Mr. Abernathy. The cashier's checks were turned over to her for safekeeping, and they were not endorsed. She would always make the daily deposits to cover whatever payouts she had made for that period. If they had a payroll to meet, she would make a deposit to cover that payroll. She used one cashier's check to cover the payouts, and she might have used two. At no time while she was employed did she receive a $1,500.00 cashier's check that was endorsed by Mr. Richardson that she was to deposit in their account and that she failed to so deposit. On Thursday, August 8, a $1,500.00 cashier's check that was endorsed was given to her. This was the day before she left, and Mr. Richardson gave it to her. That morning Mr. Richardson had asked her to deposit all the money that she had into the account of Precision Rolling Products.

Mr. Abernathy was out of town so she told Mr. Richardson that she couldn't. He said he intended to merge the companies. She said, "If we do merge these companies, do I still have a job?", and Richardson said, "Well, we'll see about that". She said, "Well, otherwise I intend going to the Labor Commissioner for the overtime pay that I have, and the fact I was never paid from one of your companies". She had added up all the pay she felt she had coming and it totaled $1,531.62. He said that he would pay her for her overtime and make it right if she "would stick by him until they got to the end of this thing". Richardson said, "* * * we'll doctor this $1,500.00 check up so that * * * Mr. Abernathy won't know * * * how this all took place; because things are in such a mess". That she talked to Mr. Abernathy the day she left, but she did not tell him about this for the simple reason that she felt she had the pay coming. At no time from June 21 until August 9, the day that she left, did Mr. Richardson give her a cashier's check in the amount of $1,500.00, which he had endorsed, and told her to deposit to the bank account of either Pacific Rolling or Precision Rolled Products, Inc., that she did not deposit. The check that was given to her by Mr. Richardson she gave to Mr. Cortese as a deposit on a house.

As her first ground for reversal appellant earnestly urges that the evidence is insufficient as a matter of law to sustain the judgment of conviction in that the evidence itself establishes a defense under Section 511 of the Penal Code as a matter of law. The section just cited reads as follows:

> "Upon any indictment for embezzlement, it is a sufficient defense that the property was appropriated openly and avowedly, and under a claim of title preferred in good faith, even though such claim is untenable. But this provision does not excuse the unlawful retention of the property of another to offset or pay demands held against him."

[1–4] Appellant insists that the evidence points unerringly to the single conclusion that she appropriated the property openly and under a claim of title in good faith. Appellant asserts that she had demanded payment for overtime and was informed by her employer that at the time of such demand the company was not in position to pay, but that on the date of termination of her employment she again demanded payment for overtime which amounted to $1,531.00. That Mr. Richardson said "he would pay her the overtime with the $1500.00 check" (People's Exhibit 1). That it was endorsed in blank by the payee (Mr. Richardson), and when delivered to her transferred title thereto. However, this testimony was contradicted by Mr. Richardson who testified he did not give the check to appellant shortly before she left her employment, but had endorsed it for deposit in the bank. Whether appellant took the check openly, in good faith and under claim of title, is a question of fact for determination by the duly constituted arbiter of the facts, and such a claim does not depend solely upon whether the claimant believes he was acting lawfully, but the surrounding circumstances must reasonably indicate good faith (People v. Clemmons, 136 Cal.App.2d 529, 535, 288 P.2d 1021). It is fundamental that the credibility of witnesses is committed to the trial court, and in the instant case the trial judge was not required to believe appellant's version of the transaction. That the trial judge was not impressed with the verity of appellant's testimony of how she received the check is evidenced by his statement when rendering his decision as follows: "Well, frankly, gentlemen, the Court just does not believe the testimony of the defendant in this matter. * * * This woman converted to her own use the sum of $1,500.00 that was not hers". There is also present the element that the taking by appellant was not "openly and avowedly" as required by Penal Code, Section 511, because by her own admission she did not tell Mr. Abernathy. Then, there is appellant's statement at the police station: "* * * I took it (the check). In a moment of temptation as they (the checks) were before me. I took one of them. What are you going to do about it?"

[5] In the final analysis, at most, appellant claims the proceeds of the check here in question as an offset against a debt due her for overtime wages. This is not a defense contemplated by Section 511 of the Penal Code, which does not excuse the unlawful retention of the property of another to offset or pay demands held against him (People v. Morley, 89 Cal.App. 451, 455, 265 P. 276). As was said in People v. Ranney, 123 Cal.App. 403, 409, 11 P.2d 405, 407: "* * * The defendant had money in his possession which he claims belonged to the company, and which he sought to retain to pay a demand for commissions which he asserts were due to him from the company. He had no right to help himself to the funds of the company, even to pay an acknowledged debt. The latter portion of section 511, supra, declares that the provision of that section 'does not excuse the unlawful retention of the property of another to *offset or pay demands held against him*'."

[6] Finally, appellant contends that the evidence is insufficient to establish a fraudulent intent upon her part. The rule is now well established that an appellate tribunal is not authorized to reverse a conviction upon the ground of insufficiency of the evidence unless it be made clearly to appear that upon no hypothesis is there sufficient substantial evidence to support the conclusion reached in the court below (People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778).

[7] Appellant concedes "that the only tenable theory under which the charge of grand theft, in the cause herein, could be prosecuted, was embezzlement". The elements of the crime of embezzlement are:

> (1) The accused must be the agent of the bailee or prosecuting witness in holding the allegedly embezzled property;
>
> (2) The property must actually belong to the alleged party;
>
> (3) It must be lawfully in the possession of the accused at the time of the alleged embezzlement;
>
> (4) The accused must have been guilty of the conversion which the statute denounces. (Section 503 of the Penal Code);
>
> (5) There must be shown an intent on the part of the accused to deprive the owner of his property unlawfully.

People v. Hewlett, 108 Cal.App.2d 358, 367, 239 P.2d 150; People v. Cannon, 77 Cal.App.2d 678, 689, 176 P.2d 409. See also: Section 503, Penal Code.

[8–11] Since appellant was the secretary and bookkeeper for Pacific Rolling & Engineering, Inc., whose funds were lawfully in her possession as part of her duties, and she used a cashier's check which was company funds as a down payment on a house, there would appear to be no dispute concerning the first four elements of the offense. However, appellant challenges the presence of the fifth element in the case at bar, in that there was no proof of unlawful intent. In this regard, appellant urges that the only evidence presented by the prosecution to prove intent was the incriminatory statement made by her and that these admissions were admitted into evidence before the *corpus delicti* was established. With this latter contention we cannot agree. While it is well settled that the *corpus delicti* must be proved aside from the extrajudicial admissions of the accused, it is equally well settled that slight or *prima facie* proof of the *corpus delicti* is all that is necessary. It may be proved by circumstances shown in evidence or by inferences drawn from facts shown. The rule requiring proof of the *corpus delicti* before the admission of extrajudicial admissions or statements is thus stated in 8 Cal Jur., sec. 303, page 235: "'To authorize the reception and consideration * * * of evidence of an extrajudicial confession or admission of a defendant, the people need not establish the corpus delicti by proof of the clear and convincing character required to support a conviction. It is sufficient if there is some proof, or prima facie proof, or even slight proof of the corpus delicti. The uncorroborated testimony of a witness is sufficient to establish the corpus delicti for this purpose * * *". Also, in the case at bar there would have been no error since order of proof is discretionary with the court and, where the *corpus delicti* is finally established, a mere variation in the order of proof cannot be said to result in any prejudice to the defendant's rights. See People v. Mehaffey, 32 Cal.2d 535, 545, 197 P.2d 12; People v. Ives, 17 Cal.2d 459, 463, 464, 110 P.2d 408; People v. Cullen, 37 Cal.2d 614, 624, 625, 234 P.2d 1. Guided by these rules it seems manifest to us that in the case now engaging our attention, the circumstances in evidence established a *prima facie* showing of the *corpus delicti* sufficient to allow the court to consider appellant's admissions in determining the question of her guilt.

[12–15] As to appellant's intent, that too may be inferred, and "is manifested by the circumstances connected with the offense * * *" Penal Code, Sec. 21. This is so because intent is inherently difficult to prove by direct evidence. Therefore, the act itself, together with its surrounding circumstances must generally form the basis from which the intent of the actor may legitimately be inferred. We have hereinbefore narrated in detail the evidentiary features of this case, and need not here repeat them. Suffice it to say that aside from any of appellant's admissions, facts were adduced at the trial from which the trial judge could, as he did, reasonably infer criminal intent. The court was also entitled to consider appellant's contradictory statements and other admissions on her part. Guilty knowledge, as well as intent to violate the law, may be shown by the conduct of the accused, including false or misleading statements made to police officers or others with regard to material facts (People v. Turner, 86 Cal.App.2d 791, 801, 195 P.2d 809; People v. Roche, 49 Cal.App.2d 459, 462, 121 P.2d 865). We entertain no doubt that under the facts of this case the trial judge was justified in his conclusion that appellant took the cashier's check with criminal intent.

For the foregoing reasons, the judgment and the order denying defendant's motion for a new trial are, and each is affirmed.

FOURT and LILLIE, JJ., concur.

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169 Cal.App.2d 368

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Jesse Cortez GARCIA, Defendant and Appellant.
Cr. 3556.

District Court of Appeal, First District,
Division 1, California.
April 6, 1959.

Defendant was convicted of armed robbery of liquor store. The Superior Court, Santa Clara County, William F. James, J., entered judgment, and defendant appealed. The District Court of Appeal, Fred B. Wood, J., held that where there was evidence tending to prove that defendant was intoxicated at the time of the robbery, the refusal to give his requested instruction on specific intent and intoxication was prejudicial error.

Reversed.

1. Criminal Law 🔑784(1), 1173(2)

In prosecution for armed robbery of liquor store, refusal of defendant's requested instructions on circumstantial evidence was prejudicial error where certain links in the chain of evidence against the defendant were circumstantial in character and there was no overwhelming evidence of defendant's guilt. West's Ann.Pen. Code, § 211.

2. Criminal Law 🔑824(9)

Where certain links in the chain of evidence against defendant are circumstantial in character, it is the duty of the court, whether requested or not, to inform the jury that to justify a conviction the facts and circumstances must not only be entirely consistent with the theory of guilt but must be inconsistent with any other rational conclusion.

3. Robbery ⚿3

A specific intent to steal is an essential element of the crime of robbery. West's Ann.Pen.Code, § 211.

4. Criminal Law ⚿774, 1173(2)
Robbery ⚿27(3)

In prosecution for armed robbery of liquor store, where there was evidence tending to prove that defendant was intoxicated at the time of the robbery, the refusal to give defendant's requested instruction on specific intent and intoxication was prejudicial error. West's Ann.Pen. Code, §§ 21, 22, 211.

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William S. Smeed, San Jose, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., for respondent.

FRED B. WOOD, Justice.

Convicted of armed robbery (Pen.Code, § 211), defendant Garcia claims that prejudicial errors occurred in instructing the jury.

Late one evening three men entered and robbed a certain liquor store. They then left, got into a car and drove away. The car, soon apprehended, had four occupants: Raul Altamirano, Frank Espinoza, Robert Gonzales and defendant Garcia.

The sales clerk at the store was unable to identify Garcia as one of the three who entered the store. He identified Altamirano only. Espinoza testified that the three consisted of himself, Altamirano and Gonzales. He said that Garcia was in the car. Thereupon the prosecution, claiming surprise, confronted Espinoza with testimony he had given at a former trial, that Garcia entered the store and Gonzales remained in the car, and a like statement he had given the police shortly after his apprehension. He admitted making the prior inconsistent statements and insisted he was lying then to protect his friend Gonzales but was telling the truth now. Garcia made no admissions and did not take the witness stand.

There was evidence tending to prove that Garcia was intoxicated at the time of the robbery. His brother and sister-in-law testified he had been drinking on the day of the robbery and was drunk about four or five hours before the robbery. Two of the officers testified they smelled the odor of alcohol on Garcia's breath. Another officer testified he gave Garcia some support when he led him to the jail; that Garcia "acted like he had passed out" when questioned after his apprehension; "he would sit there and kind of fall over in his chair and wouldn't answer your question"; it appeared to the witness as if it were an "act." Garcia was put in the "drunk tank."

[1] (1) *Was it prejudicial error for the court to reject defendant's request to give certain instructions on circumstantial evidence?*

Defendant requested and the court refused three instructions on circumstantial evidence, couched in the terms of CALJIC Nos. 26, 27, and 28, respectively. These instructions, particularly No. 27,[1] should have been given.

[2] Certain links in the chain of evidence against defendant were circumstantial in character. In such a case, it is the duty of the court, whether requested or not, to inform the jury that to justify a conviction "the facts and circumstances must not only be entirely consistent with

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[1] "I instruct you further that you are not permitted, on circumstantial evidence alone, to find the defendant guilty of the crime charged against him unless the proved circumstances not only are consistent with the hypothesis that the defendant is guilty of the crime, but are irreconcilable with any other rational conclusion."

the theory of guilt but must be inconsistent with any other rational conclusion." People v. Yrigoyen, 45 Cal.2d 46, 49, 286 P.2d 1, 3. "And it has been held that the instruction must be given where criminal knowledge is shown only by circumstantial evidence. People v. Candiotto, 128 Cal.App.2d 347, 355–356, 275 P.2d 500." Same, 45 Cal.2d at pages 49–50, 286 P.2d at page 3. There, proof of intent to defraud depended upon the drawing of an inference that defendant knew the depleted condition of his bank account. The evidence on that subject was circumstantial and conflicting. If properly instructed, the jury "might have concluded that the circumstantial evidence, while entirely consistent with defendant's guilt, was also consistent with a rational conclusion that he was innocent." Same, 45 Cal.2d at page 50, 286 P.2d at page 3. Accordingly, the failure to give the instruction resulted in a miscarriage of justice.

In our case if the jury disbelieved Espinoza's testimony that Garcia stayed in the car, conviction depended upon an inference that he was one of the three who entered the store. If they believed that testimony, there remained the question whether he had the requisite knowledge of the crime being committed, proof of which depended entirely upon circumstantial evidence. In either situation, the instruction found necessary in the Yrigoyen case was equally required in this case. Nor do we find present any factor (such as overwhelming evidence of guilt) that would justify our viewing this error as nonprejudicial.

[3, 4] (2) *Was it prejudicial error to refuse defendant's request to instruct on specific intent and intoxication?*

A specific intent to steal is an essential element of the crime of robbery. People v. Sanchez, 35 Cal.2d 522, 219 P.2d 9. Whenever "the actual existence of any particular * * * intent is a necessary element to constitute any particular species or degree of crime, the jury may take into consideration the fact that the accused was intoxicated at the time, in determining the * * intent with which he committed the act." Pen.Code, § 22, 2nd sentence.

That the jury might be advised as to such matters, defendant requested instructions substantially the same as CALJIC Nos. 72–C and 78–B, which the court refused. The instructions which the court did give omitted the element of specific intent to steal and omitted entirely the subject matter of the second sentence of section 22 of the Penal Code. The prejudicial character of the latter omission was accentuated by instructions given which featured the provisions of section 21 and the first sentence of section 22 of the Penal Code. Here we have an error that is a duplicate of the error which was deemed cause for reversal in People v. Sanchez, 35 Cal.2d 522, 219 P.2d 9. See also People v. Baker, 42 Cal.2d 550, 555, 571–572, 268 P.2d 705. We find this error no less prejudicial in our case.

The judgment and order are reversed.

BRAY, J., and HANSON, J. pro tem., concur.

169 Cal.App.2d 359

In the Matter of the ESTATE of Hazel S. LAGERSEN, Deceased.

Cyril McDonald, Public Administrator of the County of Solano, Petitioner and Appellant,

William H. McPherson, Administrator with the Will Annexed, Respondent.

Civ. 9470.

District Court of Appeal, Third District, California.

April 3, 1959.

Proceeding on opposing petitions filed by public administrator and by nominee of deceased testatrix' son for letters of administration with will annexed. From that part of order in probate, entered in the Superior Court, Solano County, Harlow V. Greenwood, J., appointing son's nominee administrator with will annexed, the public administrator appealed. The District Court of Appeal, Van Dyke, P. J., held that trial court erroneously limited cross-examination of testatrix' son, who until recently admittedly had been a resident of another state, by refusing to permit inquiry as to material matters bearing upon his intent to acquire a residence in California, but that such error did not warrant reversal of order, where probate of estate had been practically completed, leaving in issue little except the matter of fees.

Order affirmed.

1. Domicile 🔑10

In proceeding on opposing petitions by public administrator and by nominee of son of deceased testatrix for letters of administration with will annexed, testimony of son was sufficient to support finding that he was a resident of California, though admittedly he had been a resident of Louisiana until shortly before he executed nomination.

2. Domicile 🔑4(2)

In order to acquire a "domicile" by choice, both physical presence and intent to abandon old domicile and adopt another in the new location are essential, and such elements must concur.

See publication Words and Phrases, for other judicial constructions and definitions of "Domicile".

3. Witnesses 🔑268(1)

Where both public administrator and nominee of son of deceased testatrix petitioned for letters of administration with will annexed and testimony on direct examination of son, who admittedly had been a resident of Louisiana until shortly before he executed nomination, afforded only bare minimum of proof of California residence, cross-examination of son was improperly limited by refusal to permit inquiry as to material matters, such as length of time he had owned and resided in home in Louisiana, whether he had offered it for sale, whether anyone requested him to come to California to administer mother's estate, whether he owned or rented abode in California and other matters bearing upon intent to acquire a residence in California.

4. Witnesses 🔑330(1)

Cross-examination in order to disclose qualifying circumstances of the subject of testimony known to witness, but not disclosed on direct examination, and facts which would diminish the personal trustworthiness of witness is a vital feature of the law.

5. Domicile 🔑10

Conduct is the most important evidence of intention to acquire a domicile, and declarations of a party which are inconsistent with his acts are of slight weight, and his conduct is of greater evidential value.

6. Trial 🔑106

Trial court was not guilty of misconduct in refusing to hear arguments on rulings erroneously limiting and practically denying the right of cross-examination.

7. Appeal and Error 🔑1030

A judgment may not be reversed for error in procedure, unless refusal to do so would constitute a miscarriage of justice.

8. Executors and Administrators 🔑21(2)

Where special letters of administration with general powers had been issued pending disposition of opposing petitions for letters of administration with will annexed, filed by public administrator and by nominee of deceased testatrix' son, who admittedly had been a resident of another state until shortly before he executed nomination, will contest had been disposed of, and probate of estate had been practically completed, leaving in issue little except the matter of fees, error in practically denying right of public administrator to cross-examine testatrix' son for purpose of showing absence of intent to acquire a residence in California did not warrant reversal of order appointing son's nominee administrator with will annexed.

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Everett L. Mossman, Michael G. Ioakimedes, Vallejo, for appellant.

Henry C. Clausen and Richard G. Burns, San Francisco, for resondent.

VAN DYKE, Presiding Justice.

This is an appeal by the Public Administrator of the County of Solano, from that part of an order in probate which appointed respondent administrator with the will annexed of the estate of Hazel S. Lagersen, deceased. Said decedent died May 28, 1957. On June 20, 1957, her will dated March 22, 1949, was filed for probate by the executor named therein, who later renounced the right to letters. On October 4, 1957, respondent herein filed a petition asking probate of said will and for the issuance to him of letters of administration with the will annexed. He therein alleged the renunciation of right to letters by the named executor and that he was the nominee of Victor R. Lagersen, the son of decedent who resided in Louisiana. On October 14, 1957, respondent filed an amended petition alleging that his nominor then resided in California. On June 7, 1957, appellant had filed a petition asking for letters of administration. On June 20, 1957, appellant had filed a petition for letters of administration with the will annexed with respect to the 1957 will, although he alleged that will was invalid. The matters came on for hearing and eventually decedent's 1949 will was admitted to probate and respondent was granted letters of administration with the will annexed. Decedent's son, Victor, appeared at the hearing as a witness and testified that he was a California resident. In narrative form, his testimony was as follows:

I was born in Oakland, California, and lived in California until 1941, when I went into the service. I maintained my residence in California until 1954. Since that time I have resumed my residence in California. I work out of Redondo Beach in California, in sales promotion for Redondo Title Company. At this point the trial court announced itself satisfied with proof of Victor's California residence. Counsel for appellant took the witness under cross-examination and the following occurred:

"Q. Mr. Lagersen, where do you reside presently? A. In Sherman Oaks, California.

"Q. And when did you come to California this last time? A. The 13th of October.

"Q. And why did you come to California, Mr. Lagersen? A. For the purpose of looking into the settlement of my mother's estate.

"Q. And who sent for you, Mr. Lagersen? A. I believe I came on my own.

"Q. Did you receive any request from anyone to come to California to administer your mother's estate?

"Mr. Clausen [Counsel for respondent]: Object to that, your Honor, as immaterial.

"The Court: The objection is sustained.

"Q. And before coming to California where did you reside, Mr. Lagersen? A. In Shreveport, Louisiana.

"Q. And when did you first reside there? A. In 1954.

"Q. And at that time what was your occupation, Mr. Lagersen? A. I was retired.

"Q. From what? A. United States Air Force.

"Q. And do you own your own home back there, Mr. Lagersen? A. I do.

* * *

"Q. And do you have a family, sir? A. Yes.

"The Court (Interposing): Now, look here, his answer isn't good on that—on that owning a home. That isn't your home, is it? Your home is in California. A. I own a piece of property.

"The Court: You own a piece of property, but under your testimony here just now that would be your home. Is that your home? A. Oh, no, it is not my home.

"Q. And when did you buy that home, Mr. Lagersen?

"Mr. Clausen (Interposing): Now, we object to that as assuming something not in evidence.

"The Court: The objection is sustained. It isn't consequential. It isn't a part of this issue at all.

"Mr. Ioakimedes [Counsel for appellant]: Your Honor, I think it is very material.

"The Court: Look here, I am not going to argue with you at all.

"Mr. Ioakimedes: All right, your Honor.

"The Court: Please.

"By Mr. Ioakimedes: Q. Do you have any children, Mr. Lagersen? A. I—

"Mr. Clausen (Interposing): Object to that as immaterial.

"The Court: The objection is sustained.

"By Mr. Ioakimedes: Q. Where are your family at this time, Mr. Lagersen?

"The Court: He hasn't testified he has a family yet.

"Mr. Ioakimedes: I believe he has, your Honor.

"By Mr. Ioakimedes: Q. You have a family, Mr. Lagersen? A. Yes.

"Q. What is that family, Mr. Lagersen? A. My wife, two boys and a girl.

"Q. And where is that family at the present time, Mr. Lagersen? A. In Shreveport, Louisiana.

"Q. All of them? A. Yes.

"Q. Have you put up your house for sale in Shreveport, Louisiana, Mr. Lagersen?

"Mr. Clausen: Object to that as immaterial.

"The Court: The objection is sustained.

"By Mr. Ioakimedes: Q. Where do you reside now, Mr. Lagersen? A. Sherman Oaks, 4152 Murietta.

"Q. Do you rent or do you own?

"Mr. Clausen: Object to that as immaterial.

"The Court: The objection is sustained.

"Mr. Ioakimedes: Your Honor, I feel these are very material.

"The Court: Look here, I have ruled already. Go on with your next question.

"Mr. Ioakimedes: If your Honor please, we are coming to a question of fact of whether this man is a resident or not, and I feel—

"The Court (Interposing): I have ruled already, so go on with your next question.

"Mr. Ioakimedes (Continuing): You must go into the matter of intent, your Honor, and we can—

"The Court (Interposing): I don't care anything about an argument. You have got your legal rights, and do whatever you want to.

"By Mr. Ioakimedes: Q. And when did you go to Sherman Oaks, Mr. Lagersen? A. The 15th of October.

"The Court: Of this year? A. Yes.

"By Mr. Ioakimedes: Q. And when did you rent your home there, Mr. Lagersen?

"Mr. Clausen: Object to that as immaterial, your Honor.

"The Court: Objection sustained.

"By Mr. Ioakimedes: Q. When did you establish your home down there, Mr. Lagersen? A. The 14th of October.

"Mr. Clausen: 1957, Mr. Lagersen? A. Yes.

"By Mr. Ioakimedes: Q. With whom do you reside down there?

"Mr. Clausen: Object to that as immaterial.

"The Court: The objection is sustained.

"By Mr. Ioakimedes: Q. And when did you get your job, Mr. Lagersen? A. The 14th of October, 1957.

"Q. And what job was that? A. Sales representative of the Redondo Title Company.

"Q. And is that the position you hold presently? A. Yes, it is.

"Q. You stated you resided in California before 1954, is that correct? A. That is correct.

"Q. And where were you at that time, prior to 1954?

"Mr. Clausen: Object to that as immaterial.

"The Court: The objection is sustained.

"By Mr. Ioakimedes: Q. Where was your last residence before leaving California in 1954? A. It was the family residence on Hanover Street in Santa Cruz, California.

"Q. The family residence. Which family? A. My family.

"Q. Name, please? A. Lagersen.

"Q. And was it your mother's and father's residence? A. That is right.

"Q. And did you reside there with your family, sir? A. I have.

"Q. And what was your occupation at that time? A. 1954, I was retired.

"Q. Prior to 1954? A. I was in the service.

"Q. And what service is that, sir? A. United States Air Force.

"Q. And what was your position? A. I was a pi——— —

"Mr. Clausen: It is immaterial. I object on that ground.

"The Court: The objection is sustained.

"By Mr. Ioakimedes: Q. And where was your last base prior to 1954, Mr. Lagersen?

"Mr. Clausen: Object to that as immaterial, your Honor.

"The Court: The objection is sustained.

"By Mr. Ioakimedes: Q. When you came to California on October 13th, how did you come?

"Mr. Clausen: Object to that as immaterial.

"The Court: The objection is sustained.

"By Mr. Ioakimedes: Q. And what did you bring with you, Mr. Lagersen, when you came to California?

"Mr. Clausen: Object to that as immaterial.

"The Court: The objection is sustained.

"By Mr. Ioakimedes: Q. Did you bring any furniture, Mr. Lagersen?

"Mr. Clausen: Object to that as immaterial.

"The Court: The objection is sustained.

"By Mr. Ioakimedes: Q. Have you transferred your bank account from Louisiana to California, Mr. Lagersen? A. I have a bank account in Southern California.

"Q. Do you have a bank account in Louisiana, Mr. Lagersen? A. I do.

"Q. Have you closed out that account?

"Mr. Clausen: Object to that as immaterial.

"The Court: The objection is sustained.

"By Mr. Ioakimedes: Q. What have you informed your neighbors and friends in Louisiana, Mr. Lagersen, about your trip to California?

"Mr. Clausen: Object to that as immaterial.

"The Court: The objection is sustained.

"By Mr. Ioakimedes: Q. Have you made plans for moving your family to California, Mr. Lagersen?

"Mr. Clausen: Object to that as immaterial.

"The Court: The objection is sustained.

"By Mr. Ioakimedes: Q. Have you attempted to move your furniture to California, Mr. Lagersen?

"Mr. Clausen: The same objection.

"The Court: The objection is sustained.

"By Mr. Ioakimedes: Q. Do you plan on remaining in California, Mr. Lagersen? A. It is my intent to remain in California.

"Q. And for how long, Mr. Lagersen?

"Mr. Clausen: Object to that as immaterial.

"The Court: The objection is sustained."

Appellant's contentions here are as follows: 1. The record does not contain sufficient evidence to support the trial court's finding that Victor R. Lagersen was a resident of the State of California. 2. The court committed prejudicial error in limiting the cross-examination of Lagersen by counsel for appellant. 3. The court was guilty of prejudicial misconduct toward appellant.

[1, 2] The record discloses substantial support for the challenged finding. Lagerson testified that he came to California on the 13th of October, for the purpose of looking after the affairs of his mother's estate, but with the intent to resume residence in California; that he obtained employment here on the 14th and was still employed; that he had a place of residence in California; that he intended to continue to reside in California. The foregoing constitutes ample support for the findings made by the trial court. In 17A American Jurisprudence, Domicil, Section 18, Page 209, it is stated:

> "The universal view is that the acquisition of a domicil by choice has the essential elements of physical or bodily presence in the locality involved and the intent to abandon the old domicil and adopt another in the new location. These elements must concur if a new domicil is established. In other words, there must be a concurrence of the fact and the intent, the factum and the animus."

While it must be said that the testimony of Lagersen did not establish residence in California as a matter of law, we hold it to have been sufficient to support the finding of fact which the court made.

[3, 4] We think there can be no question but that it appears from this record the trial court improperly restrained and confined the cross-examination of Mr. Lagersen by counsel for appellant. As stated in 5 Wigmore on Evidence, sec. 1367, pp. 28 and 29, and sec. 1368, p. 33:

> "For two centuries past, the policy of the Anglo-American system of Evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening experience.
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> * * * * * *
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> "That the process of cross examination is invaluable, the lawyer well knows. But *why* is it invaluable? Just what does it do, and how? What is the theory of its efficiency?
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> * * * * * *
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> "* * * The fundamental feature is that a witness on his direct examination discloses but a part of the necessary facts. That which remains suppressed or undeveloped may be of two sorts, (a) the remaining and qualifying circumstances of the subject of testimony, as known to the witness, and (b) the facts which diminish the personal trustworthiness of the witness.
>
> "(a) The *remaining and qualifying circumstances of the subject of testimony* will probably remain suppressed or undisclosed, not merely because the witness frequently is a partisan, but also and chiefly because his testimony is commonly given only by way of answers to specific interrogatories * * *, and the counsel producing him will usually ask for nothing but the facts favorable to his party. If nothing more were done to unveil all the facts known to this witness, his testimony (for all that we could surmise) might present half-truths only. Someone must probe for the possible (and usual) remainder. The best person to do this is the one most vitally interested, namely, the opponent."

[5] The practical applicability of the wisdom of Wigmore is well illustrated by

the record here. Until Lagersen came to California on October 13th he was admittedly a resident of Louisiana and had been for several years. There he had his home and his family. He arrived in California on October 13th alone, and on the next day executed a nomination in favor of respondent, in which he asserted that he was a resident of California. On that day he obtained employment of a sort and between that day and the day of the hearing two weeks later he obtained at least lodgings which he declared to be his new home. His direct examination was both sketchy and brief, and consisted mainly of questions that called for a favorable answer. For example:

"Q. And then have you since that time resumed your bona fide and official residence in California? A. I have.

"Q. And at the present time are you a resident of California? A. I am.

"Q. And where are you working, Mr. Lagersen? A. I work out of Redondo Beach.

"Q. In California? A. Yes.

"Q. And what type of work do you do? A. Sales promotion for Redondo Title Company.

"Q. And have you since you resumed your residence in California most recently been conducting business in California? A. I have."

This was the bare minimum of proof and fully justified the efforts of opposing counsel to apply the probe and the test of cross-examination concerning the value of this sketchy testimony as to domicile. Lagersen admitted that when he came to California on the 13th of October his purpose had been to look into the settlement of his mother's estate. When asked who sent for him, his answer was equivocal. He said he believed he came on his own. When asked if he received any request from anyone, objection was sustained on the ground of immateriality. Clearly, the question was material and ought to have been answered. When asked if he owned a home in Louisiana, he said that he did, but under suggestion by the court he retracted this and said that he owned a piece of property and it was not his home. The length of time he had owned this property and resided in it was material, but objection was sustained. When asked if he had put up his house for sale, objection was sustained, and the ruling was error, for as has often been said the direct testimony of intention and present but recently acquired residence is of little value compared to the surrounding circumstances. As said in 17A American Jurisprudence, Domicil, section 97, page 266:

> "Professor Beale has observed that 'since actions speak louder than words the conduct of a person is the most important evidence of his intention to acquire a domicil in a place.' Where, therefore, the declarations of a party as to his intent are inconsistent with his acts, his conduct is of greater evidential value than his declarations. Declarations as to an intention to acquire a domicil are of slight weight when they conflict with the facts."

It was material to determine whether he rented or owned the property which he was claiming as his new abode, but questions to elicit that information were ruled out. A question as to when he rented his home in California was ruled out, although he had said he established his new home on the 14th of October, the day he arrived and signed respondent's nomination. Questions as to whom he resided with were ruled out. Questions as to the mode by which he came to California on the 13th of October were ruled out, as were questions of what he brought with him, whether he had closed his bank account in Louisiana, whether he had informed his neighbors and friends of his trip to California, whether he had made plans for moving his family to California and whether he had moved, or attempted to move, furniture to California, and as to how long he intended to remain in California.

[6] Closely related to the contention of error in the practical denial of the right of cross-examination are appellant's contentions that the court was guilty of misconduct in connection therewith. Reference is made to such matters as the following: When the witness was asked whether he owned or rented his new abode and objection was sustained, counsel's attempt to discuss the matter with the court met with the statement "I have ruled already, so go on with your next question." And when counsel then once more attempted to discuss the matter, the court replied: "I don't care anything about an argument. You have got your legal rights, and do whatever you want to." We do not think that the incidents indicate prejudice, but rather a firm belief on the part of the court that Mr. Lagersen had not only the right to come to California and establish a residence, but that he had done whatever was necessary to do so.

The error in the practical denial of the right of cross-examination was, however, a serious error and one that is manifest on the face of the record.

[7, 8] The only remaining question is whether or not the order appealed from should be reversed. To resolve that question something more must be said than has thus far appeared. The record discloses that Mrs. Lagersen had left two documents purporting to be wills, the one admitted to probate and which was executed in 1949, and a will executed April 6, 1957, which was holographic in character. Under it she gave all her estate to "Free and Accepted Masons to care for me until I pass on and thereafter." By the earlier will she devised property to a number of people and organizations, including the Scottish Rite Consistory of San Jose, The First Church of Christ, Scientist, in Boston, and The Regents of the University of California. Special letters with general powers had been issued. Conflicting interests had been adjusted by compromise of interested parties. A will contest had been disposed of. Apparently, the only result of a reversal would be the appointment of appellant to take charge of an estate, the probate of which had in one way or another been to all intents and purposes completed, leaving little except the matter of fees in issue. Probably a reversal would only mean another order granting letters to respondent. Under the constitutional admonition, we cannot reverse for error in procedure unless to refuse to do so would constitute a miscarriage of justice. We are persuaded from the whole record that this is not a case for reversal even though the errors we have found in the record are of grave import.

The order appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

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169 Cal.App.2d 430

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Arthur SCHULZE and Frank John Schutz,
Defendants.

Arthur Schulze, Defendant and Appellant.
Cr. 6431.

District Court of Appeal, Second District,
Division 2, California.
April 7, 1959.

Prosecution under § 288a of the Penal Code. The Superior Court, Los Angeles County, LeRoy Dawson, J., entered judgment of conviction as to one of the defendants, and he appealed. The District Court of Appeal, Ashburn, J., held that where defendant's motion to augment the record to include judgment of the trial court with respect to a codefendant was denied, there was no factual basis for defendant's argument that he was prejudiced by alleged undeserved leniency shown codefendant, and in any event, even if codefendant were treated more leniently than defendant, such fact was of no consequence and did not cause any prejudicial error with respect to defendant who received a lawful sentence.

Judgment affirmed.

1. Criminal Law ⚷1128(2)

Matters not presented by the record cannot be considered on the suggestion of counsel in the briefs. Wests' Ann.Rules on Appeal, rule 33(b).

2. Criminal Law ⚷1177

Where defendant's motion to augment the record to include judgment of the trial court with respect to a codefendant was denied, there was no factual basis for defendant's argument that he was prejudiced by alleged undeserved leniency shown codefendant, and in any event, even if codefendant was treated more leniently than defendant, such fact was of no consequence and did not spell prejudicial error with respect to defendant who received a lawful sentence.

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Gladys Towles Root and Eugene V. McPherson, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., David B. Allen, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Appellant Arthur Schulze and one Frank John Schutz (note the difference in spelling of surnames) were jointly tried and convicted of violation of § 288a, Penal Code. A police officer observed them engaged in the forbidden act and immediately arrested both. A jury was waived and the cause submitted upon the transcript of the preliminary hearing. At its conclusion the court ruled: "Find each defendant guilty as charged." A probation report was ordered and at a later hearing the court announced that it had read that report, probation was denied and appellant was committed to the state prison for the term prescribed by law.

The argument of appellant's only brief is based upon this assertion: "Thereafter the Court reduced the charge as to Schutz to a violation of section 650½ of the Penal Code and fined him $100.00. As to Appellant the Court denied probation and sentenced him to the State Prison." There is no basis in the record for this statement. Shortly after the opening brief was filed appellant made a motion to augment the record so as to afford factual foundation for an argument that appellant was prejudiced by the alleged leniency shown his co-defendant. Specifically, the motion sought inclusion in the instant record of part of the judgment with respect to a different defendant; "[t]o include therein the judgment of the trial court with respect to the defendant Frank John Schutz, and to include therein the oral proceedings in open court with reference to the pronouncement of said judgment against Frank John Schutz." The motion was opposed and denied. This leaves appellant with no substantial factual basis for his argument.

[1,2] The transcript contains only a suggestion of the alleged fact. At the time of sentencing appellant's attorney made this assertion: "Your Honor will recall, in the co-defendant's case that matter was reduced to a lesser offense and then it was granted probation. I realize there is a difference between the two reports but—". The court interrupted, saying: "Certainly there is a difference in the reports and in the individuals." Amplifying this in the briefs was not permissible. "Matters not presented by the record cannot be considered on the suggestion of counsel in the briefs. [Citations.] The procedure to augment the record is set forth in Rule 33(b), Rules on Appeal." People v. Hernandez, 150 Cal.App.2d 398, 402, 309 P.2d 969, 972. "Statements of counsel in briefs are not part of the record on appeal." Gantner v. Gantner, 39 Cal.2d 272, 278, 246 P.2d 923, 928.

We add, by way of dictum, that the facts asserted by appellant, if established, would not spell prejudicial error with respect to him. The punishment inflicted upon appellant was lawful. Legally it is of no consequence to him whether his co-defendant received undeserved leniency or not.

Judgment affirmed.

FOX, P. J., and HERNDON, J., concur.

169 Cal.App.2d 280

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Eddie Steve GURULE and Wannalee Wallace, Defendants,

Eddie Steve Gurule, Appellant.

Cr. 6422.

District Court of Appeal, Second District, Division 1, California.

March 31, 1959.

Defendant filed a petition for writ of error coram nobis on June 13, 1958, after judgment of conviction on November 1, 1957, on ground that trial court in criminal prosecution committed error at the trial because identity of informant used by the police to locate the defendant was never revealed. The Superior Court of Los Angeles County, Maurice C. Sparling, J., entered an order denying the petition, and the defendant appealed. The District Court of Appeal, Fourt, J., held that due diligence was not shown, and that therefore the petition was defective.

Order affirmed.

1. Criminal Law 🔑997(6)

"Coram nobis" is a remedy of narrow scope, and its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact, which would have prevented rendition of judgment if trial court had known the fact, and which, through no negligence or fault of defendant, was not then known to the trial court.

See publication Words and Phrases, for other judicial constructions and definitions of "Coram Nobis".

2. Criminal Law 🔑997(12)

Applicant for coram nobis must show that facts, on which he relies, were not known to him and could not, in exercise of due diligence, have been discovered by him at any time substantially earlier than time of his motion for the writ.

3. Criminal Law 🔑997(3)

Defendant's points relating to matters of law, facts of which defendant had knowledge at time of trial of criminal prosecution, conjecture and opinion as to criminal act, lack of evidence to connect defendant with the crime, lack of certainty of proof, incompetent evidence, and improper admissions of evidence could not be corrected by writ of error coram nobis.

4. Criminal Law 🔑997(15)

On petition for writ of error coram nobis, there is a strong presumption of regularity in criminal prosecution.

5. Criminal Law 🔑997(15)

When clear and substantial proof is not presented by defendant on petition for writ of error coram nobis, trial court is justified in disbelieving allegations made by petition.

6. Criminal Law 🔑1147

Order of trial court denying petition for writ of error coram nobis will not be disturbed on appeal, in absence of a clear abuse of discretion lodged with trial court.

7. Criminal Law 🔑997(12)

Defendant, who filed petition for writ of error coram nobis, was required to show due diligence, and, in event that there was no such showing, petition was defective.

8. Criminal Law 🔑997(12)

Where judgment of conviction was entered on November 1, 1957, and petition for writ of error coram nobis, on ground that trial court committed error at trial of criminal prosecution because identity of informant used by the police to locate defendant was never revealed, was not filed until June 13, 1958, due diligence was not shown, and petition was defective.

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Eddie Steve Gurule, in pro. per.

Stanley Mosk, Atty. Gen., Jack E. Goertzen, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from an order denying appellant's petition for a writ of error *coram nobis*.

On October 11, 1957, in the Superior Court in Los Angeles County, the appellant was found guilty of a violation of section 11500, Health and Safety Code. He was charged with two prior felony convictions, however the judge made no finding with reference to either of such prior convictions. The appellant made an application for probation. On November 1, 1957, the defendant's application for probation was denied and he was sentenced to the state prison as a first offender. There was no motion for a new trial and no appeal was taken from the judgment.

About June 13, 1958, the appellant filed a petition for a writ of error *coram nobis* in the Superior Court of Los Angeles County. On June 26, 1958, a hearing on said petition was had and the petition was denied. This appeal is from the denial of such petition.

The appellant contends that the trial court committed error at the trial in that the identity of the informant used by the police to locate the appellant was never revealed. We do not have the benefit of a reporter's transcript in this particular case, and are therefore unaware as to what the testimony might have been at the trial.

[1, 2] In any event, "In this state a motion to vacate a judgment in the nature of a petition for *coram nobis* is a remedy of narrow scope. (Citing cases.) Its purpose is to secure relief, where no other remedy exists, from a judgment rendered while there existed some fact which would have prevented its rendition if the trial court had known it and which, through no negligence or fault of the defendant, was not then known to the court. (Citing cases.) The applicant for the writ 'must show that the facts upon which he relies were not known to him and could not in the exercise of due diligence have been discovered by him at any time substantially earlier than the time of his motion for the writ; otherwise he has stated no ground for relief.' (People v. Shorts (1948), 32 Cal.2d 502, 513, 197 P.2d 330 * * *.)" People v. Adamson, 34 Cal.2d 320, 326–327, 210 P.2d 13, 15.

It was also said in People v. Tuthill, 32 Cal.2d 819, at page 822, 198 P.2d 505, 506: "It is a general rule that the writ will not be granted for newly discovered evidence going to the merits of the issues tried; issues of fact, once adjudicated, even though incorrectly, cannot be reopened except on motion for new trial. (Citing cases.) And the writ does not lie to correct errors of law; it 'is not intended to authorize any court to review and revise its opinions.' (Citing cases.)"

[3, 4] The appellant, in his application in the superior court, refers only to matters of law, and to facts of which he had knowledge at the time of the trial. In his brief in this court he writes of conjecture and opinion as to his criminal act, lack of evidence to connect him with the crime, lack of certainty of proof, incompetent evidence and improper admissions of evidence. None of the points as raised by the appellant, under the circumstances of this case, are of the type which a writ of error *coram nobis* was designed to correct. There is a strong presumption of regularity. People v. Croft, 134 Cal.App.2d 800, 286 P.2d 479.

[5, 6] There is no clear and substantial proof before this court and there was none, so far as we are able to ascertain, before the trial court in support of the application and petition. People v. Devora, 105 Cal.

App.2d 457, 233 P.2d 653. When such evidence is not presented, the trial court is justified in disbelieving the allegations made by the petition. The ruling of the trial court will not be disturbed on appeal in the absence of a clear abuse of the discretion lodged with it. People v. Bible, 135 Cal.App.2d 65, 286 P.2d 524.

[7, 8] Furthermore, the appellant was required to show due diligence and in the event there is no such showing, the petition is defective. People v. Shorts, 32 Cal.2d 502, 512, 197 P.2d 330. The judgment in this case was entered on November 1, 1957. The petition was filed June 13, 1958. Under the circumstances we do not believe due diligence has been shown. People v. Krout, 90 Cal.App.2d 205, 209, 202 P.2d 635.

The order denying the application of the appellant for a writ of error *coram nobis* is affirmed.

WHITE, P. J., and LILLIE, J., concur.

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169 Cal.App.2d 247

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Thomas Bruce CATLIN and Denver Ore Eggleston, Defendants.

Thomas Bruce Catlin, Defendant and Appellant.

Cr. 6376.

District Court of Appeal, Second District, Division 2, California.

March 30, 1959.

Rehearing Denied April 23, 1959.

Hearing Denied May 27, 1959.

Defendant was convicted of burglary in the second degree, petit theft, and attempted extortion. The Superior Court, Los Angeles County, Albert E. Wheatcroft, J., entered judgment of conviction and order denying motion for new trial, and defendant appealed. The District Court of Appeal, Herndon, J., held that where codefendant, who was an accomplice, testified in his own behalf in a manner which clearly incriminated defendant, Superior Court erred in refusing to give defendant's requested instructions relating to accomplice testimony, but that such error was not reversible error, where it was inconceivable that jury might reasonably have reached a different result had requested instructions been given.

Judgment and order affirmed.

1. Criminal Law 🔑427(5)

Under provision of Code of Civil Procedure that, after proof of a conspiracy, evidence may be given on a trial of act or declaration of conspirator against his coconspirator, and relating to the conspiracy, foundational requirement is satisfied by prima facie proof of the conspiracy. West's Ann.Code Civ.Proc. § 1870, subd 6.

2. Criminal Law 🔑427(2, 5)
Evidence 🔑260

Under provision of Code of Civil Procedure that, after proof of a conspiracy, evidence may be given on a trial of act or declaration of conspirator against his coconspirator, and relating to the conspiracy, fact of conspiracy must be proved before evidence of acts or declarations may be considered, but fact of conspiracy need not be established by a preponderance of the evidence in a civil action or beyond a reasonable doubt in a criminal action. West's Ann.Code Civ.Proc. § 1870, subd. 6.

3. Criminal Law 🔑428

Under provision of Code of Civil Procedure that, after proof of a conspiracy, evidence may be given on a trial of act or declaration of conspirator against his coconspirator, and relating to the conspiracy, evidence is received conditionally, since, in final analysis, jury must first pass judgment on question as to whether asserted conspiracy has been proved, and, if proved to satisfaction of jury, evidence of acts or declarations of conspirator in such circumstances may be considered. West's Ann. Code Civ.Proc. § 1870, subd. 6.

4. Criminal Law ⚿427(5)

In prosecution for burglary in second degree, petit theft, and attempted extortion, evidence was sufficient to establish prima facie the existence of a conspiracy and therefore justified admission of evidence of acts and declarations of defendant's alleged coconspirators under provision of the Code of Civil Procedure that, after proof of conspiracy, evidence may be given on a trial of the act or declaration of a conspirator against his coconspirator, and relating to the conspiracy. West's Ann.Code Civ.Proc. § 1870, subd. 6.

5. Criminal Law ⚿752½

Motion to dismiss criminal prosecution at close of the People's case is not available to the defense.

6. Criminal Law ⚿780(1)

Where codefendant, who was an accomplice of defendant, testified in his own behalf in a manner which clearly incriminated defendant, trial court erred in refusing to give defendant's requested instructions relating to accomplice testimony.

7. Criminal Law ⚿780(1), 824(7)

When testimony given on trial is sufficient to warrant conclusion on part of jury that witness implicating defendant was an accomplice, it is trial court's duty to instruct jury on accomplice testimony, and failure of trial court to so instruct jury, with or without specific request for such instructions, constitutes error.

8. Criminal Law ⚿1173(2)

Entire record must be considered in determining whether error of trial court in failing to instruct on accomplice testimony constituted prejudicial error requiring reversal of judgment of conviction.

9. Criminal Law ⚿780(1)

Where codefendant denies participating in crime, with which defendant is charged, and does or does not incriminate the defendant, it is not error to refuse defendant's requested accomplice instructions.

10. Criminal Law ⚿1165(1)

A "miscarriage of justice" entitling defendant to reversal of judgment of conviction, should be declared by reviewing court only when reviewing court, after examination of entire cause, including the evidence, is of the opinion that it is reasonably probable that a result more favorable to defendant would have been reached in absence of error.

See publication Words and Phrases, for other judicial constructions and definitions of "Miscarriage of Justice".

11. Criminal Law ⚿1173(2)

Where it was inconceivable that jury might have acquitted defendant if defendant's requested accomplice instructions, which had been erroneously refused, had been given, error was not reversible error.

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Gerald J. Levie, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

Appellant, a police officer of the city of Los Angeles, at the time of the offenses charged, was convicted in a jury trial of burglary in the second degree, petit theft, and attempted extortion. This is an appeal from the judgment of conviction and the order denying a motion for new trial. Appellant contends that the trial court committed prejudicial error in (1) admitting over objection incriminating evidence of the acts and statements of other parties to the crimes charged which occurred without the presence of the appellant; (2) denying appellant's motion to dismiss at the close of the people's case; and (3) in refusing several requested instructions respecting accomplice testimony. Reviewing the evidence according to the familiar rule, the case may be summarized as follows:

In January, 1957, appellant was a police officer of the city of Los Angeles, assigned to the Analytical Section of Central Division. Appellant had been assigned to the Central Vice Section of the Department for over three years preceding September, 1956, and while attached to the Vice Section had become acquainted with one Morris Goodman, whom appellant had investigated with regard to bookmaking activities.

About the middle of January, 1957, appellant received a telephone call from Goodman regarding the possibility of making an arrest for the production of lewd films. Appellant then telephoned Denver Ore Eggleston, his partner when assigned to the Vice Section, and co-defendant in the trial below, to inquire if Eggleston were interested in participating in the arrest. Receiving an affirmative reply, appellant arranged a meeting with Eggleston and Goodman in a bar on Sunday, January 20, 1957, at which time Goodman was introduced to Eggleston, and Eggleston was informed that the other two planned a "shakedown" which Eggleston understood to mean that extortion or blackmail would be attempted. The three men then left the bar and met again at a bowling alley on the corner of La Cienega and Santa Monica Boulevards, where Goodman made some telephone calls and informed the others that no pictures were being taken that day. The three men agreed to meet at the bowling alley the following Sunday, appellant's day off.

On January 27, 1957, the following Sunday, the three men met at the bowling alley, and at about 5 p. m. proceeded on foot a short distance to the residence of Maurice Bailey. Bailey had an upstairs apartment over a store on La Cienega Boulevard which was his place of business. The rear door was shut but unlocked, and appellant opened the door and entered the apartment followed immediately by Goodman and Eggleston. There were five people present in the apartment: Bailey, Antonio Lozzi, Lloyd Crane and a couple identified as Everett and Marilyn Jackson. When the officers and Goodman entered the apartment, they found Marilyn lying nude on the bed. There was a camera set up on a tripod pointed toward the bed and there were two stands of floodlights in the bedroom. Everett, also nude, was in the bedroom or bathroom. The three men were in plain clothes, but appellant identified himself as a police officer by displaying a patrolman's badge. Both Eggleston and appellant represented Goodman as the police officer in charge of the detail. They addressed him as "Sarge" or "Sergeant" and acquiesced in Goodman's statement that it was a narcotics investigation and that he was in charge of the detail. Goodman separated Bailey from Lozzi and Crane and ordered appellant and Eggleston to keep the others separated. Appellant and Eggleston at Goodman's direction proceeded to conduct a search of the premises. Goodman then took Bailey into the bedroom where Marilyn was lying on the bed, nude, facing the camera. Eggleston was standing by the camera, and Goodman ordered Bailey to sit on the bed beside the nude woman and face the camera, which Eggleston then operated. Bailey was then taken by Goodman into the kitchen, and from there downstairs to Bailey's place of business. During their conversation, Goodman indicated that Bailey faced an arrest for which $50,000 bail would be required, but that for the sum of $5000 he would not involve Bailey in criminal proceedings. Goodman particularly warned Bailey not to reveal the transaction to "the man upstairs" and took from Bailey five checks of one thousand dollars each, payable to cash. Goodman indicated that he would give Bailey until the following afternoon to raise the five thousand dollars in cash when he would then return the checks to Bailey.

Eggleston, who had remained in the bedroom with Marilyn, also photographed Crane and Lozzi with the nude woman on the bed. During his search of the premises, Eggleston uncovered a number of photographic slides depicting a nude man with his private parts exposed. No narcotics were found by Eggleston. Throughout these proceedings, appellant remained in the living room and hallway. He conducted a search of the living room, and kept Crane and Lozzi under surveillance; however, he took no direct part in the solicitation of funds or the operation of the movie camera.

After Goodman obtained the checks from Bailey, they returned to the living room where Goodman continued to act as the officer in charge of the detail. As the group was preparing to depart, Goodman, in appellant's presence, said to Bailey "not to forget what he had said downstairs" and "not to forget * * * about my getting the money to retrieve the checks." Goodman then indicated that the detail should leave. Before the group left, Eggleston indicated that Bailey's camera, lens and five to six rolls of motion picture color film were evidence in the case and took them with him when they left. The camera and film were never returned to Bailey.

Appellant, Eggleston and Goodman left the apartment with the Jacksons, the couple who were to pose for the lewd films. The Jacksons were not arrested but parted from appellant and his companions within a block of Bailey's residence. The following day, Bailey related the event to officers of the Los Angeles Police Department, and that afternoon, January 28, Goodman was arrested. The following July, in a separate trial, Goodman was convicted of attempted extortion. Appellant learned that Goodman had been arrested by the Bunco Detail on January 28th; however, he submitted no report of the events of January 27, nor did he disclose to his superiors his knowledge of the events or his participation in the activities of that afternoon.

Goodman was not called as a witness by the people or either defendant. Eggleston, who was tried as a co-defendant with appellant, testified in his own behalf, and was cross-examined by appellant's counsel and by the deputy district attorney. He admitted participating in the attempted extortion, and testified that appellant was also a party to the scheme. Eggleston, however, denied that he had taken the camera equipment, which was the basis of the charge of grand theft. He testified that he did not seek to be acquitted of the charge of attempted extortion, but that he was innocent of the charge of grand theft.

Testifying in his own behalf, appellant denied participating in the plan to extort money from Bailey, and in his brief appellant argues that he was the innocent dupe of Goodman and Eggleston. Appellant testified that he did not disclose his participation in the events of January 27 because he "* * * realized it was somewhat out of the scope of my employment at that time" and that he "didn't want to be involved in any way with anything that had happened out there that day."

Initially, appellant contends the trial court committed prejudicial error in admitting evidence of the acts and declarations of Goodman and Eggleston which tended to incriminate appellant in the offenses charged. It is appellant's theory, advanced throughout the trial and on this appeal, that there was insufficient evidence, apart from the declarations of Goodman and Eggleston, to permit the inference that appellant was a party to a conspiracy.

[1-3] Section 1870 of the Code of Civil Procedure, provides: "* * * evidence may be given upon a trial of the following facts: * * * 6. After proof of a conspiracy, the act or declaration of a conspirator against his co-conspirator, and relating to the conspiracy;" The foundational requirement is satisfied by prima facie proof of the conspiracy. As stated in People v. Talbott, 65 Cal.App.2d 654, 663, 151 P.2d 317, 322:

> "* * * the fact of the conspiracy must be proved before the evidence of said acts or declarations may be considered. The issue, however, need be proved only to the extent of establishing prima facie evidence of the fact. It need not be established by a preponderance of the evidence in a civil action nor beyond a reasonable doubt in a criminal action; the latter doctrine applies only to the issue of guilt. Any evidence re-

ceived by virtue of this rule necessarily is received conditionally, for in the final analysis, the jury must first pass judgment on the question as to whether the asserted conspiracy has been proved. If proved to the satisfaction of the jury, the evidence of the acts or declarations of a conspirator, in such circumstances may be considered." See also People v. Curtis, 106 Cal.App.2d 321, 326–327, 235 P.2d 51.

In the instant case the testimony of the victim of the alleged shakedown, Bailey, permits the inference that appellant was a party to the extortion scheme. The investigation which Bailey described was so patently irregular as to raise the natural inference that it was conducted for a criminal purpose. Appellant's knowing participation could reasonably be inferred. First of all, appellant participated fully in the basic deception by which Goodman, a civilian and one-time criminal suspect was cloaked with the mantle of police authority. There was testimony that appellant and Eggleston referred to Goodman as "Sarge" and followed his directions so as to indicate that Goodman was the police officer in charge of the detail. Moreover, by following Goodman's directions, appellant facilitated Goodman's private conversations with Bailey in which Goodman demanded money. Similarly, appellant failed to object to Eggleston's procedure in photographing the male occupants of the apartment in the bedroom in the company of the nude woman. Finally, there was testimony that in the presence of appellant, Goodman reminded Bailey of the money which Goodman was to collect from the victim. These obvious departures from proper police procedure permit the inference that appellant was a party to the extortion plot more clearly revealed by the acts and declarations of Goodman and Eggleston.

[4] Since there was at least prima facie evidence of the existence of a conspiracy, the trial court did not err in admitting evidence of the acts and declarations of Goodman and Eggleston. People v. Steccone, 36 Cal.2d 234, 238, 223 P.2d 17; People v. Talbott, supra, 65 Cal.App.2d 654, 663, 151 P.2d 317; cf. People v. Busby, 40 Cal.App.2d 193, 199, 104 P.2d 531.

[5] Appellant's contention that the trial court erred in denying his motion to dismiss at the close of the people's case is without merit. In the first place, no such motion is available to the defense. People v. Clark, 61 Cal.App. 46, 47, 214 P. 248; People v. Fouts, 61 Cal.App. 242, 245–246, 214 P. 657; People v. Kimball, 23 Cal.App.2d 32, 34, 72 P.2d 157; cf. People v. Faber, 29 Cal.App.Supp.2d 751, 758–759, 77 P.2d 921. In the second place, as indicated by our statement of the case, the evidence in the record when the motion was made was more than adequate to establish a prima facie case against appellant.

Finally, appellant contends the trial court committed reversible error in refusing certain requested instructions relating to accomplice testimony. Appellant requested CALJIC Number 821, relating to the necessity of corroboration for accomplice testimony, CALJIC Number 822, stating what constitutes sufficient corroboration, CALJIC Number 823, stating that corroboration cannot be found in the testimony of an accomplice, former CALJIC Number 831, indicating that the fact that a statement has been corroborated does not mean that it is true, and CALJIC Number 829, stating that the testimony of an accomplice should be viewed with distrust, all of which the trial court refused.

Eggleston, a co-defendant, testified in his own behalf in a manner which clearly incriminated appellant. Although Eggleston denied taking Bailey's camera, lens and film, he admitted that the object of their activities on January 27th was a "shakedown". Eggleston's testimony further incriminated appellant in that Eggleston testified to the effect that from the outset extortion was the express purpose of all three men. Although Eggleston never withdrew his plea of not guilty he testified that he did not seek to be acquitted of the charge of extortion.

[6–8] In this situation, it was error for the trial court to refuse the requested instructions. As stated in People v. Warren, 16 Cal.2d 103, 118–119, 104 P.2d 1024, 1032: "* * * whenever the testimony given upon the trial is sufficient to warrant the conclusion upon the part of the jury that a witness implicating a defendant was an accomplice, it is the duty of the trial court to instruct the jury upon the law as set forth in section 1111 of the Penal Code; that the failure of the trial court to so instruct the jury under such circumstances, with or without a specific request for such instructions, constitutes error; but that in the event of such failure in any case, the entire record must be considered in determining whether such error constituted prejudicial error requiring a reversal of the judgment of conviction."

[9] There are certain exceptions to the above quoted rule applicable where testimony is given by a co-defendant. Thus, it is not error to refuse accomplice instructions where a co-defendant denies participating in the crime and does not incriminate the other defendant (People v. Thompson, 133 Cal.App.2d 4, 10–11, 284 P.2d 39; People v. Dupree, 156 Cal.App.2d 60, 70–71, 319 P.2d 39) or where the co-defendant denies participating in the crime and the clear import of his denial is to incriminate the other defendant. People v. Arends, 155 Cal.App.2d 496, 512–513, 318 P.2d 532. The theory of these exceptions is that it would subject the co-defendant to unfair prejudice in the eyes of the jury to give even a limited instruction on accomplice testimony. But where, as here, the co-defendant has so testified as in practical effort to plead guilty as well as to incriminate the other defendant, we think the general rule should apply and that the accomplice instructions should be given. Cf. People v. Warren, supra, 16 Cal.2d 103, 118–119, 104 P.2d 1024.

[10] However, assuming it was error to refuse the requested instructions, as indicated in People v. Warren, supra, we must examine the entire record to determine "* * * whether such error constituted prejudicial error requiring a reversal of the judgment of conviction." People v. Warren, supra, 16 Cal.2d 103, 119, 104 P.2d 1024. And as stated in People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243, 254; "* * * a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error."

[11] In the case at bar it is inconceivable that the jury might reasonably have reached a different result had the requested instructions been given. Viewed as a whole, the record discloses a situation in which appellant, a police officer, received information concerning the production of lewd films from a civilian informant. Appellant was no longer assigned to the vice squad, but he personally contacted his former partner, Eggleston, and arranged a meeting between Eggleston and Goodman in a bar on a Sunday afternoon. When the three men entered the victim's apartment, appellant fully participated in the deception by which Goodman was represented as the police officer in charge of the detail, and his participation facilitated Goodman's solicitation of money from the victim. Appellant left with his companions without making an arrest or reporting his activities to his superiors. Moreover, appellant's failure to disclose his participation in the investigation *after* he learned of Goodman's arrest is highly significant. In the light of these facts, and applying the test enunciated in People v. Watson, supra, we are of the opinion that it is not reasonably probable that a result more favorable to defendant would have been reached had the requested instructions been given.

The judgment and order denying motion for new trial are affirmed.

FOX, P. J., and ASHBURN, J., concur.

169 Cal.App.2d 202

John Thurston CHAPMAN, Ethel May Ramey, Robert William Chapman and Nora Chapman, Plaintiffs and Respondents,

v.

Minnie CHAPMAN, also known as Minnie L. Chapman, individually and as the Administratrix of the Estate of John Chapman, deceased, Defendant and Appellant.

Civ. 9468.

District Court of Appeal, Third District, California.

March 27, 1959.

Rehearing Denied April 17, 1959.
Hearing Denied May 20, 1959.

Action to enforce an inter vivos contract between widow and her deceased husband by impressing a constructive trust upon certain realty inventoried by widow in the estate of her husband who died intestate. The Superior Court, Stanislaus County, H. L. Chamberlain, J., entered a decree adverse to widow and she appealed. The District Court of Appeal, Van Dyke, J., held that where decedent entered into an agreement with his widow whereby he bound himself to make and never to revoke, so long as he and his wife lived together as husband and wife, a will whereby he disposed of three parcels of realty in a certain manner, namely, one parcel to his wife, a second parcel to a son of decedent by a former marriage, or his heirs, and a third parcel, one-half to his wife, and one-half to such son or his heirs, and decedent subsequently revoked his will and conveyed his subject property one parcel to his wife and himself in joint tenancy, second parcel to his son and himself in joint tenancy, and third parcel to himself, his widow, and his son in joint tenancy, and decedent died after his son, heirs of his son were owners in equal shares as tenants in common of second parcel, and were owners in equal shares and as tenants in common of an undivided third parcel.

Judgment affirmed.

1. Wills 🔑68

Where a contract between a husband and wife provided that husband bound himself to make and never revoke so long as he lived with his wife as husband and wife a will whereby he disposed of certain realty, including disposition of one parcel to his son by a former marriage, or his heirs, and another parcel one-half to his wife and one-half to such son, or his heirs, contract presented sufficient uncertainty on subject of benefits to make problem one of construction to ascertain intent, and implied finding that contract was made for the benefit of decedent's son and his heirs was substantially supported.

2. Wills 🔑68

Where decedent entered into an agreement with his widow whereby he bound himself to make and never to revoke, so long as he and his wife lived together as husband and wife, a will whereby he disposed of three parcels of realty in a certain manner, namely, one parcel to his wife, a second parcel to son of decedent by a former marriage, or his heirs, and a third parcel, one-half to his wife, and one-half to decedent's son or his heirs, and decedent subsequently revoked his will and conveyed his subject property one parcel to his wife and himself in joint tenancy, second parcel to his son and himself in joint tenancy, and third parcel to himself, his widow, and his son in joint tenancy, and decedent died after his son, heirs of his son were owners in equal shares as tenants in common of second parcel, and were owners in equal shares and as tenants in common of an undivided one-half interest in third parcel.

3. Wills 🔑64

Where a husband entered into an agreement with his wife to make and never to revoke so long as he and his wife lived together a will whereby he disposed of certain realty, even though husband revoked the will, by its intentional destruction, he did not rescind such agreement, in view of fact he revoked the will with the intent of carrying out the terms of the agreement by the use of joint tenancy deeds, with the purpose of avoiding probate costs.

4. Estoppel 🔑95

Where a son did not, at time of execution, know of certain joint tenancy deeds to himself, his heirs, and his father, executed by his father, nor participate in or induce their execution, nor did it appear that father was ignorant of the result of the facts in making deeds to himself and his son and his heirs in joint tenancy, nor did father in any way act upon or rely on any conduct of his son in making such deeds, to father's injury, son's conduct, including silence after learning of situation, did not form basis of estopping his heirs from claiming under such joint tenancy deeds, under contract pursuant to which they were drawn. West's Ann.Code Civ.Proc. § 1962, subd. 3.

5. Appeal and Error ⚷1071(6)

Where from the whole record it was highly improbable that a reversal for failure to make a specific finding on a claim of estoppel would produce a different result, and it appeared from the record that no miscarriage of justice resulted from failure of court to make a specific finding upon estoppel, judgment would not be reversed for failure of court to make such finding.

◆

Wade H. Coffill, Oakdale, Patricia Lane, Carmel, Willens, Boscoe & Short, Stockton, for appellant.

Hoover, Lacy & Bienvenu, Modesto, for respondents.

VAN DYKE, Presiding Justice.

Respondents, who were plaintiffs in this action in the trial court, are the heirs at law of William Robert Chapman, deceased. William's widow, Nora, was joined during the proceedings for reasons not here material. The other respondents, and who were the original plaintiffs, are his three children, John Thurston Chapman, Ethel May Ramey, and Robert William Chapman. Appellant is the widow and the administratrix of the estate of John Chapman, who was the father by a former marriage of William. This action was brought to enforce an inter vivos contract between appellant and her deceased husband, John, by impressing a constructive trust upon certain real property inventoried by appellant in the estate of John, who had died intestate. Appellant admitted the execution of the contract, but contended herein that it had been rescinded. She also asserted that respondents were estopped to enforce it by reason of William's acts and conduct during his lifetime. The decree of the trial court was adverse to appellant and she appeals.

The real property which is the subject of this action was the separate property of John. In 1941, appellant Minnie Chapman, filed against John a suit for separate maintenance, and during its pendency the agreement in question was entered into. By that agreement John bound himself to make and never to revoke, so long as he and Minnie lived together as husband and wife, a will whereby he disposed of three parcels of real property in the following manner: Parcel 1 to Minnie. Parcel 2 to William, "or his heirs or lineal descendants." Parcel 3, one-half to Minnie and one-half to William "or his heirs or lineal descendants." The contract was executed in 1941. Shortly thereafter, John executed a will in accordance therewith. On February 25, 1952, John requested and received his will from the attorney who drafted the same. He then revoked it. On March 8, 1952, he conveyed the subject real property as follows: Parcel 1 to Minnie and himself in joint tenancy. Parcel 2 to William and himself in joint tenancy. Parcel 3 to himself, to Minnie, and to William in joint tenancy. William died December 26, 1953, predeceasing John, who died May 26, 1956.

The decree of the trial court declared respondents to be the owners in equal shares as tenants in common of parcel 2. It further declared that respondents were the owners in equal shares and as tenants in common of an undivided one-half interest in parcel 3. Respondents asserted no claim to parcel 1 which had vested in appellant on the death of John.

Appellant contends as follows: 1. Respondents were only incidental beneficiaries of the contract between John and Minnie and as such not entitled to enforce it. 2. The contract was rescinded prior to John

Chapman's death, thereby terminating any interest of respondents as third-party beneficiaries. 3. Respondents are estopped to claim under the contract. 4. The issue of estoppel was specially pleaded and the trial court committed error in failing to make any finding thereon.

[1, 2] We shall first consider appellant's contention that respondents were only incidental beneficiaries of the contract. Section 1559, Civil Code, provides: "A contract, made expressly for the benefit of a third person, may be enforced by him at any time before the parties thereto rescind it." Although respondents contend that the language of the contract makes it clear as a matter of law that it was made expressly for the benefit, first, of John's son, William, and second, and in case of his failure to take, then for the benefit of his heirs and lineal descendants, the court treated the document at trial as sufficiently uncertain upon that matter to justify the receipt of interpretative evidence to ascertain intent. We think this was proper procedure. With respect to parcel 2, the obligation of John was to devise "to the said William Robert Chapman * * * or his heirs or lineal descendants." With respect to parcel 3, the obligation of John was to devise to appellant one-half and then to devise one-half "to the said William Robert Chapman or his heirs or lineal descendants." The language "to William Robert Chapman or his heirs or lineal descendants" may reasonably be considered as creating an element of uncertainty as to who was to benefit. Also, in several other places in the contract, uncertainty was created by the reference being to William alone without mention of his heirs or lineal descendants. For instance, the contract provided that John might sell any or all of the property during his lifetime and that if he did so the proceeds of sale should be kept, managed and reinvested in his discretion; that he was not to devise those proceeds thereafter in such a way as to defeat the purposes of the agreement, but on the contrary should devise the proceeds to his wife and to William, no mention being made of William's heirs or descendants. Without going further, we hold that there was sufficient uncertainty on the subject of benefits to make the problem one of construction to ascertain intent. The evidence received in aid of interpretation was in some respects conflicting and in other respects capable of conflicting inferences. The problem of construction thus became one of fact for resolution by the trial court; and, on appeal, it presents the usual situation which poses the inquiry, Does the evidence contain substantial support for the construction adopted? We hold that it does. There is, first, the reference not only to William, but to respondents as well, thus strongly indicating an intent to include them as beneficiaries. Next, there was the situation under which the contract was made, that is, the pendency of the separation suit, the implied desire of John by providing for appellant out of his separate property to reserve the rest to his son, and his grandchildren. There was also the implied desire of John to save his marriage, even at the expense of giving up certain rights to dispose of his separate property as he saw fit and to retain the rest. Without going further, we hold that the construction adopted by the trial court is reasonable and is substantially supported.

[3] Turning now to the contention that John rescinded the agreement, the following appears in the record: There was evidence that when John re-took his will and revoked it by intentional destruction he did so with no intent to breach or cancel, or for cause rescind, the contract between himself and his wife, but only, and acting on inexpert and lay advice, with the intent to carry out the terms of his contract by the use of joint tenancy deeds, with the purpose of avoiding probate costs. The deeds were actually drawn according to his instructions by a layman, and were drawn in such a way, as is also apparent from the record here, that had he predeceased William, which would normally be expected, the disposition of the property would have met the requirements of the contract. Although John's method of performance did

not square with his contractual obligations, the court could infer that he was unaware of this, believed that he could accomplish the same effect by what he did, and that he possessed at the time no intent whatever to rescind or to do other than to perform his obligations fully. As it turned out, appellant received all that she would have received under the promised will. She lost nothing by the change in method. What she is seeking to do here is to gain by the fortuitous fact that William died before John. We hold that the trial court's finding that John did not rescind the agreement and that it was in full force and effect at his death is substantially supported.

[4] We turn now to appellant's contention that respondents are estopped to claim the contract was unrescinded. This estoppel arises, it is argued, by reason of William's conduct. It is claimed that in 1952, when William became a joint tenant with John in parcel 2, and also became a joint tenant with his father and appellant in parcel 3, he received present existing interests during his lifetime to which he was not entitled under the agreement, also, that he received certain tax advantages not otherwise available to him and, had he survived his father and appellant herein, would have received considerably more property than provided for in the agreement; that the acceptance of these benefits is presumed. It is also pointed out that at least one of respondents knew immediately after William's death of the proceedings then taken to terminate the joint tenancies of record and, therefore, knew that these tenancies had been created notwithstanding the contract. The argument runs further that by William's acceptance of these benefits he led his father to act in reliance upon the situation created and not to keep a will in effect; that, therefore, his successors in interest cannot equitably be permitted to escape the effects of the acts of their predecessor in interest and that their cause is tainted by the same estoppel as would have barred him. These contentions have no merit. The burden of proving estoppel lay upon appellant as being an affirmative defense interposed by her to respondents' cause of action. The least that can be said in opposition to her point is that there was no such evidence as compelled the trial court as a matter of law to hold that estoppel had been made out. The elements of estoppel are well known. Estoppel is well defined in Section 1962, Code of Civil Procedure, subdivision 3, as follows: "Whenever a party has, by his own declaration, act, or omission, intentionally and deliberately led another to believe a particular thing true, and to act upon such belief, he cannot, in any litigation arising out of such declaration, act, or omission, be permitted to falsify it." Appellant does not point in her brief to any evidence that William or any of the respondents knew of the joint tenancy deeds when they were drawn or that they in any way participated in or induced their execution; nor does she point out evidence that the mere silence of William when he learned of the situation in any way deceived John; nor does she point out evidence to show that John was ignorant of the results of his acts in such a way as to make William's conduct deceitful; nor is evidence pointed out to indicate John in any way acted upon or relied on any conduct of William or the respondents herein to his injury. The trial court was not obliged to find in favor of the affirmative defense of estoppel.

[5] Finally, appellant contends that the court erred in that it made no specific finding upon estoppel. However, the court clearly implied an adverse finding by its conclusions of law and judgment. The trial court also filed a brief memorandum designated "Decision on Issues of Trial" and directed the preparation of findings by plaintiffs in accord therewith. Findings were prepared and a copy thereof was served upon attorneys for appellant. The record does not disclose that different or further findings were requested. The proof of estoppel was weak. The findings made afford a fair inference that the trial court had by its judgment ruled adversely to appellant upon the claim of estoppel. Appellant did not when served with the proposed

findings object to the lack of a specific finding upon estoppel. We must say from the whole record that it is highly improbable that a reversal for such technical error as may be here present would produce a different result, and we must also say from the record that there has been no miscarriage of justice. Therefore judgment ought not to be reversed on the technicality advanced.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

169 Cal.App.2d 230

Sol FROMBERG, dba Chuck's Play Room, 733 North Main Street, Los Angeles 12, On-Sale General & Retail Package Off-Sale General Licenses, Petitioner and Appellant,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL OF The State of CALIFORNIA, Russell S. Munro, Director of the Department of Alcoholic Beverage Control of the State of California, Alcoholic Beverage Control Appeals Board of The State of California, Defendants and Respondents.

Civ. 23452.

District Court of Appeal, Second District,
Division 2, California.
March 30, 1959.

Mandamus proceeding to set aside order revoking on-sale liquor license. The Superior Court of Los Angeles County, Bayard Rhone, J., entered judgment denying the petition, and the petitioner appealed. The District Court of Appeal, Ashburn, J., held that where licensee conducted on-sale liquor business through his bartender and visited such business about twice a week in the afternoon when the business was supposed to be closed, and licensee devoted himself to his liquor store one block away, and bartender had no supervision whatever, and a narcotics trade was carried on at the on-sale premises with practically no secrecy, and the place had a well earned reputation of being a hangout for narcotics addicts and pushers, the on-sale license was properly revoked for narcotics transaction by bartender and bartender's wife and the cook and other persons, and licensee's ignorance of the transactions, if he was ignorant, would not bar the revocation, since the bartender's knowledge was imputed to the licensee.

Affirmed.

1. Mandamus 🔑187(9)

On appeal from judgment denying mandamus to require the Department of Alcoholic Beverage Control to set aside revocation of on-sale liquor license, the function of District Court of Appeal with respect to the sufficiency of the evidence was limited to ascertaining whether the findings of the department and the trial court were supported by substantial evidence.

2. Mandamus 🔑187(4)

On appeal from judgment denying mandamus to require the Department of Alcoholic Beverage Control to set aside revocation of on-sale liquor license, it was too late to interpose objections as to insufficiency of the evidence, hearsay and the like, where no objection whatever was made at the hearing before the hearing officer of the Department of Alcoholic Beverage Control to any item of evidence.

3. Intoxicating Liquors 🔑106(4)

Where licensee conducted on-sale liquor business through his bartender and visited such business about twice a week in the afternoon when the business was supposed to be closed, and licensee devoted himself to his liquor store one block away, and bartender had no supervision whatever, and a narcotics trade was carried on at the on-sale premises with practically no secrecy, and the place had a well earned reputation of being a hangout for narcotics addicts and pushers, the on-sale license was properly revoked for narcotics transaction by bartender and bartender's wife and the cook and other persons, and licensee's ignorance of the transactions, if he was ignorant, would not bar the revocation, since the bartender's knowledge was imputed to the licensee. West's Ann.Bus. & Prof.Code, §§ 24200(a, b, e), 24200.5(a), 25601.

4. Principal and Agent ⚷177(1)

Generally, the knowledge of an employee acquired during the transaction of his employer's business is imputed to the employer with the same effect as if the employer had actually participated in the transaction.

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Allan G. Bird, Redondo Beach, for appellant.

Stanley Mosk, Atty. Gen., Edward M. Belasco, Miles J. Rubin, Deputies Atty. Gen., for respondents.

ASHBURN, Justice.

Appeal from judgment denying petition for peremptory writ of mandate which would require respondents to set aside an order revoking petitioner's on-sale liquor license.

Petitioner's license covered a place known as Chuck's Play Room at 733 North Main Street, Los Angeles, which was operated by his bartender, Henry Mestas. Petitioner himself conducted a liquor store at 901 North Alameda Street, Los Angeles, and visited Chuck's Play Room about twice a week in the afternoon when the place was supposed to be closed. His major contention is that the license was revoked because of narcotics transactions conducted or permitted by Mestas without any showing of knowledge on appellant's part.

The accusation is in two counts, charging violation of §§ 24200(a), 24200(b), 24200(e), 24200.5(a) and 25601, Business and Professions Code. The first count alleges that petitioner, the licensee, between February 3, 1956 and February 29, 1956, kept and permitted his said premises (Chuck's Play Room) to be used for purposes "which were then and there injurious to the public morals, health, convenience and safety in that said premises were a resort and place of contact for illegal users, possessors and sellers of narcotics, and a place where illegal sales of narcotics were made, the dates of such sales being set forth in Count II hereof." Count II alleged that during said period of time the "said licensee knowingly permitted the following illegal sales of narcotics, to-wit, heroin, upon his licensed premises." Here follows enumeration of nine sales made on February 3, 4, 7, 8, 9, 15 and 24, 1956, by different people, one of them being a sale by Henry Mestas on February 3 and one or probably two by his wife Helen Mestas; others by persons shown in the evidence to be frequenters of the place. By amendment two more sales were alleged to have been made on February 28 and 29, 1956.

The hearing officer found to be true the allegations of Count I of the accusation and added: "At all times herein mentioned Henry Mestas was the bartender of respondent; on February 3, 1956, said bartender did sell narcotics upon said premises; on February 15, 1956, and on February 28, 1956, narcotics were sold on said premises by John Almida and by a female known as 'Tina', respectively; all of said three sales were made with the knowledge of said bartender." Concerning Count II the finding was that appellant "knowingly permitted" the making of the following sales: "February 3, 1956 sale by Henry Mestas; February 15, 1956 sale by John Almida; February 28, 1956 sale by female known only as 'Tina'." The hearing officer concluded that grounds for revocation of the license were established under §§ 24200(e), 24200(a), 24200(b) and 24200.5 (*c*)[a] as to Count II. Also: "Continuance of the on-sale general license of respondent would be contrary to public welfare and morals."

[1] The proposed decision was adopted by the department and upon appeal the Appeals Board affirmed. In the ensuing administrative mandamus proceeding the court found that the department's findings were supported by substantial evidence and the weight of the evidence, and were true

and correct; that that decision should be sustained; that the decision of the Appeals Board was not arbitrary or unreasonable and that the Appeals Board correctly decided all the issues presented. Our function with respect to sufficiency of the evidence is thus limited to ascertaining whether the findings of the department and the court are supported by substantial evidence. Endo v. State Board of Equalization, 143 Cal.App.2d 395, 399, 300 P.2d 366.

[2] The transcript of hearing before the hearing officer discloses that counsel then representing appellant rested the defense upon lack of knowledge on Fromberg's part of what was going on in his licensed premises. Present counsel, asserting insufficiency of the evidence, complains of hearsay, conclusions and the like, but no objection whatever was made at the hearing to any item of evidence. It is of course too late to interpose such objections now.

[3] The transcript fairly discloses the following facts. Appellant not only had the licensed premises known as Chuck's Play Room, at 733 North Main Street, but also had a liquor store one block away. He devoted himself to the latter activity and visited the Play Room only once or twice a week and did so during the afternoon hours when the place was supposed to be closed. Henry Mestas was his bartender there, having been hired on the recommendation of a beer salesman and having worked from December 18, 1955, until after the February events involved in this proceeding. It does not appear that Mestas had any supervision whatever. He and his wife made sales of narcotics; Fernando Chaffino, the cook, did likewise; the place was in a Mexican neighborhood and was frequented by Mexican women as well as men. When police officers went there with informants they had no difficulty in procuring heroin, seemed to have required no identification, were asked at times what they wanted and immediately supplied with same; they usually bought a half gram of heroin and it was produced from some supply which apparently was on the premises, same being sold at an established price of $12 per half gram. When Officer Lopez, after making a purchase from the cook, Chaffino, asked him when he could come in and "score" on this, Chaffino said "anytime." The trade seems to have been carried on with practically no secrecy. Of the twelve sales to which enforcement officers testified, three were made by or through activities of the bartender, Henry Mestas, one through his wife, Elsie, three by or through Chaffino, the cook, and three through John Almida. The place had a well-earned reputation of being a hangout for addicts and pushers of narcotics. It would have been so easy for appellant to learn what was going on in his licensed premises that his claim of ignorance smacks more of conscious ignorance than of innocence.

[4] This sort of ignorance does not square with the obligations of a licensee of premises devoted to the sale of alcoholic liquor. As a matter of general law the knowledge of an employee acquired during the transaction of his employer's business is imputed to the latter with the same effect as if he had actually participated in the transaction. In Granberg v. Turnham, 166 Cal.App.2d 390, 333 P.2d 423, 426, this court said: "The fact that he may or may not have reported this information to his principal is immaterial, for he was acting in the course of his employment and the principal was charged with knowledge of information acquired by him in the transaction of her business. 2 Cal.Jur.2d, § 160, p. 855; Civ.Code, § 2332; Bus. & Prof.Code, § 10177(h). 'An agent's knowledge of the content of a contract is imputed to his principal. [Citations.] This rule of law is not a rebuttable presumption. It is not a presumption at all. It is a rule which charges the principal with the knowledge possessed by his agent. [Citations.]' Columbia Pictures Corp. v. De Toth, 87 Cal.App.2d 620, 630, 197 P.2d 580, 586."

This principle has been carried into the field of liquor licenses. Section 24200.5(a), Business and Professions Code, says: "Notwithstanding the provisions of Section 24200, the department shall revoke a license upon any of the following grounds:

(a) If a retail licensee has knowingly permitted the illegal sale, or negotiations for such sales, of narcotics upon his licensed premises. Successive sales, or negotiations for such sales, over any continuous period of time shall be deemed evidence of such permission."

In a case involving sale of liquor to a minor we said in 5501 Hollywood, Inc. v. Dept. of Alcoholic Beverage Control, 155 Cal.App.2d 748, 753, 318 P.2d 820, 824: "Although the licensee is not required to act at his peril, he must exercise the caution which would be shown by a reasonable and prudent man in the same circumstances. Keane v. Reilly, supra, 130 Cal. App.2d [407] at page 410, 279 P.2d [152] at page 154. He has an active duty in that respect. 'A licentiate conducting the sale of beverages under an on sale license is charged with an active duty to prevent minors from consuming intoxicating liquor on the licensed premises, and if the licentiate, through an employee, has knowledge that such consumption is taking place there arises immediately an active duty to prevent its continuance. A failure to prevent it is within the meaning of the statute a permitting of that unlawful consumption.' Marcucci v. Board of Equalization, supra, 138 Cal.App.2d 605, 610, 292 P.2d 264, 266. To the same effect, see Cornell v. Reilly, 127 Cal.App.2d 178, 187, 273 P.2d 572."

More closely pertinent to the case at bar is Endo v. State Board of Equalization, supra, 143 Cal.App.2d 395, 300 P.2d 366, a case dealing with illegal sale of narcotics in licensed premises, the license having been revoked. After upholding the presumption declared in § 24200.5(a), supra, the court at page 401 of 143 Cal.App.2d at page 370 of 300 P.2d said: "An alternative ground for affirming the judgment of the trial court is furnished by the principle that appellant as owner and operator of the bar and as licensee is responsible for the acts of her bartender who 'knowingly permitted' the illegal sales by conducting them himself. His knowledge and permission are imputable to appellant as his employer (the owner, operator and licensee) within the scope of the principle that a 'licensed employer may be disciplined to the extent of revocation of his license for the acts of his employees.' Cooper v. State Board of Equalization, 137 Cal.App.2d 672, 678, 290 P.2d 914, 918. See also Cornell v. Reilly, 127 Cal.App.2d 178, 186, 273 P.2d 572; Swegle v. State Board of Equalization, 125 Cal.App.2d 432, 438, 270 P.2d 518; Mantzoros v. State Board of Equalization, 87 Cal.App.2d 140, 144, 196 P.2d 657." To the same effect are Kirchhubel v. Munro, 149 Cal.App.2d 243, 249, 308 P.2d 432; Nelson v. Dept. of Alcoholic Beverage Control, 166 Cal.App.2d 783, 333 P.2d 771.

Counsel's contention that appellant was not afforded a fair and impartial trial finds no substantial support in the evidence.

The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.

169 Cal.App.2d 319

Howard A. CLARK, Plaintiff and Appellant,

v.

Dean S. LESHER, Daniel B. Halcomb and Roy Wolfe, Defendants and Respondents.

Civ. 9480.

District Court of Appeal, Third District, California.

April 1, 1959.

Action for fraudulent conspiracy. The Superior Court, Madera County, Thomas Coakley, J., rendered judgment adverse to plaintiff and he appealed. The District Court of Appeal, Van Dyke, P. J., held that where controversy arose between surviving partner in newspaper business and competing newpaper owner who had purchased part of partnership interest of deceased partner as to estate of deceased partner, and surviving partner's handling of paper after decedent's death, and surviving partner executed agreement for sale of all of his rights and claims in newspaper to owner and knew that by keeping silent concerning cause of action for conspiracy against owner and manager of competing newspaper he would induce in his opponents an understanding that they were getting what amounted to a general release as to any controversy, surviving partner was bound in accordance with meaning that he induced his opponents to understand and act upon as to scope of the assignment and was not entitled to maintain his action for conspiracy.

Affirmed.

1. Release ⇐57(1)

In action by son, who until death of father had owned newspaper in partnership with father, against manager of competing newspaper and party who purchased competing newspaper and heirship rights of two other children of father in father's partnership interest for alleged conspiracy to eliminate son's newspaper from competition, evidence established that son knew that by keeping silent concerning cause of action for conspiracy he would induce in his opponents an understanding that they were getting what amounted to a general release when son executed assignment to purchaser of all his rights and claims involving newspaper as to any controversy arising out of any matters of father's estate, son's handling of newspaper or sale of newspaper to purchaser.

2. Release ⇐30

Where controversy arose between surviving partner in newspaper business and competing newspaper owner who had purchased part of partnership interests of deceased partner as to estate of deceased partner, and surviving partner's handling of paper after decedent's death, and surviving partner executed agreement for sale of all of his rights and claims in newspaper to owner and knew that by keeping silent concerning cause of action for conspiracy against owner and manager of competing newspaper he would induce in his opponents an understanding that they were getting what amounted to a general release as to controversy, surviving partner was bound in accordance with meaning that he induced his opponents to understand and act upon as to scope of the assignment and was not entitled to maintain his action for conspiracy.

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Savage & Shepard, Fresno, for appellant.

Green, Green & Barstow, Madera, for respondent Lesher.

Coffee & Wolfe, Madera, for respondent Wolfe.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment entered by the court after a trial of special defenses in an action for damages for fraudulent conspiracy. The facts and history of this litigation are set forth in Clark v. Lesher, 46 Cal.2d 874, 299 P.2d 865. We think it unnecessary to here repeat the Supreme Court's recital in that decision of the history and background of this action. For the present it will suffice to say that the complaint herein charged the following: Upon the death of appellant's father, respondent Lesher, who owned a newspaper in an adjoining county, bought a paper being published in Madera and appointed respondent Halcomb as manager thereof. Lesher and Halcomb then conspired to eliminate a rival paper, the Madera Tribune, being published by appellant as a surviving partner, from competition in the Madera field. Clark's newspaper had been owned in partnership by himself and his father. In furtherance of the conspiracy, Lesher purchased the heirship rights of the two children of appellant's father in said decedent's partnership interest in the newspaper. One Jay was the administrator of the senior Clark's estate. Without the knowledge or consent of Jay, Lesher brought an action entitled "Jay v. Clark" in the name of said administrator and for the purpose of ousting appellant from possession of the newspaper. After entry of the interlocutory judgment in

Jay v. Clark, which judgment ordered Clark to account to his father's estate for his management of the newspaper as surviving partner, Lesher and Halcomb approached one Wolfe, telling him that they would arrange to have him appointed as receiver of the partnership, in which event he was to discontinue the publication of the newspaper. Wolfe agreed to the plan and Lesher and Halcomb procured the order appointing Wolfe as receiver of the partnership without the knowledge or consent of said administrator and without notice to appellant. Although the interlocutory judgment directed that the business be sold as a going concern, Lesher, Halcomb and Wolfe conspired to obtain an order authorizing the pre-sale cessation of the publication. In an ex parte proceeding conducted without securing the consent of the administrator and without giving notice to appellant, Wolfe, by knowingly misrepresenting to the court that there were not sufficient funds to continue publishing the paper procured the order directing that publication be discontinued within 10 days and that the business be sold. The newspaper could have been sold to best advantage while being published and circulated and defendants knew that cessation of its publication would cause irreparable damage to its owners. When publication ceased there was a total destruction of the good will of the newspaper. Immediately thereafter, advertisement and subscription rates of Lesher's newspaper were raised. In collaboration with Halcomb and Wolfe, Lesher entered a bid to buy the newspaper, offering to raise any other bid by $200. Lesher's bid was accepted and the assets of the newspaper were delivered to him.

A general demurrer to the complaint was sustained without leave to amend and judgment was entered accordingly. On appeal the judgment was reversed on the ground that the complaint stated a cause of action in tort for fraudulent conspiracy to destroy and depreciate the good will of the partnership. Clark v. Lesher, 106 Cal.App.2d 403, 235 P.2d 71. Respondents answered, denying the fraudulent conspiracy and alleging four affirmative defenses. The trial then proceeded on these special defenses, a jury returned a verdict for the defendants, respondents here, and on appeal this judgment was in part reversed. As to two of the special defenses the Supreme Court (Clark v. Lesher, 46 Cal.2d 874, 299 P.2d 865) held that they were not valid defenses as a matter of law. As to two other special defenses the Supreme Court directed a retrial in accordance with the court's ruling as to the validity of those defenses. The case was remanded to the trial court and it has now again been tried as to the two said special defenses. This time the trial was before the court without a jury and the trial court made findings and entered judgment sustaining the two special defenses.

We think it necessary to discuss only one of the special defenses sustained by the trial court as it effectually disposes of the action if, as we hold, the defense was properly made out. It was specially pleaded by respondents, Lesher and Halcomb, that the cause of action sued upon herein had been assigned to Lesher under an agreement made in a preceding action which led to a stipulated judgment therein. Said the Supreme Court in Clark v. Lesher, supra, 46 Cal.2d at page 883, 299 P.2d at page 870:

> "* * * By the terms of the agreement Clark and his wife assigned to Lesher 'all of their right, title and interest of every kind and nature in and to the properties in the Estate [the estate of appellant's father George Clark]' and 'all claims of every kind, nature, and description that they have heretofore filed against said Estate, or which they might hereafter assert against said Estate,' together with 'their entire interest in the partnership * * and in all assets of said partnership.' The cause of action, being one for the fraudulent destruction of the good will of the newspaper, arose out of the violation of a right of property, and it was, therefore, assignable and could have been included in the agreement, if the parties so intended. [Citing cases.]
>
> "The case was tried on the theory that the question of whether the cause

of action for fraud had been assigned to Lesher was to be determined from the face of the written instrument. Under this theory the construction of the writing was the responsibility of the trial court and not the function of the jury. [Citing cases.] The instructions of the court, however, erroneously left to the jury the legal question of the intepretation of the assignment.

"Defendants urge that the error was not prejudicial, asserting that it can be said as a matter of law that under the terms of the instrument Clark transferred his cause of action to Lesher. We do not agree. The assignment is reasonably subject to opposed constructions with respect to whether the parties intended to include the cause of action for fraud. The broad language used might be fairly construed to mean that Clark parted with all rights arising out of his connection with the newspaper, including the right to recover for fraudulent injury to its good will. On the other hand, the assignment does not mention the cause of action for fraud or any claim against Lesher or the other defendants, and the reference to the 'assets' of the newspaper might be understood as applying merely to items of property involved in operating the business and and not to a right to recover for prior tortious injury to such property. Evidence relating to the negotiations which preceded execution of the assignment was introduced, but it was limited by the trial court to the separate defense that Clark was estopped to deny the transfer. The evidence could properly have been received as an aid to the construction of the instrument, but the court ruled it was inadmissible for that purpose. * * * [t]he extrinsic evidence was conflicting, and, since the intention of the parties to the agreement may be determined by resolving the conflicts, we should not attempt to construe the assignment as a matter of law."

On the retrial of the issue as to whether or not the cause of action had been assigned to Lesher, a great deal of testimony, both oral and documentary, was received by the court. Once again it was much in conflict. The trial court made findings that the cause of action sued upon had been transferred to Lesher and therefore no longer belonged to appellant. Judgment in favor of all defendants to the action was entered, after which this appeal was taken.

The trial court filed in the cause a document entitled "Decision on Trial of Special Defenses." Later in the findings of fact the court adopted by reference said "Decision on Trial of Special Defenses." Selected quotations from that document so made a part of the findings will sufficiently show the basis of the trial court's decision on the issue of transfer and by its recitals will furnish a sufficient test of the propriety of the trial court's ruling on that special defense:

"Did the Assignment of June 23, 1949, from Howard Clark to Lesher, executed and filed in the Matter of the Estate of George A. Clark, Deceased, No. 2038 of this Court, transfer to Lesher plaintiff's cause of action for fraud as against all defendants?

* * * * * *

"The Supreme Court, in the last appeal herein, 46 Cal.2d 874 [299 P.2d 865], held that the Assignment is ambiguous and that the ambiguity should be resolved by extrinsic evidence. Pursuant thereto, this Court heard extended testimony from all who participated in any way in the events immediately preceding the execution of the Assignment. The conclusion from such testimony is inescapable:

"A. That the defendants Lesher and Wolfe understood that by the Assignment all matters of possible dispute between them and Clark were being settled;

"B. That Howard Clark was assigning to Lesher all claims of every kind and character arising out of the affairs of the Madera Tribune, particularly in connection with its operation since the death of George

Clark and its shutdown as a newspaper in July of 1948; and

"C. That Howard Clark knowingly led the defendants Wolfe and Lesher to rely on these understandings in the course of their settlement negotiations which culminated in the execution of the Assignment and the Judgment which followed, which Judgment is filed in the case of Wolfe v. Clark, No. 7656 of this Court.

"True, no general release was executed. This is understandable from an examination of the circumstances and the haste under which the Assignment was negotiated and executed. Those circumstances may be summarized as follows:

"1. At the time of George Clark's death in September, 1944, he and his son, Howard, plaintiff herein, each owned a one-half interest in the Madera Tribune. Following the death of George, and continuously until Wolfe qualified as Receiver on June 25, 1948, Howard Clark continued to operate the Tribune. He did so without consulting the administrator or heirs of the George Clark Estate, taking the position that he had no obligation to them.

"2. From shortly after George Clark's death until the execution of the Assignment, June 23, 1949, the affairs of the Tribune had been the source of bitter controversy between Howard Clark, hereinafter referred to as 'Clark,' and all who claimed any interest in the Tribune. The latter include Jay, the Administrator of George Clark's Estate (see Jay v. Clark, No. 6555 of this Court, and 85 Cal.App.2d 88, 192 P.2d 462); Wolfe, the Court-appointed Receiver (see Wolfe v. Clark, No. 7656 of this Court); and Lesher (see: (1) Clark v. Lesher, 46 Cal.2d 874, 299 P.2d 865, (2) 106 Cal.App.2d 403, 235 P.2d 71, and (3) Wolfe v. Clark, supra); who in 1948 became part owner of the Tribune and later in 1948 became sole owner.

"3. Wolfe, as Receiver of the Tribune, had sued Lesher in Action No. 7563 of this Court.

"4. Clark had appealed an adverse decision in Jay v. Clark, supra. Two years had elapsed between the decision of the trial court and the decision of the Appellate Court. In that case, the trial court found and the District Court of Appeal had affirmed by implication, if not expressly, that Clark had been guilty of bad faith in refusing to render an accounting of his stewardship of the Tribune following the death of George Clark.

"5. Among other things, the Court, in Jay v. Clark, ordered Clark to account and directed that a Receiver be appointed to wind up the partnership affairs and to sell its assets, to wit, the Tribune. More than a year intervened between the affirmance by the District Court of Appeal and the Supreme Court's denial of a hearing on June 10, 1948, in Jay v. Clark, and the date of the Assignment in issue, June 23, 1949. Despite the affirmance of the judgment requiring him to account, Clark continued to take the position, and aggressively so, that he either could not or did not have to account to the Administrator, Lesher, or the Court.

"6. At the start of the trial on June 21, 1949, in Wolfe v. Clark, Clark and his wife were urging substantial claims against the Tribune. Lesher had cross-complained therein, denying all of the claims of the Clarks and alleging that Lesher, alone, was entitled to possession of all of the assets of the Tribune.

"7. On the first day of that trial there had been testimony that Clark had used funds of the Tribune for his personal use. This, of course, was of vital concern to Jay, the Administrator of the George Clark Estate, and to Lesher as owner of a two-sixths interest in the George Clark Estate and of the entire interest in the Tribune through his purchase thereof at the Receiver's sale.

"8. Between the time Lesher acquired a two-sixths interest in the Tribune in 1944 (the year of his purchase of the interests of Merritt and Thalia in the Estate of George Clark, Deceased) and the Receiver's sale of the Tribune to Lesher in 1948, Clark and his then attorney had been unrestrained in their denunciation of Lesher.

"9. As further grist for the mill of discord, Lesher, according to Clark's allegations herein (complaint verified July 8, 1949), had conspired to put the Tribune out of business. True, this Complaint was filed two weeks after the execution of the Assignment. But, though given every opportunity by the Court to do so, Clark's counsel showed little inclination to point out just what new evidence he and Clark had discovered between June 23 and July 8, 1949, on which to base the allegations of the complaint herein. It is clear to the Court that all of the allegations of Clark's complaint herein were based upon information, real or imaginary, in his possession on June 23, 1949. Thus, on the second day of the trial in Wolfe v. Clark, June 22, 1949, a situation more ideally crying for settlement of all possible claims between all of the parties would be difficult to imagine.

"It is disputed whether Mr. Child, who was present as attorney for the Administrator during the trial of Wolfe v. Clark, or Mr. Savage, as attorney for Clark, proposed that there be a settlement. It is undisputed, however, that all agreed that a settlement was desirable and that the trial was recessed for that purpose.

"The question now is—what did they purport to settle?

"Clark and Savage testified that settlement negotiations, conducted in the corridor of the Courthouse on June 22 and 23, 1949, were expressly limited to the matter then in litigation.

"Child, Wolfe, and Coffee, all attorneys and all opposed to Clark at the time of the Assignment, testified in substance that it was understood that all matters arising out of the affairs of the Tribune and the relationship of Mr. and Mrs. Clark, Lesher, and Wolfe in relation thereto, constituted the subject matter of the settlement negotiations and of the Assignment.

"The Court accepts the view of the defendants and rejects that of the plaintiff.

"It will serve no useful purpose to restate the testimony in detail. Suffice it to point out that Clark and Savage each testified that Clark brought home to Savage privately, during the negotiations on June 22 and 23, 1949, that he did not want to settle if it meant waiving his alleged claim for wrongdoing on the part of Lesher and perhaps others in bringing about the shutdown of the Tribune. Savage may have felt that by the wording of the Assignment he was protecting and reserving Clark's right in that respect. The Supreme Court held that the Assignment was subject to that construction, although equally subject to the opposing construction (Clark v. Lesher, 46 Cal.2d 874, at p[age] 884 [299 P.2d 865, at page 870]). This Court now finds that if such was the intention of Messrs. Clark and Savage, it was an undisclosed intention to reserve of which Clark may not now belatedly avail himself.

"* * * The rule is stated thus in the Piazza case [Leo F. Piazza Paving Co. v. Bebek and Brkich], supra [141 Cal.App. 2d 226], at page 230 [296 P.2d 368]:

"'* * * in determining whether there has been a mutual consent to contract the courts are not interested in the subjective intent of the parties, but only in their objective intent—that is, what would a reasonable man believe from the outward manifestations of consent.'

The Court believes that a reasonable man present at the discussions on June 22 and 23, 1949, and having no interest in the subject matter, would have understood and concluded that the parties were settling all matters between them of every kind and character relating to the Tribune.

"These considerations also materially affect the Court's thinking and conclusions:

"A. The testimony was unanimous that the Assignment contemplated that Clark should be relieved of all obligation to account for his stewardship of the Tribune—extending over a period of five years. This, despite the testimony on June 21 and 22, 1949, that he had used, for his personal use, funds of the Tribune in which the Administrator, Lesher, as heir and co-owner, and Wolfe, as Receiver, had an interest. Yet the Assignment is silent as to any waiver or release. Therefore, admittedly, the Assignment does not on its face include all matters on which there was clear agreement.

"Even this omission is understandable. After five years of discord and litigation, all parties were relieved to find that perhaps everything between them could be settled—although it now appears that Clark had a reservation that he withheld from all except his attorney. The settlement, i. e., the Assignment, was negotiated, signed, and judgment thereon rendered, all in less than twenty-four hours. The $5,000 called for by the Assignment was paid to Clark on the same day; namely, June 23, 1949. The desire on the defendants' part to settle everything, and the desire on Clark's part to receive cash in hand and to be relieved of his obligation to account, undoubtedly caused the defendants on the one hand to overlook the desirability of obtaining an express general release, and on the other hand, caused Clark's attorney to overlook an express release of the matter admittedly uppermost in Clark's mind; viz., a release of Clark's obligation to account. Both Mr. Savage and Mr. Clark testified that a waiver of accounting was uppermost in Clark's mind. Understandably so, because this Court and the District Court of Appeal had ordered Clark to account.

"Clearly, therefore, the Assignment did not by its terms cover all of the matters admittedly agreed upon.

"B. In the light of all the circumstances, it is difficult to believe that anyone situated as were Lesher and Wolfe, particularly Lesher, would knowingly agree to a settlement waiving Clark's obligation to account and involving a cash payment to Clark if they suspected that they would face still another lawsuit arising out of the affairs of the Tribune.

"C. Clark points out that he personally received only $500 of the $5,000 paid in the settlement. This overlooks the fact that Clark's wife received $4,500 for her disputed claims against the Tribune. It also overlooks the facts: (1) that Lesher had already paid $30,750 for a 'dead' newspaper and $10,000 additional for a two-sixths interest while the paper was still operating, despite the fact that Clark and his then attorney had constantly maintained that as a *going* newspaper the Tribune was not worth that amount of money; (2) that the Tribune, when Wolfe took over as Receiver, was at best in a precarious financial condition, if not bankrupt; (3) that Lesher waived Clark's accounting of the stewardship of the paper from 1944 to 1948; and (4) that the Clarks received personal property of nominal value.

"In the light of the foregoing, the most reasonable interpretation is that the defendants Lesher and Wolfe believed, and were led to believe by Clark, that everything between them arising out of the affairs of the Tribune was being settled on June 23, 1949; further, that mention of Clark's claim against the defendants, on which this action is based, was either deliberately and in bad faith withheld from the defendants, or it was strictly an afterthought arising after the execution of the Assignment. This Court believes that it was a bit of both, and concludes that Clark cannot now avail himself of the situation which he created. Since Clark transferred all of his rights and claims involving the Tribune to Lesher, his cause of action, if any existed, as against Halcomb and Wolfe, as well as against Lesher, is no longer Clark's to assert."

Another statement of the rule of interpretation relied upon by the court as stated in the foregoing quotation from the court's decision is found in 3 Corbin on Contracts, section 538, at page 45:

> "* * * A contractor is bound in accordance with the meaning that he induces another to understand and act upon, if he knows or has reason to know that the other will so understand and act. And in determining whether or not he has reason to know,

> the court should be advised of all the surrounding circumstances; of the meaning that is given to the language of the agreement by common usage, by usage in the trade or business or profession of the parties; of communications between the parties during preliminary negotiations and during the execution of the writing; and of subsequent interpretations and practical application by either party that is assented to or acted upon by the other."

The record discloses that in all essential particulars there was before the court the probative matters which the court declared it relied upon in making its decision defining the scope and effect of the assignment. We will quote a few parts thereof. Mr. Child testified: "To the best of my recollection, Mr. Savage said: 'We ought to get together and settle all the claims of the parties,' meaning Mr. Lesher, Mr. Howard Clark, his wife, Mr. Jay, as administrator, and Betty and Merit. We had discussed the matter of the accounting which, of course, was due two ways, to the estate and by the receiver, the matter of certain personal property that was owned by or claimed to be owned by Mrs. Howard Clark, the matter of the claims that were to be filed, or could be filed in the estate of Clark—all issues between the parties were to be settled by the payment of $8,000. * * * Q. At any time, Mr. Child, during the proceedings involving the settlement which you have related, during any of the conversations that took place relative thereto, were you ever informed, either by Mr. Clark or Mr. Savage or anyone, that Mr. Clark had any claim that was not being settled in that transaction? A. No, Mr. Green. To the contrary, Mr. Savage said he had been able to settle the claims of the parties, where nobody else had succeeded. Q. When was the first time you heard of the claim that was asserted in this lawsuit? A. I believe by a newspaper article some weeks subsequent." Mr. Wolfe testified as follows: "Q. Were you present at that time when any conversation took place between Mr. Savage and Mr. Child? A. I was present when Mr. Savage directed a comment toward Mr. Child—we were all around the counsel table—to the effect that, 'Can we settle all this trouble and litigation?' * * * Q. At any time, Mr. Wolfe, after publication of the newspaper was terminated by you, did either Mr. Clark or Mr. Savage complain to you of the fact that the newspaper publication had been terminated? A. No. They have never mentioned to me that specific complaint. There were a number of complaints, but that was not one of them." Mr. Coffee who was present at the time of the negotiations for settlement testified: "Do you recall anything else regarding that conversation, as to the substance of it, about what was to be settled? A. That all of the litigation and all the matters in connection with this whole Clark estate and Tribune matter could be settled. * * I mean that this whole thing, and all the litigation, and all the matters in connection with this Tribune partnership should be settled."

[1,2] We are satisfied the trial court could, as it did, conclude that under the circumstances appellant Clark knew that by keeping silent concerning the cause of action herein sued upon by him he would induce in his opponents an understanding that they were getting what amounted to a general release as to any controversy arising out of any of the matters of the George Clark estate, or arising out of his handling of the Tribune after his father's death, including all matters arising out of the sale of that newspaper to Lesher. He was therefore bound in accordance with the meaning that he induced his opponents to understand and act upon as to the scope of the assignment.

The judgment is affirmed.

PEEK and SCHOTTKY, JJ., concur.

169 Cal.App.2d 400

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Marie WILLIAMS aka Mattie Lou Burkley, Defendant and Appellant.

Cr. 1197.

District Court of Appeal, Fourth District, California.

April 6, 1959.

Defendant was convicted of grand theft. The Superior Court, San Bernardino County, Carl B. Hilliard, J., rendered judgment and denied motion for new trial, and defendant appealed. The District Court of Appeal, Shepard, J., held that where sales clerk observed defendant pushing hangers holding men's suits on rack, saw her walk away hitching up the front of her skirt and pointed her out to police officer, who took her to police headquarters where she voluntarily lifted up her dress, and three men's suits, including coats, pants and hangers were found suspended from her girdle, subsequent conviction of defendant for grand theft was not based on evidence secured by illegal search and seizure.

Affirmed.

1. Criminal Law 🔑394.4(13)

Where sales clerk observed defendant pushing hangers holding men's suits on rack, saw her walk away hitching up the front of her skirt and pointed her out to police officer, who took her to police headquarters where she voluntarily lifted up her dress and three men's suits, including coats, pants and hangers were found suspended from her girdle, subsequent conviction of defendant for grand theft was not based on evidence secured by illegal search and seizure.

2. Municipal Corporations 🔑188

Police are entitled to act upon information received from complaining witnesses in stopping and questioning a shoplifting suspect, especially where circumstances present peculiar appearance.

3. Criminal Law 🔑1036(1)

Where stipulation was entered into for hearing of case on evidence adduced at preliminary examination and stipulation was without reservation of any kind, trial court was not warned in any way that objection would be made as to questioning of officer witness about portions of conversation with defendant in which she admitted prior offenses of same character as that for which she was charged, and no such objection was made during the trial, defendant could not on appeal for first time retract stipulation.

4. Criminal Law 🔑372(1)

Evidence of prior offenses may under some circumstances be admissible to prove common plan or design.

5. Criminal Law 🔑478(1)
Larceny 🔑59

In prosecution for grand theft of three men's suits, admission of testimony of sales clerk, who had worked continuously at sale of men's suits for more than 16 years in locality in which the theft occurred, as to value of suits was not an abuse of discretion and his testimony as an expert was ample to show that value was in fact more than $200.

6. Larceny 🔑6

Market value of property stolen, is not dependent alone on wholesale or cost price.

7. Larceny 🔑59

In prosecution for grand theft of three men's suits, evidence was sufficient to support finding that value was in excess of $200.

8. Larceny 🔑65

Evidence sustained conviction for grand theft.

◆

Harry Weiss, Patrick Coleman, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Ernest E. Sanchez, Deputy Atty. Gen., for respondent.

SHEPARD, Justice.

Defendant was convicted of grand theft and sentenced to prison. She appeals from the judgment of conviction and the order denying a motion for new trial.

The trial was had before the court without a jury. The cause was by stipulation of the parties submitted to the trial court on the evidence taken at the preliminary examination, plus some additional evidence offered by the People. Defendant did not take the witness stand and no evidence was offered by the defense. A second count of the information charging burglary and a charged prior conviction were dismissed on motion of the district attorney.

The evidence shows that defendant went into Lowe's Men's Store in Ontario, California, on May 6, 1957; that a sales clerk therein while waiting on another customer saw defendant pushing the hangers holding men's suits back and forth on the rack; that he then saw her walk away, grabbed at the front of her skirt, "hitching it up"; that she walked slowly out of the lobby, again "hitching up" the front of her skirt; that he followed and watched her some distance along the street; that he then called the police and said: "A girl is standing in front of the First National Bank and I am sure she has merchandise from our store under her skirt * * * She is a colored girl and she is standing in front of the bank at this minute"; that when the police officer arrived at the scene said sales clerk pointed out the defendant; that the officer spoke to her and she was then taken to the police headquarters; that at the police headquarters a secretary acting as matron, who had been informed by the arresting officer that defendant was suspected of shoplifting, talked to her and asked her to come to another room for the purpose of search; that there is no evidence that she objected to the prospective search other than to say "she had nothing on her"; that before any search actually commenced the defendant started to cry and said she had something under her dress; that the matron then asked defendant to help in the search; that defendant then lifted her dress and revealed three complete men's suits (including pants and suit jackets on hangers) suspended from her pantie girdle; that these suits were later identified as the property of said Lowe's Men's Store; that said sales clerk had not given her permission to take them, nor had anyone else in the store done so within his knowledge; that said sales clerk had worked as a salesman and stock clerk for this store continuously for 16 or 17 years, knew the fair market value of the suits, that in his opinion their value at the time of taking was $214, and that the wholesale value was less than $200.

[1, 2] Defendant on this appeal raises only three points. First, that the conviction is based on evidence secured by illegal search and seizure. We find no merit in this contention. The observation of the sales clerk, his statements to the police, his pointing out of the defendant, the defendant being taken to police headquarters, the girl finally saying she had something under her dress and voluntarily lifting up her dress, were uncontradicted. The testimony contains no direct description of how distorted the clothing appeared, but one would be naive indeed not to understand what she must have looked like with three men's suits (coats, pants and hangers in each case) suspended from the front of her girdle. The officers were not required to blind themselves to what was in plain sight, (particularly the matron after the defendant voluntarily lifted up the front of her dress). People v. Carswell, 51 Cal.2d 602, 335 P.2d 99; People v. Roberts, 47 Cal.2d 374, 379(8), 303 P.2d 721. Furthermore, the police are entitled to act upon information received from complaining witnesses in stopping and questioning a suspect, especially where the circumstances present the peculiar appearance which must necessarily have been here present. People v. Borbon, 146 Cal.App.2d 315, 319(1), 303 P.2d 560; People v. Paul, 147 Cal.App.2d 609, 616(3), 305 P.2d 996.

[3] Defendant's second contention is that the district attorney was guilty of prejudicial misconduct in asking an officer witness about portions of a conversation with defendant, in which she admitted prior offenses of the same character. We are here confronted at the outset with the stip

ulation for a hearing of the case on the evidence adduced at the preliminary examination. This stipulation was without reservation of any kind. The trial court was not warned in any way that objection would be made on this score, and none was made during the trial. The defendant cannot now, on appeal, for the first time retract the stipulation entered into in good faith and without reservation before the trial court. People v. Costello, 107 Cal.App.2d 514, 518(6), 237 P.2d 281.

[4] That evidence of prior offenses may under some circumstances be admissible to prove common plan or design is well settled. People v. Cavanaugh, 44 Cal.2d 252, 265(9), 282 P.2d 53; People v. Cassandras, 83 Cal. App.2d 272, 281(6), 188 P.2d 546; People v. Schubin, 166 Cal.App.2d 267, 332 P.2d 737. There is a possible inference in the evidence that the defendant might have used similar methods in stealing from other stores. The questions about the officer's conversation with the defendant were cut short, however, and the whole conversation was not revealed. Had the defendant objected in the trial court that court could have heard an offer of proof by the district attorney as to the whole conversation, and thereupon determined whether or not the officer should or should not have been called and allowed to recount the whole conversation. Because of the character of the stipulation we find it unnecessary to rule on the admissibility of that portion of the conversation related at the preliminary examination.

[5–7] The last contention of the defendant is that the evidence was insufficient to establish the value of the property stolen as being in excess of $200. The sales clerk had worked continuously at the sale of men's suits for more than 16 years in the locality in which the theft occurred. He testified that he was familiar with the fair market value and that the value was $214. The evidence of the clerk's experience was ample to support the trial court's exercise of discretion in allowing him to testify as an expert. Frank v. Repp & Mott, 70 Cal. App.2d 407, 414, 161 P.2d 279; People v. Horowitz, 70 Cal.App.2d 675, 689, 161 P.2d 833. His testimony, as such expert, is ample to show that the value was in fact more than $200. People v. Lizarraga, 122 Cal. App.2d 436, 437(1), 264 P.2d 953; People v. Latham, 43 Cal.App.2d 35, 39(6), 110 P.2d 101. It is well established that the market value is not dependent alone on wholesale or cost price. (47 Cal.Jur.2d (Theft) 457; 14 Cal.Jur.2d 788; 32 American Jurisprudence, 888.) The evidence adduced was amply sufficient to support the finding of the court that the value was in excess of $200.

[8] On a review of the whole cause, we find that the entire evidence was overwhelmingly sufficient and was totally uncontradicted.

The judgment and the order denying a new trial are affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

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169 Cal.App.2d 79

Thomas SHANNON, Plaintiff and Appellant,

v.

CIVIL SERVICE EMPLOYEES INSURANCE UNION, a corporation, Defendant and Respondent.

Civ. 18094.

District Court of Appeal, First District, Division 1, California.

March 25, 1959.

Rehearing Denied April 24, 1959.

Hearing Denied May 20, 1959.

Action by former insurance agent against insurance company. The Superior Court, City and County of San Francisco, Edward Molkenbuhr, J., entered judgment for insurance company and former agent appealed. The District Court of Appeal, Fred B. Wood, J., held that where agency contract in the printed form provided that it could be terminated by either party at any time upon written notice to the other and typewritten terms and conditions which contract was specifically subject to provided that agent agreed to produce certain minimum insurance business and that should minimum requirements not be met contract was subject to cancellation or renegotiation, contract could not be construed as meaning that as long as minimum insurance business was produced it could not be cancelled by company.

Affirmed.

1. Insurance ⚿79

Where insurance agency contract provided in printed form that it could be terminated by either agent or insurance company at any time upon written notice to the other, and the typewritten conditions on the back thereof which were expressly made a part of contract provided that agent agreed to produce certain specified minimum business and that should these minimum requirements not be met contract would be subject to cancellation or renegotiation, contract could not be construed to mean that it was not cancellable by insurance company as long as the minimum insurance business was produced by agent.

2. Master and Servant ⚿20

A contract for permanent employment is only a contract for an indefinite period terminable at will of either party unless it is based on some consideration other than the services to be rendered.

3. Contracts ⚿215(1)

Contracts for life or in perpetuity will only be upheld when intention is clearly expressed in unequivocal terms.

4. Insurance ⚿74

Where insurance agency contract consisted of a printed form with clause at the end that it was subject to terms and conditions on reverse side and such terms and conditions were typewritten, both the typed and printed clauses would be construed together giving effect to each.

Eugene H. O'Donnell, San Francisco, for appellant.

Harry S. Young, Leo H. Shapiro, V. G. Skinner, San Francisco, for respondent.

FRED B. WOOD, Justice.

This action presents the question whether a contract of December 31, 1951, designating plaintiff as agent of the defendant, was terminable at the will of either party.

On October 28, 1955, defendant gave plaintiff written notice of termination, effective December 31, 1955. The trial court held the contract was thus terminable.

The contract was upon a printed form, paragraph (6) of which read as follows: "(6) *This Agreement* supersedes all previous agreements, whether oral or written, between the Company and Agent and *may be terminated by either party at any time upon written notice to the other.*" (Emphasis added.)

To the left of the signature upon this printed form, these words were typed: "Subject to Terms and Conditions on the Reverse Side of This Contract."

Upon the reverse side, in typewriting over the signatures of the parties, the following appeared:

> "Thomas Shannon in accepting the agency agrees to act as organizer of the City and County Employees of San Francisco County, and further agrees to produce a minimum of insurance business as follows: (Through agents he may appoint) * * * [a sliding scale of minimum sales per year, increasing from $20,000 for 1951 to $200,000 for 1955] * * * $200,000 minimum to be maintained thereafter.
>
> *"Should these minimum requirements not be met, said contract* as set forth on the face of this form *shall be subject to cancelation or re-negotiation."* (Emphasis added.)

Plaintiff contends that these two clauses are "inconsistent," hence the typewritten "controls" the printed clause (Code Civ.

Proc. § 1862); also, that they are "absolutely repugnant," requiring that the printed form be "disregarded" (Civ.Code, § 1651). He places an unwarranted construction upon the typewritten clause. He would interpret it as if it said that the "contract as set forth on the face of this form" shall be "subject to cancelation or re-negotiation" *only* "* * * should these minimum requirements not be met * * *." Such transposition of the several parts of this clause and the insertion of the word "only," would be a radical rewriting of it. No such radical treatment is called for.

[1] The typewritten clause simply says that if the minimum requirements are not met the contract may be cancelled or renegotiated, presumably at the option of the company. It possibly limits the company to cancellation (without monetary relief) as a remedy for failure of the agent to produce the stipulated volume of business. It does not deal with the duration of the contract as such. For example, it does not say that it shall continue so long as the agent lives and the company continues in business, subject to cancellation for nonperformance.

[2, 3] Applicable here is the long established principle that a "contract for permanent employment * * * is only a contract for an indefinite period terminable at the will of either party * * * unless it is based upon some consideration other than the services to be rendered." Speegle v. Board of Fire Underwriters, 29 Cal.2d 34, 39, 172 P.2d 867, 870. In our case, the trial judge, Honorable Edward Molkenbuhr, logically and convincingly expounded and applied this principle in these words:

> "It is not a contract the expiration or duration of which depends upon the expiration of a given time or upon the completion of a given undertaking or the happening of some event. Contracts for life or in perpetuity will only be upheld when the intention is clearly expressed in unequivocal terms, and courts are prone to hold against the theory that a contract infers a perpetuity of right or imposes a perpetuity of obligation, and they will only construe a contract to impose such an obligation when the written document itself compels the construction and none other. Contracts for life—and that is what is contended for here—are so unusual as to have been, with rare exceptions, condemned by the courts as unreasonable and unauthorized.
>
> "Because of the unusual nature of life or perpetual agreements, the length and permanence of the obligation undertaken, the various unforeseeable events and conditions which may be encountered on such a journey in the future, and the unpredictable effects upon the parties, special precautions have been decreed essential, both as to consideration and the terms of employment, in construing and enforcing the compact. The responsibility assumed and the obligations imposed will be neither created nor spelled out by mere inference when they are not clearly and unequivocally expressed in the contract itself."

This opinion, in which we concur, is further supported by the following authorities: Ruinello v. Murray, 36 Cal.2d 687, 689–690, 227 P.2d 251; Adkins v. Model Laundry Co., 92 Cal.App. 575, 581–582, 268 P. 939; Nissen v. Stovall-Wilcoxson Co., 120 Cal.App.2d 316, 319, 261 P.2d 10; Zimco Restaurants, Inc. v. Bartenders Union, 165 Cal.App.2d 235, 331 P.2d 789; and cases collected in 35 A.L.R. 1432 and 135 A.L.R. 646.

[4] Accordingly, we can and do read the typed and the printed clauses together, giving effect to each. The printed clause requires written notice of termination, which was given.

Plaintiff advances the further argument that the notice of termination was ineffective because by its terms it was expressly based upon the printed termination clause. That depends in part upon plaintiff's mistaken theory that the printed termination clause must be read out of the contract. Moreover, even if this theory of plaintiff's were correct, the conclusion that the notice was nugatory would not follow. The notice clearly evinces an intent to terminate the contractual relationship of the parties, which is all that is required for termination at will. No one was misled concerning the intent to terminate.

The judgment is affirmed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; PETERS, J., not participating.

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168 Cal.App.2d 351

George SCHAFFER and Blanche Schaffer, Plaintiffs and Respondents,
v.
CLAREMONT COUNTRY CLUB, a corporation, Defendant and Appellant.
Civ. 17786.

District Court of Appeal, First District,
Division 2, California.
April 3, 1959.

Action by parents against country club, which had acquired rock quarry property and used excavation created by quarrying operations as reservoir for water to irrigate its golf course, for wrongful death of son who fell into the reservoir and drowned. The Superior Court, County of Alameda, Chris B. Fox, J., rendered judgment for the parents, and the club appealed. The District Court of Appeal, 336 P.2d 254, reversed. On petition for rehearing, the District Court of Appeal, Dooling, J., held that although evidence was sufficient to support judgment for parents on ground of attractive nuisance, it could not be said that verdict was not based on erroneous instruction that if club violated statutory provision requiring owner in fee simple to cover, or fence securely, abandoned excavation dangerous to minors under 12 years of age, presumption of negligence arose, and error was prejudicial.

Rehearing denied.

1. Appeal and Error 🔑1064(1)

If court cannot determine whether jury based its verdict on erroneous instructions or not, error must be deemed prejudicial.

2. Appeal and Error 🔑1064(1)

Erroneous instructions applying incorrectly a statutory duty are prejudicial although verdict would find support on theory of common-law negligence.

3. Appeal and Error 🔑1064(1)

In action by parents against country club, which had acquired rock quarry property and used excavation created by quarrying operations as reservoir for water to irrigate its golf course, for wrongful death of son who fell into the reservoir and drowned, although evidence was sufficient to support judgment for parents on ground of attractive nuisance, it could not be said that verdict was not based on erroneous instruction that if club violated statutory provision requiring owner in fee simple to cover, or fence securely, abandoned excavation dangerous to minors under 12 years of age, presumption of negligence arose, and error was prejudicial.

◆

Donahue, Richards & Gallagher, Oakland, for appellant.

Boccardo, Blum, Lull, Niland & Teerlink, San Jose, for respondents.

DOOLING, Acting Presiding Justice.

On petition for rehearing respondent argues that since we held the evidence sufficient to support a plaintiffs' judgment on the ground of attractive nuisance we should have affirmed following the rule stated in Brandes v. Rucker-Fuller Desk Co., 102 Cal.App. 221, 228, 282 P. 1009, 1012: "* * * even though the evidence may not be sufficient to sustain a cause of action * * * to which an instruction applies, a reversal may not be had upon that ground if the evidence as to other causes of action * * * is sufficient to sustain the verdict."

This rule has frequently been announced in opinions in the District Courts of Appeal of which respondent cites 15. As so broadly stated it has not been applied in any recent opinion of the Supreme Court. In Nunneley v. Edgar Hotel, 36 Cal.2d 493, 500, 225 P.2d 497, 502, the question was presented to the Supreme Court and the counterargument was made that "there is no way of determining whether responsibility was laid upon each of them [defendants] because of general negligence, or violation of the statute." The court after finding that the erroneous instructions as to statutory duty only applied to one defendant was careful to point out that since the jury found against both defendants it was clear that the verdict could not have been based upon the erroneous instructions which only applied to one of the two held liable. 36 Cal.2d at pages 500–501, 225 P.2d at pages 501–502; cf. dissenting opinion in the same case, 36 Cal.2d 502, 225 P.2d 497.

[1] It is the generally accepted rule that if the court cannot determine whether the jury based its verdict on the erroneous instructions or not the error must be deemed prejudicial. Edwards v. Freeman, 34 Cal.2d 589, 594, 212 P.2d 883; Huebotter v. Follett, 27 Cal.2d 765, 770–771, 167 P.2d 193; Oettinger v. Stewart, 24 Cal.2d 133, 140, 148 P.2d 19, 156 A.L.R. 1221; Davenport v. Stratton, 24 Cal.2d 232, 254, 149 P.2d 4.

Where the jury is erroneously instructed that the defendant was under a statutory duty the likelihood of the jury being prejudicially misled is increased by the fact that the statutory duty becomes the measure of care and if the jury finds a violation of the statute it need not concern itself with the further question of common-law negligence as measured by the conduct of that ideal concept the man of ordinary prudence.

[2] So parallel with the cases relied on by respondent we find another group of cases holding that erroneous instructions applying incorrectly a statutory duty are prejudicial although the verdict would find support on the theory of common-law negligence. Westberg v. Willde, 14 Cal.2d 360, 369–371, 94 P.2d 590; Markwalder v. Leonhard, 152 Cal.App.2d 254, 256–259, 313 P.2d 200; Clark v. Pamplin, 147 Cal. App.2d 676, 679–680, 305 P.2d 950; Anderson v. Mothershead, 19 Cal.App.2d 97, 99, 64 P.2d 995; Adrian v. Guyette, 14 Cal. App.2d 493, 505–506, 58 P.2d 988; Elmore v. County of Lassen, 10 Cal.App.2d 229, 233–234, 51 P.2d 481; Johnson v. Gokey, 4 Cal.App.2d 497, 498–499, 41 P.2d 193; Pilcher v. Tanner Motor Livery, 138 Cal. App. 558, 560–561, 33 P.2d 58.

[3] Under the circumstances of this case we cannot say that the verdict was not based on the instructions erroneously applying the statutory duty.

The petition for rehearing is denied.

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169 Cal.App.2d 54

Frank BROWN and Ernestine Brown, Plaintiffs and Appellants,

v.

Lawrence BROWN and Sara E. Brown, doing business as "B. & B. Topsoil Co.", Defendants and Respondents.

Civ. 18060.

District Court of Appeal, First District, Division 1, California.

March 24, 1959.

Hearing Denied May 20, 1959.

Action for dissolution of a partnership, for an accounting, and for declaratory relief. The Superior Court, County of San Mateo, A. R. Cotton, J., entered an order granting motion of defendants to dismiss the complaint, and plaintiffs appealed. The

District Court of Appeal, Hanson, J. pro tem., held that where plaintiffs filed and served a second amended complaint after time allowed by the court for filing thereof had expired, and some 49 days later, defendants moved to dismiss such amended complaint on ground of its untimely filing, and defendants did not offer any proof which overcame implied grant of time for filing of the amended complaint due to defendant's failure to take timely action to dismiss, defendants were not entitled to a dismissal on ground of untimely filing of the amended complaint.

Judgment reversed.

1. Pleading ⚷352

A plaintiff has no absolute right to have a pleading stricken from the files merely because it was not filed in time, and on the other hand, a defendant has no absolute right to have his belated pleading remain in the files, for a defendant cannot, as of right, answer or demur after the expiration of time prescribed by statute, and it is a proper practice, therefore, for plaintiff to move to strike the pleading from the files, and in the exercise of a sound discretion, a court may properly grant such motion to strike.

2. Pleading ⚷356(4)

Where plaintiffs filed and served a second amended complaint after time allowed by the court for filing thereof had expired, and some 49 days later, defendants moved to dismiss such amended complaint on ground of its untimely filing, but defendants did not offer any proof which overcame implied grant of time for filing of the amended complaint due to defendant's failure to take timely action to dismiss, defendants were not entitled to a dismissal on ground of untimely filing of the amended complaint. West's Ann.Code Civ.Proc. §§ 581, subd. 3, 585, 586.

◆

Bergen Van Brunt, William Gearhart, Allan L. Sapiro, San Francisco, for appellants.

Donald J. Miller, San Mateo, for respondents.

HANSON, Justice pro tem.

This is an appeal by Frank Brown and Ernestine Brown, plaintiffs, from an order made and entered on May 14, 1957, granting the motion of the defendants, Lawrence Brown and Sara E. Brown, doing business as "B. & B. Topsoil Co.," a partnership, to dismiss plaintiffs' Second Amended Complaint which sets forth three causes of action, to wit: one for a dissolution of the partnership, one for an accounting, and one for declaratory relief.

Both plaintiffs and both defendants are, respectively, husband and wife, and plaintiff Frank Brown and defendant Lawrence Brown are brothers. In May 1951 Frank and Lawrence entered into a general partnership agreement to do business together under the name of "B. & B. Topsoil Co." On October 20, 1952, Frank and Lawrence entered into a written agreement dissolving the partnership. In May 1953, about seven months after the dissolution agreement had been signed, plaintiffs brought this suit. Following the filing of the complaint, an oral stipulation was entered into by the parties and their counsel extending time to plead until further notice was given. On April 12, 1956, almost three years after the complaint was filed, the defendants filed a demurrer to it, principally on the grounds of uncertainty and ambiguity. The demurrer was sustained on April 19, 1956, with leave to amend. On April 26, 1956, plaintiffs filed a First Amended Complaint pleading common counts to which defendants again demurred on May 4, 1956. The demurrer was by stipulation sustained on May 16, 1956, with ten days leave to amend. On June 21, 1956, defendants served plaintiffs with a notice of the sustaining of the demurrer to the First Amended Complaint. About nine months later, on March 15, 1957, plaintiffs filed and served a Second Amended Complaint. Some 49 days later the defendants under the provisions of section 581, subd. 3, Code of Civil Procedure, moved to dismiss the amended complaint on the ground that it had not been filed within the time allowed by the court. The motion was granted on May 14, 1957.

The plaintiffs-appellants contend that the case falls within the principle announced by the Supreme Court in Reher v. Reed, 1913, 166 Cal. 525, 137 P. 263, which construed some of the mandatory provisions of section 585 of the Code of Civil Procedure, which section contains language similar to that found in section 581, subd. 3, the section here involved. On the other hand, the defendants-respondents contend that the decision in Daniels v. Daniels, 1955, 136 Cal. App.2d 224, 288 P.2d 910, which construed the language of section 581(3), is controlling. While the latter case is directly in point, it does not cite the Reher case or that of Baird v. Smith, 1932, 216 Cal. 408, 409, 14 P.2d 749, which followed it.

Before proceeding to a discussion of the above-cited cases, we think it well to quote the language of section 581, subd. 3, which reads as follows: "An action *may* be dismissed in the following cases: [Emphasis added.]

* * * * * *

"3. * * * By the court, when either party fails to appear on the trial and the other party appears and asks for the dismissal, or when, after a demurrer to the complaint has been sustained, the plaintiff fails to amend it within the time allowed by the court, and the defendant moves for such dismissal."

It will be observed that the language here used is permissive (may) as contrasted with the mandatory language of sections 585 and 586 to which reference will be made later. Moreover, it should also be observed that the section above quoted deals with a failure to amend a complaint within the time allowed by the court after a demurrer has been sustained, while sections 585 and 586 deal with the reverse situation, the failure to answer or demur to a complaint within the time allowed by the court.

The court in the Daniels case, supra, 136 Cal.App.2d 224, at pages 227–228, 288 P.2d 910, at page 911, in effect held that under section 581, subd. 3, a plaintiff who failed to amend his complaint within the time specified lost his right absolutely to do so and that the order then became equivalent to a judgment and could be reviewed only in the modes prescribed by statute.

In the Reher case a summons on the cross-complaint was served on the cross-defendants and by stipulation of the parties, filed in the cause, the cross-defendants were given until October 21, 1911, to plead. It was not until ten days later, on October 31, 1911, that they filed their answer to the cross-complaint. Thereafter, on November 8, 1911, upon application of the cross-complainant Reed, an entry was made by the clerk declaring the default of the cross-defendants for failure to answer within the time stipulated and upon said supposed default the clerk then entered judgment against them for the sum demanded in the cross-complaint. On December 13, 1911, the cross-defendants gave written notice that they would move the court to set aside said judgment. No affidavit of merits was filed or presented. The court said it was not necessary to resort to section 473 or to determine whether or not, as an application under that section, the grounds were well stated. It went on to say [166 Cal. 525, 137 P. 264]: "The clerk is not authorized to enter a default, unless no answer has been filed 'within the time specified in the summons or such further time as may have been granted.' Code Civ.Proc., § 585. *When a party, after the time expressly granted for filing a pleading against him has expired, suffers further time to elapse without taking any action thereon, and in the mean time the pleading is served and filed, he, by such conduct, in effect grants the additional time and the party is not strictly in default. The clerk is not authorized to enter a default for failure to file an answer when such answer is on file at the time such default is attempted to be entered.*" (Emphasis added.)

In Baird v. Smith, supra, 1932, 216 Cal. 408, 409, 14 P.2d 749, 750 (default prematurely entered), it is stated: "It is well settled that a plaintiff's failure to have the defendant's default *regularly* entered in an implied grant of further time to the defendant in which to appear in the action. [Court's emphasis.] Tregambo v. Comanche Mill & Min. Co., 57 Cal. 501; Reher v. Reed, 166 Cal. 525, 528, 137 P. 263, 264, Ann.Cas. 1915C, 737; Lunnun v. Morris, 7 Cal.App. 710, 95 P. 907; Mitchell v. Banking Corp., 81 Mont. 459, 264 P. 127."

[1] However, in 2 Witkin, California Procedure, 1698–1699, the author says: "This rule [the rule enunciated in Reher v. Reed, supra] has been explained in terms of an 'implied grant' by the plaintiff of additional time to plead. [Citations.] But this is inaccurate both in theory and result. The plaintiff cannot extend the defendant's time to plead except expressly in the manner provided by statute * * *, and the waiver does not confer any right on the defendant. The plaintiff, by his inaction, loses the right to have a default and default judgment entered *as a matter of course, but the defendant does not gain an absolute right to file a belated answer.* [Emphasis added.] The answer, filed after the time has elapsed, may, *in the court's discretion* [emphasis added], be *stricken out* on motion of the plaintiff, and then the default may be entered. As the court said in Cuddahy v. Gragg, 1920, 46 Cal.App. 578, 580, 189 P. 721. * * *: 'The plaintiff has no absolute right to have the pleading stricken from the files merely because it was not filed in time; *and, on the other hand, the defendant has no absolute right to have his belated pleading remain in the files* [emphasis added]; for a defendant cannot, *as of right,* answer or demur after the expiration of the time prescribed by statute. It is a proper practice, therefore, for the plaintiff to move to strike the pleading from the files; and, *in the exercise of a sound discretion* [emphasis added], the court very properly may grant such motion to strike.'" We agree with the above quoted statement from the Cuddahy case.

[2] In Reher v. Reed an answer to the cross-complaint was filed ten days late. Nine days thereafter the cross-complainant caused an entry of default and judgment to be made by the clerk. About thirty days thereafter the cross-defendant filed a motion to set aside the default and judgment which was supported by affidavits of excuse. The cross-complainant on the hearing offered no counter-affidavits or other challenge to the truth of the affidavits, but rested his case wholly on statutory grounds. We think the Supreme Court, faced with that situation, was of the view that the burden then rested on the cross-complainant Reed to overcome the showing made by the cross-defendant. As he had not met the burden, the court interpreted his conduct as in effect granting additional time to the cross-defendant to plead. The same is true in the instant case. We accordingly deduce from the opinion of the Supreme Court that the implied grant of time may be overcome by affidavits or evidence. No such showing was made in the instant case.

For the reasons stated, the judgment is reversed.

PETERS, P. J., and BRAY, J., concur.

Hearing denied; GIBSON, C. J., and TRAYNOR, J., dissenting.

PETERS, J., not participating.

In the Matter of the Application of Grey Everett McNEER, for a Writ of Habeas Corpus.*

3 Cr. 2934.

District Court of Appeal, Third District, California.

March 25, 1959.

Rehearing Granted April 24, 1959.

Proceeding by prisoner for writ of habeas corpus. The Superior Court, Sacramento County, Raymond T. Coughlin, J., granted writ and ordered prisoner discharged from further custody and People appealed. The District Court of Appeal, Van Dyke, P. J., held that where petitioner, under an information charging murder, was convicted of murder in the second degree and judgment was reversed and cause remanded for new trial, petitioner had been acquitted of murder in the first degree, and compelling him to submit to new trial including that degree of murder was a denial of his constitutional rights.

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* Opinion vacated 343 P.2d 304.

Affirmed.

1. Criminal Law ⚷193½

Conviction of a crime necessarily included in another crime bars a prosecution for the other.

2. Criminal Law ⚷161

Doctrines of stare decisis and res judicata must yield to positive constitutional mandate that no person shall be twice put in jeopardy for the same offense. West's Ann.Const. art. 1, § 13; West's Ann.Pen.Code, § 1484.

3. Criminal Law ⚷193½

Where indictment charged defendant with murder and he was convicted of murder in the second degree and such conviction was reversed and cause remanded for retrial, by first verdict of guilty of murder in the second degree defendant had been acquitted of murder in the first degree and compelling him to submit to a trial for first degree murder constituted denial of his constitutional rights, and judgment sentencing defendant to life imprisonment after conviction of first degree murder in second trial was void as being in excess of jurisdiction on face of record. West's Ann.Pen.Code, § 1484.

4. Habeas Corpus ⚷111(1)

Where it appeared that defendant found guilty of second degree murder in first trial was sentenced to life imprisonment based on void conviction of first degree murder on new trial and at time of seeking writ of habeas corpus he had served for far longer period than usually was case on convictions for second degree murder, District Court of Appeal could not disagree with action of trial judge in discharging petitioner upon granting of writ rather than remanding petitioner to trial court to be sentenced for crime of murder in the second degree. West's Ann. Pen.Code, § 1484.

Edmund G. Brown, Atty. Gen., by Doris H. Maier, Dep. Atty. Gen., for appellants.

Robert Cole, Public Defender and Edward M. McDonell, Asst. Public Defender, County of Sacramento, Sacramento, for respondent.

VAN DYKE, Presiding Justice.

Petitioner, under an information charging murder, was convicted in the Los Angeles County Superior Court of murder of the second degree. Judgment was pronounced against him November 22, 1934. Petitioner appealed, the judgment was reversed, and the cause was remanded for retrial. Petitioner interposed pleas of once in jeopardy and former acquittal as to murder in the first degree. On retrial the court directed the jury to bring in verdicts adverse to petitioner on the special pleas. Petitioner was found guilty of murder in the first degree. Petitioner was sentenced to imprisonment for life. He moved for a new trial and when his motion was denied he appealed, asserting in both proceedings that the court erred in directing verdicts against him on his special pleas, arguing that the court was without jurisdiction to try him for any degree of murder higher than second degree. These contentions were disallowed and the judgment was affirmed. People v. McNeer, 14 Cal.App.2d 22, 57 P.2d 1018. Petitioner applied for a hearing before the Supreme Court and hearing was refused. On July 17, 1958, in the case of Gomez v. Superior Court, 50 Cal. 2d 640, 328 P.2d 976, the Supreme Court ruled that where a person charged with a certain degree of a crime had been convicted on trial of a lesser degree the conviction of the lesser degree was an acquittal of all higher degrees of that crime; that he could not constitutionally again be prosecuted for a higher degree on retrial following a reversal on appeal of conviction of the lower degree because to do so would, as to the higher degree, place him in jeopardy a second time. On learning of this decision petitioner applied to the Superior Court in Sacramento County for a writ of habeas corpus; and, after a hearing, the court granted the writ and ordered petitioner discharged from further custody. The People have appealed.

[1] It appears our courts have consistently held that a conviction of a crime necessarily included in another crime bars a prosecution for that other. Thus, as held in People v. McDaniels, 137 Cal. 192, 69 P. 1006, 59 L.R.A. 578, a prosecution for battery cannot be followed by prosecution for assault based upon the same acts since an assault is a necessary element of battery and it is impossible to commit battery without assaulting the victim. Conviction of the lesser but included offense was held to be a bar to a prosecution for the greater on the theory that to convict of the greater would be to convict twice of the lesser. It, of course, made no difference as to which offense was first prosecuted. If the defendant was tried first for the lesser offense that prosecution barred the subsequent prosecution for the greater offense. Nevertheless, where a defendant was prosecuted for a major crime, divided into degrees, and was convicted of a lesser degree of that crime, the conviction of the lesser degree was long held not to operate as an acquittal of the greater. The Gomez decision eliminated the distinction between the two situations. Said the Supreme Court at page 653 of 50 Cal.2d, at page 985 of 328 P.2d:

> "It is our opinion that there is no sound basis for the distinction heretofore drawn by the courts of this state insofar as lesser included offenses and degree crimes are concerned and that petitioners here should be considered as having been once in jeopardy. * * *"

It is stated in 14 American Jurisprudence, Courts, section 130, page 345:

> "The general principle is that a decision of a court of supreme jurisdiction overruling a former decision is retrospective in its operation, and the effect is, not that the former decision is bad law, but that it never was the law. * * *"

The application of this rule in the Superior Court led to the issuance of the writ and to respondent's discharge.

[2] Appellant contends that retrospective application is to be denied under the related policy rules of stare decisis and res judicata. The constitutional mandate is positive, and is a fundamental part of the "Bill of Rights." "No person," says the Constitution, "shall be twice put in jeopardy for the same offense." Art. 1, § 13. Stare decisis and res judicata must here yield.

Appellant contends further that the Supreme Court could have limited the application of the Gomez decision to prospective matters only, and must be assumed to have done so. We need not here discuss the first premise. Admitting it arguendo we still find the Supreme Court did not limit the scope of its decision and must therefore be assumed to have followed the general rule.

[3] From the record here it appears as a matter of law that by the first verdict of guilty of murder of the second degree respondent had been acquitted of murder of the first degree and that compelling him to submit to a trial including that degree of murder was to deny him his constitutional rights. The judgment sentencing respondent to life imprisonment, insofar as it rested upon a conviction of first degree murder, was void as being in excess of jurisdiction on the face of the record.

[4] Appellant contends that the trial court, in the performance of its duty to "dispose of such party as the justice of the case may require" (Section 1484, Penal Code), ought to have remanded petitioner to the Superior Court in Los Angeles County, wherein he was convicted, there to be sentenced to imprisonment for the crime of murder of the second degree. The trial court denied the request for remand and ordered petitioner discharged. Although the record here does not disclose any stated reason for that decision, it appears to us that the record supports it. Petitioner has already served imprisonment for a

far longer period than is usually the case on convictions for second degree murder. The decision to discharge was that of a veteran trial judge with long experience in the administration of criminal law. On the whole record we cannot disagree.

The judgment appealed from is affirmed.

PEEK and SCHOTTKY, JJ., concur.

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169 Cal.App.2d 235

ANSCO CONSTRUCTION COMPANY, a corporation, Plaintiff and Appellant,

v.

OCEAN VIEW ESTATES, INC., a corporation, Defendant and Respondent.

Civ. 23557.

District Court of Appeal, Second District, Division 2, California.

March 30, 1959.

Action to recover compensation for labor and materials furnished the defendant wherein the written bid contained separate items but an error in addition was made in computing the total amount due. From portions of a judgment of the Superior Court of Los Angeles County, Joseph M. Maltby, J., the plaintiff appeals. The District Court of Appeal, Ashburn, J., held that the trial judge's award of interest was error and that failure to award plaintiff attorney's fees for the amount conceded by defendant and the trial judge to be reasonable was error.

Portions of judgment appealed from reversed.

1. Appeal and Error 🔑770(1)

In action for the recovery of compensation for labor and materials furnished, respondent's failure to file a brief confessed the correctness of findings of the trial court with respect to quantities and the sufficiency of evidence to support them.

2. Interest 🔑12

"Interest" is awarded as damages by way of compensation for wrongful detention of money due plaintiff which occurs only when the sum is liquidated. West's Ann.Civ.Code, §§ 3287, 3289.

See publication Words and Phrases, for other judicial constructions and definitions of "Interest".

3. Damages 🔑74

"Liquidated damages" are those which are certain by computation from the face of the contract which might be made certain by reference to well-established market values plus computations.

See publication Words and Phrases, for other judicial constructions and definitions of "Liquidated Damages".

4. Interest 🔑19(2)

If the amount of an indebtedness or the amount owing can be calculated from the statements rendered by the plaintiffs to defendants and that statement is correct it is the matter of mere calculation and interest can be awarded. West's Ann.Civ. Code, §§ 3287, 3289.

5. Interest 🔑19(1)

In action to recover for labor and materials furnished where plaintiff submitted a written bid for the job containing numerous items and setting forth a total cost which was erroneous because of an error in addition, denying plaintiff interest prior to judgment on the ground that the amount sued for was unliquidated was error.

6. Interest 🔑39(5)

In action to recover for labor and materials furnished where payment made by the defendant did not constitute payment in full but only as a payment on account, plaintiff was entitled to interest at the rate of 10% upon its entire claim as provided by agreement until the entire sum was paid and upon the amount in dispute until date of judgment.

7. Contracts 🔑233

Where contract for furnishing labor and materials contained provision that any attorney's fees, costs or other expenses which might be incurred for collection of monies due would be paid by the buyer, provision constituted a reasonable amount for attorney's fees in light of all the circumstances.

8. Contracts ⚿233

Where contract for furnishing labor and materials contained a provision for a reasonable amount of attorney's fees in light of all the circumstances and plaintiff's attorney testified that his services were worth $1,200 or $1,400 and both the trial judge and the attorney for the defendant conceded that the amount sought was reasonable, it was an abuse of discretion for the trial judge not to award to the plaintiff the amount the plaintiff sought. Superior Court of Los Angeles, rule 12.

9. Attorney and Client ⚿140

Rule 12 of the Superior Court of Los Angeles County respecting attorney's fees should not control a court's discretion in awarding attorney's fees since rule was adopted by judges of the Superior Court for their own governance and is not directed toward the conduct of parties or counsel and the judges are free to depart from its provisions whenever the interest of justice require. Superior Court of Los Angeles, rule 12.

10. Contracts ⚿233

In action to recover for labor and materials furnished under a contract, where the bid for the job consisted of nine separate items but contained an error in addition as to the total amount, refusing to consider in awarding attorney's fees for services for the collection of the entire amount rather than the amount resulting from the error was an abuse of discretion where it was not until over two months after the suit was filed that the defendant paid what it then conceded to be due.

Arthur D. Guy, Long Beach, for appellant.

No appearance for respondent.

ASHBURN, Justice.

This is an action for recovery of compensation for certain labor and materials furnished defendant (general contractor) in the excavation and construction of certain streets, curbs, gutters, etc., in a designated tract in the city of Palos Verdes Estates. The judgment runs in favor of plaintiff, but it appeals from (1) that portion which denies any interest prior to date of judgment, and (2) that portion which fixes an attorney fee for plaintiff, the claim being that the allowance of $264.20 was so small as to amount to an abuse of discretion. Respondent has filed no brief.

Appellant submitted a written bid for the job consisting of nine separate items, exemplified by number 1: "Excavate from street areas and spread on adjacent lots and/or street areas. Approx: 8000 cu yds of earth at $0.61 per cu. yd. = 4880.00." The bid items were carried into a written contract in the same form and figures. The total set forth in each document was: "Approx: total cost $28,590.56." The addition was erroneous. The total should have been $33,421.76;[1] difference was $4,831.20. Apparently the error was mutual and was not discovered until about May 27, 1957, when plaintiff billed defendant, after completion of the work, for the sum of $33,541.44, less a progress payment defendant had made in the sum of $5,240; net amount claimed being $28,301.44. Thereupon a controversy arose as to whether the contract was one for doing the work at an agreed price or upon a unit bassis. Plaintiff sued for $28,301.44 with interest at ten per cent per annum from June 10, 1957; its portion of the work was completed on May 25, 1957 and accepted by the city on June 11, 1957. The complaint also prayed for a reasonable attorney fee of $3,500.

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[1] There are certain discrepancies in the figures found in this record but we have deemed it unnecessary to undertake the task of reconciling them.

The contract contained these pertinent provisions which enter into the determination of the questions of right to interest and amount of attorney fees: "That quantities of excavation and fill to be calculated from grade sheets established by your Engineer for the rough grading of tract. * * * Terms: Net cash, labor, material and equipment jobs, each completed portion payable within 10 days after date of completion of such portion. * * 1. If account is not paid when due, interest will be charged at the rate of 10% per annum. * * * 9. Any attorney fees, costs or other expenses which may be incurred in the collection of monies due under this contract and/or in connection with any action involving this contract, will be paid by the buyer."

[1] The action was filed on August 1, 1957. Before trial and on November 6, 1957, defendant paid to plaintiff $23,356.56. After crediting this sum and the progress payment of $5,240 the court reached the conclusion that the net amount due was $4,504.81 for which amount judgment was rendered. This was predicated upon a finding that "the actual quantities of materials and work performed by the plaintiff" at the prescribed rates was $33,101.37. Defendant did not dispute this at the trial but rested its defense upon a denial of any amount due, this upon the theory that the contract required plaintiff to do the work at a stipulated cost of $28,590.56. "Plaintiff's Exhibit III was introduced in evidence, without objection, which document contains a statement of the final quantities of labor and materials furnished to the defendant for the improvement of the defendant's tract of land. No evidence whatsoever was introduced by the defendant tending to show that plaintiff had not, in fact, furnished the quantities of labor and materials stated in plaintiff's Exhibit III." (Narrative Statement p. 2.) Respondent's failure to file a brief confesses the correctness of the findings and the sufficiency of the evidence to support them. (See, 4 Cal.Jur.2d, § 496, p. 334.)

Plaintiff claimed interest from June 10, 1957, upon the sum of $28,301.44, at ten per cent per annum. The court found the amount due to be $4,504.81 and denied interest except upon the judgment rendered on April 3, 1958.

The contract itself provides for interest from due date at ten per cent per annum. Section 3289, Civil Code, says: "Any legal rate of interest stipulated by a contract remains chargeable after a breach thereof, as before, until the contract is superseded by a verdict or other new obligation."

[2-4] Aside from any contractual provision interest is awarded as damages by way of compensation for wrongful detention of money due plaintiff. Sears, Roebuck & Co. v. Blade, 139 Cal.App.2d 580, 595, 294 P.2d 140. But this occurs only when the sum is liquidated within the purview of Civil Code, § 3287 and the pertinent authorities. That section says: "Every person who is entitled to recover damages certain, or capable of being made certain by calculation, and the right to recover which is vested in him upon a particular day, is entitled also to recover interest thereon from that day, except during such time as the debtor is prevented by law, or by the act of the creditor, from paying the debt." Liquidated damages have been defined "as those which were certain by computation from the face of the contract, or which might be made certain by reference to well-established market values plus computation." Lineman v. Schmid, 32 Cal.2d 204, 209, 195 P.2d 408, 411, 4 A.L.R.2d 1380. "The contention is made that the amount which the plaintiffs are entitled to recover in this case is unliquidated, and therefore interest should not be allowed until the entry of judgment. This contention, however, is not determinative of the question of interest. If the amount of the indebtedness or the amount owing can be calculated and determined from the statements rendered by the plaintiffs to the defendants, and that

statement is found to be true and correct, it is a matter of mere calculation." Anselmo v. Sebastiani, 219 Cal. 292, 301, 26 P.2d 1, 5. To the same effect, see, Engleberg v. Sebastiani, 207 Cal. 727, 729, 279 P. 795; Chase v. National Indemnity Co., 129 Cal. App.2d 853, 865, 278 P.2d 68; 28 Cal.Jur. 2d § 5, pp. 399–400. Such was the situation at bar.

[5] The trial judge's ruling was controlled by the consideration that liability for any amount in excess of the sums paid before trial (i. e. $4,504.81) was the subject and the only subject of a bona fide dispute. But that is a false quantity in the problem. "The amount of interest to which the one party is entitled or for which the other is bound is not determinable by the misconceptions of the parties as to their rights or duties under the terms of their express contract, but by the terms of the contract itself as finally interpreted by the court. By the terms of this contract the defendant was bound to pay plaintiff the amount due upon his delivery as specified therein within a stated time after such delivery had been made and interest began to run upon such deferred payments under the foregoing provisions of the law relating to interest from the date they became due. The only way in which the defendant could have avoided or terminated his liability to pay interest under his said agreement would have been to have made a tender of payment of the whole amount of principal and interest due up to the date of such tender." Western Lithograph Co. v. Vanomar Producers, 62 Cal.App. 644, 647, 217 P. 534, 535. "'A dispute as to the price agreed, or as to the amount of work done or its cost, will not prevent the allowance of interest. * * * Where the data necessary to determine the amount due are supplied to the debtor by an invoice or statement, he will be charged with interest for failure to pay.'" Anselmo v. Sebastiani, supra, 219 Cal. 292, 301, 26 P.2d 1. Accord: Koyer v. Detroit F. & M. Ins. Co., 9 Cal.2d 336, 346, 70 P.2d 927; Fairchild v. Bay Point, & C. Ry. Co., 22 Cal.App. 328, 330, 134 P. 338; Kammerer v. Marino, 76 Cal.App. 635, 638–639, 245 P. 432; Maurice L. Bein, Inc. v. Housing Authority, 157 Cal.App.2d 670, 686, 321 P.2d 753.

[6] The trial judge made another error in the matter of interest. Plaintiff had to sue for $28,301.44, plus interest from June 10, 1957, and the action was filed on August 1, 1957. It was not until November 6, 1957 that the sum of $23,356.56 was paid. It did not constitute payment in full, served only as a payment on account and plaintiff was entitled to interest at the rate of ten per cent upon its entire claim until November 6, 1957, and upon $4,504.81 until date of judgment.

[7, 8] The contract provision for attorney fees, above quoted, connotes a reasonable amount in the light of all the circumstances. The trial judge computed the fee in accordance with Rule 12 of the Superior Court of Los Angeles County,[2] and used $4,504.81 as the basis.

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[2] "Section 1. When an attorney's fee is allowed on a recovery on a promissory note or other contract providing for payment of a reasonable attorney's fee, and no foreclosure of a mortgage or trust deed is involved, a reasonable attorney's fee shall be deemed to be the amount computed by applying to the amount recovered, exclusive of costs, the appropriate schedule hereinafter set forth, in addition to which a further allowance may be made for extraordinary services, on compliance with section 5 of this rule. * * *

"In a contested case or a case required to be set for trial: For the first $1000 or part thereof, at the rate of ten per cent, with a minimum of $100; for the next $9000, at the rate of four per cent; for the next $10,000, at the rate of three per cent; for the next $30,000, at the rate of two per cent; for the next $50,000, at the rate of one per cent; and for all above $100,000, at the rate of one-half of one per cent. * * *

"Section 5. Every application for compensation for extrordinary services rendered by an attorney in any case mentioned in section 1, section 2 or section 3 of this rule, or in a probate proceeding, and every application in any other case, as authorized by law, for allowance, fixing or recovery of attorneys' fees, shall be accompanied by an itemized state-

At the close of the trial plaintiff's attorney testified that his services were worth $1,200 or $1,400. The following colloquy then occurred: "The Court: There isn't any doubt about that in my mind. I think the work done and accomplishments are worth more, but I don't think I have the jurisdiction to award more than $264.20. Mr. Guy: May I leave that matter open? The Court: Yes. Mr. Shearer: You stated before you made your ruling that you felt there was some error on both sides. I don't question the value of what Mr. Guy has done and I know his time is worth $1200 or $1400." Feeling bound by the rule the judge fixed the fee at $264.20. Later a motion to reopen the cause was granted for the purpose of considering the matter of attorney fees. Plaintiff's attorney then presented an affidavit with a detailed schedule of his services showing 57 hours and 25 minutes devoted to the case and a valuation of $1,722.50 on the services. Defendant submitted a "Statement in Opposition" to the motion to reopen, which contained this sentence: "Counsel for defendant will not question the fact that plaintiff's counsel has spent a great deal of time in the preparation and presentation of this case." The court receded from its former position that Rule 12 imposed a jurisdictional restriction upon his discretion but adhered to the view that the rule should be applied at bar. In view of the showing made by plaintiff's attorney and the concessions voiced by defendant's counsel and the judge, this ruling appears as a matter of law to be an abuse of discretion for it does not award to plaintiff an amount which both parties indicated would be reasonable. Moreover, it withholds from plaintiff most of the amount which the judge himself indicated to be reasonable.

[9] That Rule 12 could not control the court's discretion seems clear. We need not pause to inquire as to the binding effect of rules prescribed by the Judicial Council for the Superior Courts (cf. Cantillon v. Superior Court, 150 Cal.App.2d 184, 309 P.2d 890), for Rule 12 was adopted by the judges of the superior court for their own governance and is not directed toward the conduct of parties or counsel. The judges are free to depart from its provisions whenever the interests of justice require, as here. Flagg v. Puterbaugh, 98 Cal. 134, 136, 32 P. 863; People v. Williams, 32 Cal. 280, 287–288; Baxter v. Boston-Pacific Oil Co., 81 Cal.App. 187, 189, 253 P. 185; Pickett v. Wallace, 54 Cal. 147, 148; People v. Demasters, 105 Cal. 669, 673, 39 P. 35; Connell v. Higgins, 170 Cal. 541, 546, 150 P. 769.

[10] It was also error (which doubtless will not be repeated on the next hearing) for the judge to refuse to take into consideration services directed toward collection of the entire $28,301.44, for it was not until November 6th, over two months after suit filed, that defendant paid what it then conceded to be due. Its answer, filed on August 23, 1957, alleged the receipt of plaintiff's statement for $33,541.44, and further averred: "Defendant is informed and believes and upon such information and belief alleges that plaintiff did not furnish the amounts of materials or move the amounts of earth set forth in said statement. Defendant will have said items checked by its engineers and request permission of the court to offer these items in evidence at the time of trial or to amend their complaint if required." Although the answer also alleged that defendant's indebtedness was the principal sum of $23,350.56 and prayed that it be so adjudged, the pleading was equivocal to say the least, and plaintiff's attorney was required to be prepared to prove plaintiff's entire claim.

The portions of the judgment from which plaintiff has appealed are reversed.

FOX, P. J., and HERNDON, J., concur.

ment of the services rendered or to be rendered by any attorney for or in respect to whose services such application is made."

169 Cal.App.2d 88

Frederic CROMWELL, Plaintiff and Appellant,

v.

E. S. HEWARD, Defendant and Respondent.

Civ. 18084.

District Court of Appeal, First District, Division 2, California.

March 25, 1959.

Hearing Denied May 20, 1959.

Judgment debtor brought independent action in equity against judgment creditor to set aside a default judgment taken by judgment creditor against judgment debtor. The Superior Court, Contra Costa County, Hugh H. Donovan, J., entered a decree setting aside the default judgment but directing that original action by judgment creditor against judgment debtor proceed to trial, and the judgment debtor appealed from portion of the decree directing that the original action proceed to trial. The District Court of Appeal, Draper, J., held that judgment debtor, in seeking aid of equity to afford a trial on the merits, would be deemed to have offered to waive his right to assert the bar of statutes of limitation in the original action.

Decree affirmed.

1. Judgment 🔑447(1)

One who seeks intervention of equity to set aside judgment must allege facts showing that he has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding.

2. Judgment 🔑452

In order to justify intervention of equity to set aside default judgment, there must be reasonable certainty that one seeking to have judgment set aside would have emerged in a more advantageous position in trial on the merits.

3. Judgment 🔑460(1)

Allegations of one, who seeks intervention of equity to set aside a default judgment against him, must be such as to warrant court in determining that if facts so alleged be proven, a different result would ensue.

4. Judgment 🔑466

Court of equity, in vacating a default judgment, may decree that judgment shall be entered in favor of applicant for equitable intervention.

5. Judgment 🔑465

Judgment debtor, by bringing an independent action in equity against judgment creditor to set aside default judgment taken by judgment creditor against judgment debtor, would be deemed to have offered to waive his right to assert limitation statutes as bar to judgment creditor's presentation of the merits on retrial of judgment creditor's original action after setting aside of default judgment. West's Ann.Code Civ. Proc. §§ 581a, 583.

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Wallace, Garrison, Norton & Ray, San Francisco, for appellant.

Alfred M. Miller, San Francisco, for respondent.

DRAPER, Justice.

This is an independent action in equity to set aside a default judgment taken against plaintiff. Plaintiff prevailed, but appeals from that portion of the decree which directed that the earlier action proceed to trial.

The earlier action was filed by Heward, as plaintiff, November 27, 1951. Summons was issued on the same date. Affidavit of one Byrnes recited service upon Cromwell December 5, 1951. This affidavit was filed and on July 8, 1954 default judgment was entered in Heward's favor for $9,024.32. The trial court found that the affidavit of service upon Cromwell was false and fraudulent, and that he had no knowledge of the entry of any judgment against him until July 1, 1955. The trial court also found that Heward was guilty of no fraud, that he had no contact with and gave no instructions to the process server. Upon finding that Cromwell had "a sufficiently meritorious defense to entitle (him) to a trial of the issues * * * in a proper adversary proceeding," the court ordered the default judgment set aside, and directed that the earlier action "should be permitted to proceed to trial upon the issues * * * upon * * * Cromwell filing his answer thereto, without further service." There is no appeal from the order vacating the default judgment, but Cromwell appeals from that portion which requires trial of the original action.

Cromwell contends that the trial court has no jurisdiction to proceed in the original action, and must dismiss it because summons was not served within 3 years (Code Civ.Proc. § 581a) nor the action brought to trial within 5 years (Code Civ.Proc. § 583).

[1-3] One who seeks the intervention of equity to set aside a judgment must allege facts showing that he "has a sufficiently meritorious claim to entitle him to a trial of the issue at a proper adversary proceeding." Olivera v. Grace, 19 Cal.2d 570, 579, 122 P.2d 564, 569, 140 A.L.R. 1328. "There must be reasonable certainty that plaintiff would have emerged in a more advantageous position." Hart v. Gudger, 153 Cal.App.2d 217, 220, 314 P.2d 549, 551. The allegations must be such as to "warrant the court in determining that if the facts so alleged be proven, a different result would ensue." Huron College v. Yetter, 78 Cal.App.2d 145, 150, 177 P.2d 367, 371; see also Wilson v. Wilson, 55 Cal.App.2d 421, 427, 130 P.2d 782; Parsons v. Weis, 144 Cal. 410, 417, 77 P. 1007.

Recognizing this rule, which he concedes here, Cromwell alleged in his complaint that he "had and has a good and sufficient defense" to the original action. This allegation rather clearly recognizes the necessity of a defense on the merits existing at the time of default judgment. More important, although Cromwell alleges these defenses in some detail, his pleading nowhere refers to sections 581a, 583, or any statute of limitations.

The trial court did not purport to find that Cromwell had the right to prevent any trial of Heward's claim and Cromwell's claimed defenses thereto. It found only that his defense was "sufficiently meritorious * * * to entitle (him) to a trial of the issues." Had the claimed bar to trial been asserted before decree, the court might well have determined that it would be inequitable to vacate the judgment merely to permit Cromwell to assert a somewhat technical bar to a debt properly due. Burbridge v. Rauer, 146 Cal. 21, 24-25, 79 P. 526; Gregory v. Ford, 14 Cal. 138, 142.

[4] In vacating a judgment, a court of equity may decree that judgment shall be entered in favor of the applicant for equitable intervention. Dunlap v. Steere, 92 Cal. 344, 28 P. 563, 16 L.R.A. 361. But it is clear that this result was neither attempted nor intended here. A common alternative remedy is the setting aside of the judgment so that a new trial can be had on the merits. (3 Pomeroy's Equity Jurisprudence [5th ed.] 276; 29 Cal.Jur.2d 133, Judgments, § 178.) The existence of this power is implicit in the California decisions. (Olivera v. Grace and other cases cited supra.) Cromwell's detailed allegation of his defenses upon the merits to the former action shows that such a trial upon the merits is what he sought in this action.

[5] The very purposes of equitable intervention would be frustrated if a decree expressly designed to permit trial upon the merits were construed to prohibit such a trial. Cromwell's shield against a judgment not based upon a fair adversary proceeding would then serve as his sword to inflict a like judgment upon his adversary. In the circumstances here shown, we have no hesitancy in holding that Cromwell, in seeking the aid of equity to afford a trial upon the merits, has offered to waive his right to assert the bar of sections 581a and 583 to Heward's presentation of the merits of his case, Heward having been found to be without fault in securing the former judgment. If another ground were necessary, the trial court's decree, although not in form conditional, could readily be construed to impose assent to such trial as a condition to the vacation of the former judgment. Such condition may be imposed. (30 Am.

Jur. 682, Judgments, § *727*; see also 2 Pomeroy's Equity Jurisprudence [5th ed.] 83.)

Appellant relies upon McColgan v. Piercy, 17 Cal.App. 160, 118 P. 957. But that decision is readily distinguished from the case at bar. There no judgment had been entered. There was no application for equitable intervention. No step had been taken in that action for more than 5 years after filing of return of service. Upon determining that the return was false, the court in the original action ordered dismissal under section 581a. Thus there was no possible room for resort to the rule applied in our case. The other decisions cited by appellant are even more clearly distinguishable.

Decree affirmed.

KAUFMAN, P. J., and DOOLING, J., concur.

CITY OF PALM SPRINGS, a Municipal Corporation, Petitioner,

v.

Mary G. RINGWALD, City Clerk of the City of Palm Springs, Respondent.*

Civ. 6000.

District Court of Appeal, Fourth District, California.

March 26, 1959.

Hearing Granted May 20, 1959.

Proceeding on petition for a writ of mandate directing a city clerk to publish an ordinance enacted by the council providing for a parking district to be financed by bonds which were to be paid in part through creation of a special fund to be supplied from future revenue from the city's sales and use taxes. The District Court of Appeal, Stone, J. pro tem., held that pledge of sales and use tax revenue in the future for a parking district without approval of two-thirds of the electorate of the city, constituted a violation of section of constitution providing that no city shall incur any indebtedness for any purpose exceeding in any year the income and revenue provided for such year without the consent of two-thirds of the qualified electors thereof, and therefore ordinance providing for such a pledge and proposed bonds were invalid.

Writ denied.

1. Mandamus 🔑82

Mandamus is an appropriate remedy to compel a city clerk to publish an ordinance if it met requirements of the law, since publication was a ministerial duty.

2. Municipal Corporations 🔑867(2)

Revenue bonds or other obligations of a governmental body which are payable solely from a special fund do not violate section of the constitution providing that certain legislative bodies may not encumber general funds of a city beyond the year's income without first securing consent of two-thirds of the electors, provided the governmental body is not liable to maintain the special fund out of its general fund or by tax levies should the special fund prove insufficient, although the indebtedness so created must not be an indebtedness or obligation of the governmental body concerned, and payments under the special fund beyond a current year, that is, payments in the future, cannot be a charge upon the general fund, but rather the revenue must be supplied by the agency to be benefited. West's Ann.Const. art. 11, § 18.

3. Municipal Corporations 🔑867(2)

A municipal pledge of sales and use tax revenue in the future for a parking district, without approval of two thirds of the electors of the city, constituted a violation of section of constitution providing that no city shall incur any indebtedness for any purpose exceeding in any year the income and revenue provided for such year without the consent of two thirds of the qualified electors thereof, and ordinance providing for such a pledge was invalid.

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* Opinion vacated 342 P.2d 898.

West's Ann.Streets & High.Code, §§ 35100 et seq., 35255; West's Ann.Const. art. 11, § 18.

4. Municipal Corporations ⚷867(2)

Section of constitution providing that certain legislative bodies may not encumber general funds of a city beyond the year's income without first securing consent of two-thirds of the electors, was not intended to apply only to property tax revenues, but applies to other types of income and revenue taxes which produce revenue for the general fund of a city. West's Ann. Const. art. 11, § 18.

5. Municipal Corporations ⚷867(2)

Purpose of section of constitution dealing with incurring of a liability for any purpose exceeding in any year the income and revenue provided for such year, is not to interfere with a city's exercise of its discretion in determining for what objects the public convenience and welfare shall be exercised and for which money may be appropriated, but rather it is designed so that the people who are required to pay the cost of providing such objects of public convenience and welfare will have an opportunity to express their approval or disapproval of a long term indebtedness, by providing that the legislative body may not encumber the general funds of the city beyond the year's income without first securing the consent of two-thirds of the electors. West's Ann.Const. art. 11, § 18.

6. Constitutional Law ⚷48

Legislation should be interpreted consonant with constitutionality.

7. Municipal Corporations ⚷919

Statute which permits a city council to make contributions to a parking district after issuance of bonds, does not authorize a pledge or a diversion of future revenue from the general fund for the payment of such bonds. West's Ann.Streets & High. Code, §§ 35100 et seq., 35255; West's Ann. Const. art. 11, § 18.

Jerome J. Bunker, City Atty., Palm Springs, Kirkbride, Wilson, Harzfeld & Wallace, Ernest A. Wilson, San Mateo, for petitioner.

Thompson & Colegate, Roy W. Colegate and F. Gillar Boyd, Jr., Palm Springs, for respondent.

STONE, Justice pro tem.

Petitioner, City of Palm Springs, is a general law city governed by a city council. An ordinance was enacted by the council pursuant to the Parking District Law of 1951 (Streets & Highways Code Section 35100 et seq.) which provides for a proposed parking district to be known as Parking District No. 1 of the City of Palm Springs. To pay the cost of acquiring property for the parking lots and to construct improvements and install parking meters, the ordinance provides that bonds shall issue in the amount of $1,400,000. It further provides that the bonds and interest thereon are not to be a debt of the City nor a charge, lien, or incumbrance, legal or equitable, on any of the City's property or upon any of its income or receipts or revenues other than the revenues to be pledged to the payment thereof. The revenue to be pledged is to be derived from the following sources: (1) revenue from parking facilities to be acquired; (2) the net revenue from street parking meters existing or to be installed within the proposed district; (3) contributions of money by the City to the district; and (4) the creation of a special fund to be supplied from future revenue from the City's sales and use taxes. The first of the three proposed methods of financing the parking district bonds are specifically enumerated in Streets and Highways Code section 35411. There is no provision in the act for the pledge of sales and use tax revenue for that purpose. Petitioner urges that such authority derives from section 35255 of the Streets and Highways Code, which reads:

> "*Additional contributions by city.* The statement of the amount of city contribution in the petition or in the resolution of intention shall not prevent the city from making additional

> contributions to the project before or after the issuance of bonds therefor and shall not prevent the city from paying all or any part of the incidental expenses in connection with the proceedings under this part."

Petitioner's theory is that if the City is empowered to make contributions "after the issuance of bonds" it has implied authority to pledge those contributions *in futuro*. Based upon this premise the City has framed its ordinance to provide that a special fund shall be established to be supplied by a pledge of future use and sales tax revenue. The respondent City Clerk refuses to publish the ordinance upon the ground it and the bonds proposed to be issued pursuant to it are and will be invalid upon two grounds: first, "That the proposed ordinance and subsequent bond issue will violate the constitutional limitations on municipal debt contained in Article XI, Section 18 of the California State Constitution"; and second, "That the proposed ordinance and subsequent bond issue will be invalid in that they do not follow the provisions of the Parking District Law of 1951".

Petition for Writ of Mandate Proper Remedy.

[1] A question has been raised as to whether mandamus is a proper remedy. Before taking up the two objections to the ordinance raised by respondent it should be noted that mandamus is an appropriate remedy to compel respondent to publish the ordinance if it meets the requirements of the law since the acts demanded are ministerial duties. City of Walnut Creek v. Silveira, 47 Cal.2d 804, 807, 306 P.2d 453; City of Oxnard v. Dale, 45 Cal.2d 729, 731, 290 P.2d 859.

Does the Pledge of Sales and Use Tax Revenue *in Futuro* Violate Article XI Section 18 of the California Constitution?

The City proposes to pledge as a trust fund part of the City sales and use tax revenue to be received in future years. This sales and use tax revenue is to supplement the income from the operation of the parking areas to be acquired, and from the parking meters, because such income alone would be insufficient to discharge the bond payments as they are to become due. Respondent contends that a diversion of future sales and use tax revenue from the general fund of the City would violate the provisions of Article XI, Section 18 of the California Constitution which provides, insofar as pertinent here:

> "No county, city, town, township, board of education, or school district, shall incur any indebtedness or liability in any manner or for any purpose exceeding in any year the income and revenue provided for such year, without the assent of two-thirds of the qualified electors thereof, voting at an election to be held for that purpose, nor unless before or at the time of incurring such indebtedness provision shall be made for the collection of an annual tax sufficient to pay the interest on such indebtedness as it falls due, and also provision to constitute a sinking fund for the payment of the principal thereof, * * *."

The City does not propose to hold a bond election nor seek the approval of the bonds by two-thirds of the electors. Petitioner asserts that such an election is unnecessary because the sales and use tax revenues are to be pledged to a special fund and therefore Section 18, Article XI is not controlling.

Special Fund Doctrine.

[2, 3] California has long recognized the "special fund doctrine" which generally stated holds that revenue bonds or other obligations of a governmental body which are payable solely from a special fund do not violate Section 18, Article XI of the Constitution provided the governmental body is not liable to maintain the special fund out of its general fund or by tax levies should the special fund prove insufficient. This doctrine has been created by decisions of the courts and not by statute.

The California cases which have recognized and defined the doctrine in this state have placed certain limitations upon its applicability. It has been held first that the indebtedness so created must not be an indebtedness or obligation of the governmental body concerned, which in this case would be the City. This requirement has been satisfied by petitioner as the ordinance provides by section 2930:

> "*Bonds Not a Debt.* The bonds and interest thereon are not a debt of said City, nor a charge, lien or encumbrance, legal or equitable, upon any of its property or upon any of its income or receipts or revenues, other than the revenues which have been pledged to the payment thereof as herein provided."

The second requirement enunciated by the cases is that payments into the special fund beyond the current year, that is, payments *in futuro*, cannot be a charge upon the general fund. Rather, the revenue must be supplied by the agency to be benefited. In each decision upholding the special fund doctrine the payments pledged to be paid into the special fund have been from the revenue of the particular project to be benefited or the district or agency of which the project was to become a part. A review of the California cases which have recognized and defined the special fund doctrine, in relation to the source, of revenue and the project benefited, reveal the following: Ryan v. Riley, 65 Cal.App. 181, 190, 223 P. 1027. Motor Vehicle Department benefited, special fund derived from the use of highways; Shelton v. City of Los Angeles, 206 Cal. 544, 275 P. 421, Department of Water and Power benefited, the special fund provided from revenue derived from Department of Water and Power; In re California Toll Bridge Authority, 212 Cal. 298, 302, 298 P. 485. Toll Bridge Authority benefited, special fund provided from revenues collected as tolls by the Toll Bridge Authority; California Toll Bridge Authority v. Kelly, 218 Cal. 7, 13, 21 P.2d 425, special fund provided from tolls to be collected from use of particular bridge for which bonds issued; Department of Water and Power of City of Los Angeles v. Vroman, 218 Cal. 206, 22 P.2d 698, power facilities of city benefited, special fund derived from the sale or use of electric energy; Housing Authority of Los Angeles County v. Dockweiler, 14 Cal.2d 437, 460, 94 P.2d 794, improvements to Housing Authority, revenue derived from housing project and any annual contributions made by the Federal Authorities to the Housing Authority; City of Glendale v. Chapman, 108 Cal.App.2d 74, 238 P.2d 162, improvements to be made to existing water works, special funds supplied by revenue collected by water works; Board of State Harbor Commissioners for San Francisco Harbor v. Dean, 118 Cal.App.2d 628, 631, 258 P.2d 590. San Francisco harbor benefited, special fund provided from revenue derived from harbor facilities; City of Oxnard v. Dale, 45 Cal.2d 729, 732, 290 P.2d 859, sewer system benefited, special fund derived from gross revenues from the sewer system.

Prior to the decision of City of Oxnard v. Dale, supra, there had been some doubt whether the source of revenue for the special fund was restricted to the improvements for which the bonds were issued, or whether there could be a pledge of revenue from the entire facility or agency which was to be benefited. The broader view was adopted by the court and the Special Fund Doctrine in California was clarified accordingly. The rule governing the source of the special fund was delineated as follows, 45 Cal.2d at page 733, 290 P. 2d at page 861:

> "The cases in California are not entirely clear as to the extent of the operation of the special fund doctrine, and there is a conflict of authority on the subject in other states. Some of the courts in other jurisdictions have held that revenue bonds payable solely from a special fund will not be free from the constitutional limitation unless the fund is restricted to the revenues from the particular improvement which is to be constructed out of the proceeds of the bonds in question, but

under the prevailing view the doctrine may be applicable where the revenues of the entire existing system, as well as those of the proposed improvement, are pledged. See Joint Report of Committees of the American Society of Civil Engineers, the Section of Municipal Law of the American Bar Association and others (1951), 12 Ohio State L.J. 147, 182, et seq.; 38 Am. Jur. 155–156."

Petitioner contends that the Supreme Court, by its decision in City of Walnut Creek v. Silveira, 47 Cal.2d 804, 306 P.2d 453, overruled all of the prior decisions which restrict the doctrine in so far as the source of the revenue supplying the special fund is concerned. However, when construed in the light of its facts the Walnut Creek case does not overrule City of Oxnard v. Dale, supra, and the long line of cases which preceded it. The question before the court was the constitutionality of the Limited Obligation Bond Law of 1955, Gov.Code, § 43648 et seq. That act authorized cities of less than 4,000 population to issue Limited Obligation Bonds which were to be paid solely from sales and use taxes, provided the proceeds from the bonds were used for the acquisition, construction and completion of certain types of municipal improvements. The Limited Obligation Bond Law specifically made a favorable vote of two-thirds of the electors voting a prerequisite to the issuance of the bonds authorized by the act. Government Code, Sec. 43614. This is the same voting requirement contained in Section 18, Article XI of the Constitution. City of Fairfield v. Hutcheon, 33 Cal.2d 475, 477, 202 P.2d 745. Compliance with this requirement was had in the Walnut Creek case as the court said, 47 Cal.2d at page 808, 306 P.2d at page 454, "The election was duly and regularly held in the manner provided by law; two-thirds of the votes cast at the election were in favor of, and authorized the issuance of the limited obligation bonds". Thus in the Walnut Creek case the Supreme Court did not have before it the question of whether or not that portion of Section 18, Article XI which requires a favorable vote of two-thirds of the electors voting was dispensed with. It is also significant that in the Walnut Creek case, supra, 47 Cal.2d at page 813, 306 P.2d at page 457, the court as authority for its ruling cites the cases of City of Oxnard v. Dale, supra; Department of Water and Power of City of Los Angeles v. Vroman, supra; California Toll Bridge Authority v. Kelly, supra; In re California Toll Bridge Authority, supra; and Shelton v. City of Los Angeles, supra, all of which restrict the special fund doctrine to those situations where the income is derived from the agency to be benefited. Further, the court in support of its holding quotes with approval 47 Cal.2d at page 813, 306 P.2d at page 457, the following limitation enunciated in City of Oxnard v. Dale, supra: "'An obligation which is payable out of a special fund is not an "indebtedness or liability" of a governmental body within the meaning of section 18 of article XI of the Constitution if the governmental body is not required to pay the obligation from its general funds, or by exercise of its powers of taxation, should the special fund prove insufficient.'" We deem the words "not required to pay the obligation from its general funds" to be controlling. The sales and use taxes which petitioner proposes to pledge are excise taxes unrelated to the parking district, and such revenue comes within the meaning of the term "general funds". We conclude that the case of City of Walnut Creek v. Silveira, supra, does not overrule City of Oxnard v. Dale, supra, in so far as the source of revenue supplying the special fund is defined therein. Rather, it holds that revenue bonds or other obligations payable solely from a special fund established pursuant to either (1) the authority of constitutional legislation, or (2) the special fund doctrine as enunciated by the Supreme Court in City of Oxnard v. Dale, supra, do not violate Article XI, Section 18 of the Constitution. The special fund established by the ordinance before us is not authorized by the Parking District Law of 1951, nor does it meet the requirements of the special fund doctrine. Therefore, the revenue to be derived from the sales and use tax, which is an excise tax, may not be diverted from the general fund for a period beyond the particular year unless there is compliance with Section 18, Article XI of the California Constitution.

Does Article XI, Section 18 Apply Only to Property Taxes?

[4] Petitioners contend that Article XI, Section 18 is intended to apply only to property tax revenues. No authority is cited for this position. We think the reason none is cited is that section 18 uses the language "exceeding in any year the *income and revenue* provided for such year". It may be true that at the time section 18, Article XI was adopted a city or county received very little income or revenue other other than that derived from property taxes. That fact if conceded does not support an implication which would justify a restrictive interpretation of the words "income and revenue" which are clear and unambiguous. The foresight of those who framed the provision has been demonstrated during the intervening years. Cities and counties have developed into more and more complex governmental organizations offering many new and widely varying types of services. The increase in volume as well as variety of services demanded by an evolving society has added to the cost of government. Cities and counties have found it increasingly difficult to meet such costs by property tax revenue alone. Necessity has required them to devise ways of supplementing that source of income. The sales and use tax with which we are concerned is a pertinent example of such a tax. The scope of Article XI, section 18 encompasses not alone property taxes, but the other types of "income and revenue" taxes which produce revenue for the general fund.

[5] Petitioner also contends: "If the city makes reasonable provisions for its creditors, it should be permitted, in the exercise of its taxing power, to determine for what objects of public convenience and welfare its power shall be exercised and to appropriate money for those objects". We consider this argument completely irrelevant. The purpose of section 18, Article XI of the Constitution is not to interfere with the city's exercise of its discretion in determining for what objects of public convenience and welfare its power shall be exercised and for which money may be appropriated. Rather, it is designed to afford the people who are required to pay the cost of providing such objects of public convenience and welfare an opportunity to express their approval or disapproval of a long term indebtedness. The constitutional provision does not prohibit the legislative body of the city from spending any or all of its current income for whatever it deems to be proper or necessary objects of public convenience or welfare. It simply provides that the legislative body may not encumber the general funds of the city beyond the year's income without first securing the consent of two-thirds of the electorate.

Do the Ordinance and Proposed Bond Issue Violate the Parking District Law of 1951?

[6, 7] The answer to this, respondent's second objection, is largely answered by the discussion of respondent's first objection. Petitioner relies on section 35255 of the Streets and Highways Code which permits the city council to make contributions after the issuance of the bonds as its authority for pledging future sales and use tax revenue. If this section is interpreted as petitioner contends it would impute to the legislature an intent to enact legislation which contravenes Article XI, Section 18 of the Constitution. This would be contrary to settled judicial principles which require an interpretation of legislation consonant with constitutionality. Shealor v. City of Lodi, 23 Cal.2d 647, 653, 145 P.2d 574. Therefore, we conclude that section 35255 does not authorize a pledge or a diversion of future revenue from the general fund.

Respondent raises additional questions concerning the adequacy of the petition which was circulated preparatory to forming the district. We deem it unnecessary to discuss those questions in view of the holding that the ordinance and proposed bonds are invalid.

Writ denied.

GRIFFIN, P. J., and MUSSELL, J., concur.

169 Cal.App.2d 256

EMBREE URANIUM COMPANY, a limited partnership, Plaintiff,

v.

Frank LIEBEL, Virgil Liebel, Evert Beatty, Alberta Beatty, Louis Mannatt, Bonnie Mannatt, Defendants.

EMBREE URANIUM COMPANY, a limited partnership, Plaintiff and Appellant,

v.

Frank LIEBEL, Virgil Liebel, Evert Beatty, Alberta Beatty, Louis Mannatt and Bonnie Mannatt, Defendants and Respondents,

Pauline M. McNally and Thomas B. Washburn, Third Party Claimants and Respondents.

Civ. 5664.

District Court of Appeal, Fourth District, California.

March 30, 1959.

Proceeding involving claims under chattel mortgages on automobiles upon which execution was levied by sheriff under judgment against mortgagor. The Superior Court, Kern County, Norman F. Main, J., upheld third party claims, and appeal was taken. The District Court of Appeal, Shepard, J., held that where notes with appended information and certificates of registration with motor vehicle department gave names of mortgagor, names of mortgagees and dates of mortgages, amounts of indebtedness, identity of property given as security and fact that it was given as security, chattel mortgages were not invalid on ground that there was insufficient compliance with section of Civil Code relating to form and mortgages were not void as against judgment creditor.

Affirmed.

1. Appeal and Error 🔑82(5)

Where judgment creditor levied upon judgment debtor's property and third party claims alleging prior right under chattel mortgages on two of debtor's automobiles were filed, judgments entered pursuant to trial court's findings for third party claimants and against judgment creditor on each of third party claims were orders directly bearing on and affecting the enforcement of the judgment and were appealable under statute to effect that an appeal may be taken from any special order made after final judgment. West's Ann.Vehicle Code, §§ 195–198; West's Ann.Code Civ.Proc. §§ 689b, 963.

2. Appeal and Error 🔑83

Execution 🔑201, 204

In statute to effect that judgment determining validity of claim filed with officer levying on personal property "shall be conclusive between claimant and plaintiff" purpose of quoted words was to lend order the dignity of a judgment, which, when final, would be conclusive as between contending title claimants, and would enable successful party receiving judgment to set up plea of res judicata to any new action on that particular matter and an appeal lies from such judgment especially in view of statute to effect that an appeal may be taken from a final judgment entered in an action or special proceeding. West's Ann.Code Civ. Proc. §§ 689b, 963; West's Ann.Civ.Code, § 2956.

3. Chattel Mortgages 🔑43

Where notes with appended information and certificates of registration with motor vehicle department gave names of mortgagor, names of mortgagees and dates of mortgages, amounts of indebtedness, identity of property given as security and fact that it was given as security, chattel mortgages were not invalid on ground that there was insufficient compliance with section of Civil Code relating to form and mortgages were not void as against judgment creditor who obtained levy of execution against mortgaged property. West's Ann.Vehicle Code, § 198; West's Ann.Civ. Code, §§ 2956, 3440.

4. Chattel Mortgages ⚷43

In view of fact that registration of motor vehicle is an integral part of process of giving notice to world of existence of a chattel mortgage, both documents must be looked to for sum total of information required. West's Ann.Vehicle Code, § 198.

5. Chattel Mortgages ⚷186

If mortgage follows procedure set up by law it is sufficient under statute excepting mortgages allowed by law from statute to effect that every transfer of and lien on personal property made by person having possession of property and not accompanied by immediate delivery is conclusively presumed fraudulent as against transferor's creditors while he remains in possession. West's Ann.Civ.Code, § 3440.

6. Execution ⚷196

In proceeding involving claims under chattel mortgages on automobiles upon which execution was levied by sheriff under judgment against mortgagor, question of actual good faith by mortgagor and mortgagees was one of fact for trial court. West's Ann.Vehicle Code, §§ 195–198.

7. Execution ⚷202

In view of fact that no findings were required in summary proceedings involving claims under chattel mortgages on automobiles upon which execution was levied by sheriff under judgment against mortgagor, reviewing court was compelled to assume that trial court made all findings necessary to support its judgment for claimants and that, therefore, trial court found that all of acts of third party claimants in acquisition of mortgages and transfer of title were done in good faith. West's Ann.Vehicle Code, §§ 195–198.

8. Constitutional Law ⚷70(3)

If there be need for restoration of any of former protections to creditors or subsequent encumbrancers of automobile subject to chattel mortgages, such as affidavits of good faith, local recordation, due dates, interest or other details, such matters are for legislative and not judicial consideration. West's Ann.Vehicle Code, §§ 195–198.

◆

Di Giorgio & Davis, Bakersfield, for appellant.

Mack, Bianco, King & Eyherabide, Bakersfield, for respondents.

SHEPARD, Justice.

Plaintiff here recovered a judgment for $40,000 against defendant (appeal decided by this court May 26, 1958, [160 Cal.App. 2d 827, 325 P.2d 516]). Under said judgment, execution was levied by the sheriff on a 1959 Mercury sedan automobile and on a 1955 Ford sedan automobile. Respondent Pauline M. McNally filed with the sheriff her third party claim alleging a prior right under a chattel mortgage on the Mercury. Respondent Thomas B. Washburn filed with the sheriff his third party claim alleging a prior right under another chattel mortgage.

The chattel mortgage alleged by McNally is in the form of a promissory note dated March 17, 1956. After the usual promissory note terminology and on the lower left-hand corner of the same paper is contained the following words:

" { stock feed
cash
"Note: for, money & value
on 1955 Merc
Engine No. 55LA10553M
License 2 U 48896".

That the certificate of registration of the automobile described on the face of the note was duly deposited with the Department of Motor Vehicles, and that a certificate of ownership was issued showing McNally as legal owner in accordance with the provisions of Sections 195–198 of the Vehicle Code, is not in dispute.

The chattel mortgage alleged by Washburn is also in the form of a promissory note, dated March 15, 1956, and it also, following the ordinary words of a promissory note, contains the following sentence:

> "This note is payable on demand and is secured by Ford Fairlane Town Sedan, Eng. No. 45RT116643 Lic FDJ 909."

In the case of the Washburn chattel mortgage also there is no dispute that the certificate of ownership was duly deposited with the Department of Motor Vehicles, and Washburn was also duly registered as the legal owner of the automobile herein last above described.

The trial court found for the third party claimants and against plaintiff on each of the third party claims, and plaintiff appeals from the judgments entered pursuant thereto.

Respondents contend that appellant had no right of appeal because the statute relating to trial of third party claims (Code Civ.Proc., Sec. 689b) says that the "judgment determining the validity of the claim * * * shall be conclusive between the claimant and the plaintiff." Neither party cites any precedent from a court of last resort interpreting this phase of the section. Nor have we been able by our own research to discover any.

[1, 2] The provision of said Section 689b respecting summary trial of third party claims thereunder was inserted in substantially the form in which it now appears at the time said Section 689b was rewritten by the legislature in 1953. Section 963 of the Code of Civil Procedure provides that:

> "An appeal may be taken * * *
>
> "1. From a final judgment entered in an action, or special proceeding, * * *
>
> "2. * * * from any special order made after final judgment * * *".

In our view, this was an order directly bearing on and affecting the enforcement of the judgment. Kaufman v. Brown, 106 Cal.App.2d 686, 689(2), 235 P.2d 632; Lande v. Southern Cal. Freight Lines, 78 Cal.App.2d 417, 419(1), 177 P.2d 936. We are satisfied that the legislative purpose in the use of the words "shall be conclusive between the claimant and the plaintiff" was to lend to this order the dignity of a judgment, which, when final, would be conclusive as between the contending title claimants, and would enable the successful party receiving such judgment to set up the plea of res judicata to any new action on that particular matter. Cutting off an appeal on matters of this kind would, in many instances, have exceedingly serious consequences for either plaintiff or claimant, and it is our opinion that had the legislature entertained any such intention it would have said so in direct terms. The legislature uses the term "judgment" in describing this procedure. It is our opinion that an appeal does lie from such a judgment, and that it is perfectly reasonable to rest the authority therefor on the words "from a final judgment entered in an action, or special proceeding."

Appellant contends on this appeal that the alleged chattel mortgages are invalid because there was insufficient compliance with the provisions of Civil Code, Section 2956, relating to form and that, therefore, the contended mortgage is void as against creditors and in particular as against plaintiff's execution levied herein.

Respondents contend that the enactment of Vehicle Code, Sections 195 to 198, as they now appear, provide an exclusive method of giving constructive notice of the existence of a chattel mortgage; that since Vehicle Code, Section 198 provides that the execution of such chattel mortgages need not be acknowledged, proved or certified, and explicitly accepts such chattel mortgages from the provisions of

Civil Code Sections 2957, 2959a, 2965 and 2966, Civil Code Section 2956 is a mere directory expression as to chattel mortgages on motor vehicles. Respondents further call attention, in this connection, to the fact that there are no longer any penalty provisions or statements of invalidity connected with the forms set up in said Section 2956, as far as motor vehicles are concerned.

Appellant cites, in support of its contention that Civil Code, Section 2956 should be applied in literal and strict form and that failure to comply therewith invalidates any attempted chattel mortgage as against creditors, such cases as Cardenas v. Miller, 108 Cal. 250, 39 P. 783, 41 P. 472 (holding an unrecorded chattel mortgage invalid against creditors and that the term "good faith" does not apply to creditors); Kahriman v. Jones, 203 Cal. 254, 263 P. 537 holding that the then legislative intent required strict construction and ruling invalid a chattel mortgage lacking due dates), while respondents cite in support of their contention for a rule of substantial compliance such cases as Bush v. Bank of America, etc., Ass'n, 1 Cal.App.2d 588, 37 P.2d 168 (ruling that a defective compliance with chattel mortgage procedure nevertheless sufficient as against subsequent encumbrances with actual knowledge) and Pacific States Savings & Loan Co. v. Strobeck, 139 Cal.App. 427, 33 P.2d 1063, 1066, (ruling that a chattel mortgage otherwise sufficient is not vitiated by the lack of a date nor because it is in form an assignment for bill of sale).

These and other authorities are of little value in the face of statutory changes that have occurred since they were rendered. Vehicle Code, Section 198, as amended in 1951, reads as follows:

> "The method provided in this chapter for giving constructive notice of a chattel mortgage on a vehicle registered hereunder is exclusive, the execution of such chattel mortgage need not be acknowledged or proved and certified, and any such chattel mortgage is excepted from the provisions of Sections 2957, 2959a, 2965 and 2966 of the Civil Code."

In Pacific States Savings & Loan Co. v. Strobeck, supra, the court said: "Generally speaking, statutory requirements are substantially complied with when everything prescribed by them which can affect substantial rights has been complied with", cited with approval in Crofts and Anderson v. H. L. Petersen Const. Co., 130 Cal.App.2d 790, 793, 279 P.2d 828.

[3, 4] The need for acknowledgment, proof and certification has been dispensed with by said Vehicle Code, Section 198. Civil Code, Section 2956 has by its latest amendment eliminated the necessity for interest rates and due dates. The new method of registration under said Vehicle Code Section 198 is now the sole method of giving constructive notice. From an examination of the two documents involved in each case, to wit, the note with its appended information and the certificate of registration with the Motor Vehicle Department, the whole intent of mortgage security of the indebtedness evidenced by each note is perfectly apparent with the names of the mortgagors, the names of the mortgagees and the date of the mortgage, the amount of the indebtedness, the identity of the property given as security, and the fact that it is given as security. Since the registration of the vehicle is now an integral part of the process of giving notice to the world of the existence of a chattel mortgage, it is our opinion that both documents must be looked to for the sum total of the information required.

[5] Civil Code, Section 3440 makes no requirement whatever as to form. It merely refers to "mortgages allowed by law". If the mortgage follows the procedures set up by law it is sufficient under said section 3440.

[6, 7] Of course, the question of actual good faith by the mortgagor and mortgagee was one of fact for the trial court. Since no findings are required in the summary proceedings here involved we are compelled to assume that the trial court made

all findings necessary to support its judgment and that, therefore, it found that all of the acts of the third party claimants in the acquisition of the mortgage and transfer of title were done in good faith.

[8] If there be need for restoration of any of the former protections to creditors or subsequent encumbrancers, such as affidavits of good faith, local recordation, due dates, interest or other details, such matters are for legislative and not judicial consideration.

The judgments are affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

168 Cal.App.2d 365

Kurtz A. DECKER, Plaintiff and Respondent,

v.

S. H. KRESS COMPANY et al., Defendants and Appellants.

No. 18042.

District Court of Appeal, First District, Division 2, California.

April 3, 1959.

Action against proprietor of store for personal injuries sustained by plaintiff as result of fall in store. From adverse judgment of the Superior Court, City and County of San Francisco, Raymond J. Arata, J., the proprietor appealed. The District Court of Appeal, 335 P.2d 952, reversed. On petition for rehearing, the District Court of Appeal held that evidence on appeal must be construed most favorably to party prevailing in lower court.

Petition denied.

Appeal and Error 🔑930(1)

Evidence on appeal must be construed most favorably to party prevailing in lower court.

O'Connor, Moran, Cohn & Hall, San Francisco, for appellant.

Allan L. Sapiro, Bergen Van Brunt, San Francisco, for respondent Decker.

Boyd & Taylor, San Francisco, for respondent Pacific Indemnity Co.

PER CURIAM.

On petition for rehearing it is pointed out that while on his deposition respondent testified that he unplugged and plugged in the cord, on the trial he denied having done so. Since the evidence on appeal must be construed most favorably to respondent the references in the opinion to respondent having plugged in the cord were improper. We do not regard this fact as vital to our decision, which was based on the obviousness of whatever danger inhered in the cord lying openly on the floor and the ease with which respondent could have obviated this plainly visible condition when the loudspeaker was not in use.

The petition for rehearing is denied.

169 Cal.App.2d 179

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Donald C. PATTERSON, Defendant and Appellant.

Cr. 6282.

District Court of Appeal, Second District, Division 2, California.

March 27, 1959.

Hearing Denied May 20, 1959.

Prosecution for furnishing a minor with marijuana cigarettes. From adverse judgment of the Superior Court, Los Angeles County, Clement D. Nye, J., and from an order denying motion for new trial, the defendant appealed. The District Court of Appeal, Fox, P. J., held that court did not err in permitting police official, who had special training in field of narcotics and extensive experience over a period of years with narcotic users and effect of smoking marijuana cigarettes upon the user, to testify as to effect of smoking marijuana cigarettes and to express opinion that cigarette smoked by minor was a marijuana cigarette.

Judgment and order affirmed.

1. Criminal Law ⚷478(1)

In prosecution for furnishing a minor with marijuana cigarettes, court did not err in permitting police official, who had special training in field of narcotics and extensive experience over a period of years with narcotic users and effect of smoking marijuana cigarettes upon user, to testify to effect of smoking marijuana cigarettes and to express opinion that cigarette smoked by minor was a marijuana cigarette. West's Ann.Health & Safety Code, § 11714.

2. Criminal Law ⚷486

In prosecution for furnishing a minor with marijuana cigarettes, expert opinion of police officer, who had special training in field of narcotics and extensive experience over a period of years with narcotic users and effect of smoking marijuana cigarettes upon the user, had a proper foundation when alleged defect in hypothetical question had been supplied by defendant's own cross-examination of officer concerning effects of dexamil spansules which had been taken earlier in evening by minor. West's Ann.Health & Safety Code, § 11714.

3. Criminal Law ⚷470

In prosecution for furnishing a minor with marijuana cigarettes, testimony of police officer, who had special training in field of narcotics and extensive experience with narcotic users and effect of smoking marijuana cigarettes upon user, concerning technique of making such cigarettes, their size as compared to an ordinary cigarette, manner of smoking, odor therefrom and expressing his opinion that cigarette smoked by minor was a marijuana cigarette, did not invade province of jury. West's Ann. Health & Safety Code, § 11714.

4. Criminal Law ⚷351(8)

In prosecution for furnishing a minor with marijuana cigarettes, effort by defendant to get another person who had also smoked marijuana cigarettes at same time to testify falsely indicated a consciousness of guilt. West's Ann.Health & Safety Code, § 11714.

5. Poisons ⚷9

Evidence was sufficient to sustain conviction for furnishing a minor with marijuana cigarettes. West's Ann.Health & Safety Code, § 11714.

6. Jury ⚷149

In prosecution for furnishing a minor with marijuana cigarettes, court did not err in proceeding with trial upon excusing a juror who became ill after jury had begun its deliberations when the trial was continued with remaining 11 jurors by stipulation of counsel and defendant personally. West's Ann.Health & Safety Code, § 11714; West's Ann.Const. art. 1, § 7; West's Ann. Pen.Code, § 1123.

7. Jury ⚷29(5)

Under section of Constitution providing that a trial by jury may be waived in all criminal cases by consent of both parties expressed in open court, defendant and his counsel can consent to a trial by 11 jurors, and court has jurisdiction to pronounce judgment on such a jury's verdict. West's Ann.Const. art. 1, § 7; West's Ann. Pen.Code, § 1123.

8. Jury ⚷149

Statute providing for discharge of entire jury where a juror becomes ill or otherwise unable to perform his duty and no alternative juror is available is not mandatory, and such provision can be waived. West's Ann.Pen.Code, § 1123.

9. Criminal Law ⚷938(1), 1156(3)

Granting of motion for new trial on ground of newly discovered evidence rests in sound discretion of trial court, and reviewing court will not interfere except upon a clear showing of an abuse of such discretion.

10. Criminal Law ⚷939(1)

In order to secure a new trial on ground of newly discovered evidence it must appear, among other things, that party could not with reasonable diligence have discovered and produced it at the trial.

11. Criminal Law ⚷939(1)

In prosecution for furnishing a minor with marijuana cigarettes, defendant was not entitled to new trial on ground of newly discovered evidence when persons from which such evidence was to come were in daily attendance at trial and conferred with defendant during course of trial. West's Ann.Health & Safety Code, § 11714.

Morris Lavine, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Norman H. Sokolow, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

A jury found defendant guilty of violating Health and Safety Code, section 11714 in that he unlawfully furnished a narcotic (marijuana) to Lois Mae Aleshire, a minor. He has appealed from the judgment and from the order denying his motion for a new trial.

Viewed in the light most favorable to the party successful in the trial court (see People v. Caritativo, 46 Cal.2d 68, 70, 292 P.2d 513), the following is a summary of the pertinent facts: On July 27, 1957, Miss Aleshire, then 16 years of age, accompanied Bob Jones and a boy named Allen to the home of a girl named Linda, in the Echo Park district of Los Angeles. They arrived around midnight. There were a number of people at Linda's home. While Miss Aleshire was with Bob Jones, talking with some other people, defendant inquired of her whether she and Bob wanted to "toke up," which she understood to mean smoke marijuana. If so, defendant advised them to go downstairs to the bedroom. She and Bob went on downstairs as suggested by defendant; he followed them shortly. When he came into the bedroom he produced a cigarette, lit it and handed it to Miss Aleshire. She took a puff and then handed it to Bob. The cigarette was then rotated among the three, who were the only persons in the room. When the cigarette was almost consumed, defendant took the back of a match box and rolled it until it was round, making a kind of cigarette holder out of it. This is called a "crutch." Then defendant put the remainder of the cigarette into this crutch and the three of them continued to smoke it until it was entirely consumed. Miss Aleshire had four or five puffs or drags on this cigarette.

The cigarette was shorter and smaller in diameter than an ordinary cigarette. It was firmly wrapped and "tucked in" at both ends. Before the cigarette was smoked it was uncapped; that is, one end of the cigarette was squeezed until the tucked in part came out. The cigarette made a popping noise when it was being smoked, as there was a seed in it; it smelled like burning leaves. Approximately a half hour later another such cigarette was produced and lit by defendant and was smoked. While smoking the cigarette and for some period thereafter Miss Aleshire experienced certain physical sensations: her head felt big and her throat and mouth felt dry; later she became thirsty; she was happy and laughing. These sensations lasted about an hour and a half. After the expiration of that period she felt sleepy, and became hungry, because she "was smoking marijuana." Her happy feeling had disappeared; she was tired and wanted to go home and go to bed.

Prior to this incident Miss Aleshire had smoked this type of cigarette some 10 or 15 times. Smoking such cigarettes, she said, makes you "feel like you're up on clouds." These cigarettes are about 2½ inches long and burn faster than the ordinary type. She had rolled some of these cigarettes herself on prior occasions; she knew what a "crutch" for smoking marijuana was, and was familiar with other jargon of users.

Officer Edwin O. Hall, of the Los Angeles Police Department, who had had special training in the field of narcotics and extensive experience over a period of years with narcotic users and the effect of smoking marijuana cigarettes upon the user, gave testimony relative to the technique of making such cigarettes, their size as compared to an ordinary cigarette, and the manner of smoking and the odor therefrom. In response to hypothetical questions based on the testimony of Miss Aleshire, Officer Hall expressed the opinion that the cigarette Miss Aleshire smoked on the occasion in question was a marijuana cigarette.

While defendant admitted attending the party at Linda's home on July 29th, and that Bob Jones, whom he talked to briefly, arrived around midnight, he did not remember seeing Miss Aleshire there, and denied furnishing her with a marijuana cigarette, or that he had ever seen her smoking marijuana. He denied having gone downstairs to the bedroom that night. He recalled that "Linda was at the top of the stairs keeping everyone from downstairs because of the baby being asleep down there" and that the baby was a light sleeper. Defendant admitted that he had contacted Robert Jones some four or five days prior to the trial, at which time he asked him to testify that he was not present at the party on July 29th.

In rebuttal, Jones testified that he had known defendant for some nine months; that he took Miss Aleshire to the party at Linda's home on July 29th; that another boy named Allen was with them; that they arrived around midnight; that Miss Aleshire, defendant and the witness went downstairs to a bedroom where defendant produced the cigarette in question, lighted it, took one or two puffs and handed it to Miss Aleshire, who took some puffs, and that two or three cigarettes of this same type were smoked downstairs that night. Jones further testified that defendant contacted him two or three days before the trial and requested him to testify in the negative as to whether Jones was downstairs; whether he was ever given any marijuana by defendant; and as to any question which would implicate defendant.

During the course of deliberations of the jury, one of the jurors became ill. This juror was excused by the court. "By stipulation of counsel and the defendant personally," the trial continued with the remaining eleven jurors resuming deliberations and ultimately rendering a verdict of guilty.

Three affidavits based on asserted newly discovered evidence were submitted in support of the motion for a new trial. These were signed by defendant, Robert and Carol Lee Tuttle, and Stewart and Cathy Bernstein.

Stewart Bernstein testified during the course of the hearing on the motion that he was present at the party at Linda's home on July 29th, as was his wife Cathy. According to their affidavit, Cathy became ill sometime before midnight and went downstairs to Linda's bedroom to lie down; that she was accompanied by her husband, Stewart; that they remained in the bedroom until the party broke up at approximately 2:00 a. m.; that there was only one bedroom downstairs and that they occupied that bedroom without anyone else being present, and that neither Miss Aleshire, Bob Jones, nor defendant entered said bedroom during that evening. At the hearing Stewart testified that he was a friend of defendant's, having known him prior to the party; that he heard about defendant's arrest and the reason therefor from several sources prior to Christmas 1957. (The trial started on January 29, 1958.) He further testified that he had seen Linda after having heard of defendant's arrest and that he discussed with her, casually, the reasons for the arrest.

At the hearing on the motion for new trial, Officer Hathaway, of the Los Angeles Police Department, testified that Robert and Carol Lee Tuttle were present in the courtroom every day during defendant's trial; that they also talked with the defendant during the trial. After receiving this evidence and hearing argument, the court denied defendant's motion for a new trial.

[1] In arguing that the evidence is insufficient to support the verdict and judgment, defendant also argues that the court erred in receiving evidence from Officer Hall on the effect of smoking marijuana cigarettes; that no proper foundation was laid for his opinion that the cigarette Miss Aleshire smoked on this occasion was a marijuana cigarette; and that in any event the officer's opinion on this question invaded the province of the jury.

We shall first consider defendant's contention that the court erred in permitting Officer Hall to testify as to the effect of smoking marijuana and to express the opinion that the cigarette Miss Aleshire smoked at the party in question was a marijuana cigarette. Defendant argues no proper foundation was laid; that is to say, that the officer was not qualified to give an expert opinion on these matters. This same problem was raised in People v. Flynn, 166 Cal. App.2d 501, 333 P.2d 37, with respect to this particular officer. In the Flynn case, as here, defendant was charged with furnishing a minor with marijuana cigarettes which the quartette, including the minor, smoked. In the Flynn case, Presiding Justice White detailed the background, training and experience of Officer Hall (166 Cal. App.2d at page 506, 333 P.2d at page 41), which is substantially the same as that in the instant record; analyzed the principles relating to the qualifications and the opinion testimony of an expert witness; reviewed the applicable authorities and concluded: "* * * we are satisfied from the testimony given by Officer Hall * * * that he had a thorough knowledge of marijuana * * * gained through experience in interviewing addicts and study, not possessed by the average man. He thus qualified as an expert and as such his opinion was properly received." 166 Cal.App.2d at page 506, 333 P.2d at page 41. We are in accord with this conclusion. See People v. Winston, 46 Cal.2d 151, 155, 293 P.2d 40; People v. Barbera, 50 Cal.2d 688, 691, 328 P.2d 973; People v. Rios, 127 Cal.App.2d 620, 621, 274 P.2d 163.

[2] Defendant argues, however, that Hall's expert testimony, based on a hypothetical question,[1] was not properly received because it did not take into account the effect upon Miss Aleshire of two dexamil spansules she had taken earlier that evening. The record reveals, however, that defendant's trial counsel, upon cross-examination of Hall, fully explored the reactions produced by taking dexamil[2] and their comparison with the effects of smoking marijuana. Therefore, that which was assertedly improperly omitted from the People's hypothetical question was adequately covered by the defendant's cross-examination of Hall. It is thus apparent that there was little or no chance of the jury being misled by Hall's opinion-response to the People's hypothetical question.

[3] We turn to defendant's contention that Officer Hall's expert testimony invaded the province of the jury. The controlling principle on this question is thus stated in People v. Wilson, 25 Cal.2d 341, at page 349, 153 P.2d 720, at page 725: "There is no hard and fast rule that the expert cannot be asked a question that coincides with

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[1] Officer Hall was asked: "Assume for a minute that a person has smoked a cigarette and that either while smoking that cigarette or shortly thereafter that person feels the following sensation: That person's head feels large, the person's throat feels dry and the person is thirsty, that this sensation lasts for about an hour and a half, and that at that time, at the end of the hour and a half, that person then feels sleepy and wants to eat a lot and no longer feels happy in contrast to a happy feeling during the hour and a half. Do you have any opinion as to what type of cigarette that person smoked to get those effects?" Defendant's objection to this question on the ground that it did not contain all of the evidence was overruled.

[2] Although defendant objected to Hall's being permitted to testify as an expert with respect to marijuana, he did not, however, raise any such objection respecting Hall's testimony pertaining to the effects of dexamil. In fact, it was defendant himself who asked these questions.

the ultimate issue in the case. 'We think the true rule is that admissibility depends on the nature of the issue and the circumstances of the case, there being a large element of judicial discretion involved. * * * Oftentimes an opinion may be received on a simple ultimate issue, even when it is the sole one, as for example where the issue is the value of an article, or the sanity of a person; because it cannot be further simplified and cannot be fully tried without hearing opinions from those in better position to form them than the jury can be placed in.'" We are here dealing with a problem with which the average person is not well informed. It could not be further broken down or simplified. The expert was in a much better position to form an opinion as to the contents of the cigarette than the jury because, as pointed out in People v. Flynn, supra, 166 Cal.App.2d at page 509, 333 P.2d at page 41, "he had a thorough knowledge of marijuana * * * not possessed by the average man." There was clearly no error in receiving the expert opinion of Officer Hall that the cigarette Miss Aleshire smoked was a marijuana cigarette. People v. Flynn, supra.

[4, 5] We shall now consider defendant's argument that the evidence is insufficient to support the judgment. The testimony of Miss Aleshire and Bob Jones adequately established the fact that defendant provided the cigarette in question, lighted it, and handed it to Miss Aleshire, who took several drags on it. The testimony of Miss Aleshire that she "was smoking marijuana," in light of her familiarity with such contraband (see People v. Candalaria, 121 Cal.App.2d 686, 690, 264 P.2d 71), her description of the sensations and effects of smoking the cigarette and the expert's opinion, based thereon, that it was a marijuana cigarette support an inference that it was in fact marijuana. Finally, on this phase of the case, does the evidence justify an inference that defendant knew this was a marijuana cigarette? In our opinion it does. The withdrawal of defendant, Miss Aleshire and Jones from the other members of the party in order to smoke this cigarette, is not without significance, as is defendant's familiarity with the jargon of marijuana smokers and the mechanical technique by which a cigarette can be completely consumed. The statements and conduct of the defendant, as testified to by Miss Aleshire, indicate defendant knew this was marijuana. Defendant's effort to get Jones to testify falsely indicates a consciousness of guilt. People v. Moore, 70 Cal.App.2d 158, 163, 160 P.2d 857. When all these facts are considered, they "justify the inference of guilt" (People v. Deysher, 2 Cal.2d 141, 149, 40 P.2d 259, 263,) drawn by the jury. Therefore it cannot be said that the evidence is insufficient as a matter of law to sustain the conviction. People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

[6] Defendant contends that the court erred in proceeding with the trial upon excusing a juror who became ill after the jury had begun its deliberations. He argues that neither he nor his counsel could waive the right to a single juror after deliberations had started, and that by the discharge of this juror he was in jeopardy. We find no merit in this contention.

[7] It will be recalled that upon one of the jurors becoming ill and being excused by the court the trial continued and the remaining eleven jurors resumed their deliberations "by stipulation of counsel and the defendant personally * * *." California Constitution, Article I, section 7, provides that a trial by jury may be waived in all criminal cases by the consent of both parties, expressed in open court by the defendant and his counsel. Our courts have held that pursuant to this provision a defendant and his counsel can consent to a trial by eleven jurors, and that the court has jurisdiction to pronounce judgment on such a jury's verdict. People v. Clark, 24 Cal.App.2d 302, 74 P.2d 1070; hearing denied; certiorari denied 304 U.S. 574, 58 S.Ct. 1049, 82 L.Ed. 1538. In holding the waiver effective and the verdict valid, the court stated (24 Cal.App.2d at page 304, 74 P.2d at page 1071): "* * * The defendant was authorized by article I, § 7, of the Cal-

ifornia Constitution to, and did in open court formally waive the absence of the twelfth juror, consenting to be tried by the remaining eleven jurors. That procedure did not divest the court of jurisdiction to pronounce judgment. There is no sound reason why a defendant may not waive a part of a jury since the constitutional provision authorizes him to waive the entire jury."

[8] Defendant calls attention to Penal Code, section 1123, which provides for the discharge of the entire jury where a juror becomes ill or otherwise unable to perform his duty and there is no alternative juror available, and argues that such provision is mandatory and cannot be waived by the defendant. The settled law, however, is contrary to the defendant's position. In People v. Williams, 128 Cal.App.2d 458, 465, 275 P.2d 513, 517, the court held that section 1123 is not mandatory and that "this provision may be waived." The fact that the jury had retired to deliberate when one of the jurors became ill and was excused should have no effect whatever upon the application of the foregoing principle. There is no sound reason why a defendant may not waive the participation of a juror in the deliberations of that body just as he may waive the absence of a juror during the course of taking testimony.

[9, 10] There is no merit in defendant's contention that the court abused its discretion in denying defendant's motion for a new trial. The basic rule is stated in People v. Greenwood, 47 Cal.2d 819, at page 821, 306 P.2d 427, at page 429: "The granting or denial of a motion for a new trial on the ground of newly discovered evidence rests in the sound discretion of the trial court" and that an appellate court will not interfere except upon a clear showing of an abuse of such discretion. In order to secure a new trial on the ground of newly discovered evidence it must appear, inter alia, that "* * * the party could not with reasonable diligence have discovered and produced it at the trial." People v. Sheran, 49 Cal.2d 101, 111, 315 P.2d 511.

[11] The principle in the Sheran case disposes of any claim for a new trial based on the affidavit of Robert and Carol Lee Tuttle for the reason that the testimony at the hearing on the motion for new trial disclosed that these parties were in daily attendance at the trial and conferred with defendant during the course of the trial. The testimony of Stewart Bernstein on this hearing was such as to lack persuasiveness. The trial judge may well have disbelieved the affidavit of Bernstein and his wife. The trial judge simply exercised his judicial discretion in denying defendant's motion for a new trial. There is no indication that he in any way abused that discretion.

Judgment and order affirmed.

ASHBURN and HERNDON, JJ., concur.

169 Cal.App.2d 261

Theodore J. CURPHEY, Petitioner,
v.
SUPERIOR COURT of the State of California, IN AND FOR THE COUNTY OF LOS ANGELES, Respondent.
Civ. 23739.

District Court of Appeal, Second District, Division 1, California.

March 31, 1959.

Hearing Denied May 27, 1959.

Proceeding on petition for a writ of prohibition to restrain a Superior Court from trying petitioner upon an accusation returned by a grand jury of the county charging him with willful and corrupt misconduct in office. The District Court of Appeal, Nourse, J. pro tem., held that the duly appointed coroner of the County of Los Angeles, as an appointed classified civil service officer of the county, was not subject to removal from office under an accusation filed by the grand jury pursuant to the Government Code, but proceedings for his removal could be had only pursuant to the charter of the county under which he was appointed.

Writ issued as prayed for.

1. Counties ⚷62, 67

The manner of appointment or removal of a county officer is not a matter of statewide concern but of local concern, and control over it, by the Constitution, has been placed under the control of the county involved, under its charter. West's Ann. Const. art. 11, § 7½.

2. Municipal Corporations ⚷79

Provisions of a freeholder's charter, granted a city pursuant to the Constitution, relative to the removal or discharge of an appointed or classified officer of the city supersedes general laws relative to removal of such an officer upon accusation by a grand jury. West's Ann.Const. art. 11, §§ 8, 8½.

3 Officers ⚷69.1

Local, classified civil service officers in a county which has been granted a freeholder's charter may not be removed either by action of a grand jury or by proceedings had under the charter, but may be removed only by proceedings had under the charter. West's Ann.Gov.Code, §§ 3060–3070; West's Ann.Const. art. 11, § 7½; art. 20, § 16.

4. Officers ⚷69.4

The duly appointed coroner of the County of Los Angeles, as an appointed classified civil service officer of the county, was not subject to removal from office under an accusation filed by the grand jury pursuant to the Government Code, but proceedings for his removal could be had only pursuant to the charter of the county under which he was appointed. West's Ann.Gov.Code, §§ 3060–3070; West's Ann. Const. art. 11, § 7½; art. 20, § 16.

◆

Joseph A. Ball, Long Beach, and Frederick O. Field, Los Angeles, for petitioner.

William B. McKesson, Dist. Atty., Los Angeles, for real party in interest.

Harold W. Kennedy, County Counsel, Los Angeles, for respondent.

NOURSE, Justice pro tem.

Petitioner, the duly appointed coroner of the County of Los Angeles and an officer in the classified civil service under the charter of the county, seeks a writ of prohibition to restrain the respondent court from trying him upon an accusation returned by the grand jury of the county under section 3060 of the Government Code, charging him with wilful and corrupt misconduct in office.

There is but one question presented by the petition and the answer thereto, to-wit: Is an appointed classified civil service officer of the County of Los Angeles subject to removal from office under an accusation filed by the grand jury pursuant to section 3060 of the Government Code? If the answer to this question is in the negative, the respondent court does not have jurisdiction to try the petitioner upon the accusation returned by the grand jury. We have reached the conclusion that the answer to the question must be in the negative.

It is undisputed that petitioner is an officer of the county, appointed to his office under the provisions of the county's charter and is subject to discharge or reduction in rank in the manner provided for by the charter.

It is respondent's contention that petitioner as an officer of the county is subject to the provisions of sections 3060 and 3070 of the Government Code and that he may be removed from office by proceedings had under those sections or by proceedings had in accordance with the provisions of the charter. On the other hand appellant contends that the charter has superseded the general law and specifically the provisions of sections 3060–3070 of the Government Code and that the petitioner may only be removed in accordance with the terms of the charter.

The solution to this question depends upon the construction placed upon section

7½, article XI, of the Constitution of this state.

So far as pertinent here, section 7½ of article XI reads as follows:

> "Any county may frame a charter for its own government consistent with and subject to the Constitution * * * and relating to matters authorized by provisions of the Constitution, * * *
>
> "If a majority of said qualified electors, * * * shall vote in favor of such proposed charter, it shall be deemed to be ratified, and shall be forthwith submitted to the Legislature, * * * for its approval or rejection as a whole, * * * if approved by a majority vote of the members elected to each house, such charter shall become the charter of such county and *shall become the organic law thereof relative to the matters therein provided,* * * * *and shall supersede all laws inconsistent with such charter relative to the matters provided in such charter.* * * *
>
> "It shall be competent, in all charters, framed under the authority given by this section to provide, in addition to any other provisions allowable by this Constitution, and the same *shall provide,* for the following matters: * * *
>
> "2. For * * * coroners * * * for the * * * appointment of said officers * * * and, * * * for the manner of their appointment; * *
>
> "4. For * * * their removal; * * * provided, that the provisions of such charters relating to the powers and duties of boards of supervisors and all other county officers shall be subject to and controlled by general laws; * * *
>
> "Whenever any county has framed and adopted a charter, and the same shall have been approved by the Legislature, as herein provided, the general laws adopted by the Legislature in pursuance of Sections 4 and 5 of this article, shall, as to such county, be superseded by said charter as to matters for which, under this section it is competent to make provision in such charter, * * *." (Emphasis added.)

The charter of the County of Los Angeles established a Civil Service Commission charged with the formulation, promulgation and enforcement of a civil service program for classified officers and employees of the county. By the provisions of the charter the commission is empowered to prescribe and enforce rules for the classified service which are given the force and effect of law. The rules *must* provide for the means and manner *for the discharge* or demotion of classified officers and employees and *must provide for such discharge* or demotion *only after the officer has been notified* of the specific grounds and particular facts upon which the discharge or reduction is based and a finding by the commission after hearing that the discharge or demotion is justified.[1]

[1] The manner of appointment or removal of a county officer is not a matter of statewide concern but of local concern, and control over it may be and has by section 7½ of article XI of the Constitution been placed under the control of the county under its charter. Pearson v. County of Los Angeles, 49 Cal.2d 523, at page 536, 319 P.2d 624, at page 631.

In the case just cited it was contended by the respondent County of Los Angeles that an officer of the county who had been convicted of a felony was automatically removed from office under the provisions of sections 1028 and 1770 of the Government Code. In holding that these sections were not applicable to civil service employees of the county, Mr. Justice Schauer speaking for the Court said in part as follows:

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[1] No hearing or finding by the commission is required unless the employee by his reply puts the truth of the charges in issue and demands a hearing.

"Defendants contend, however, that the Government Code sections set forth principles governing a matter of statewide concern, and therefore are controlling in this case irrespective of the provisions of section 7½ of article XI. It is settled that local rules or regulations as to matters which a county is constitutionally empowered to regulate by charter supersede general state laws on the subject, except as to matters of statewide concern where the state has occupied the field. [Citations.] But the general laws in question here do not appear to be part of an overall legislative design to occupy an entire field of law in a matter of statewide concern, as was the case with the laws relating to eminent domain [citations], or workmen's compensation [citations]. Rather, the statutes here involved relate to but a narrow segment of the field of public employees, a field which the local governments have been granted the constitutional power to regulate.

"It may be conceded that the state has an interest in establishing qualification standards for peace officers at all levels of government, and, as noted hereinabove, the power of the Legislature to prescribe such qualifications for county officers is specifically preserved by section 5 of article XI. However, as also noted previously, section 7½ of article XI authorizes charter provisions which empower 'boards of supervisors, by ordinance' to fix and regulate the manner of appointment and removal of deputies and other attaches, and specifies that such charter provisions, and necessarily the ordinances enacted thereunder, shall control over general laws on the subject which are enacted pursuant to section 5 of article XI. If sections 1028 and 1770 of the Government Code are held to control valid charter provisions relative to removal of peace officers, then any other general law relating to removal of public employees would also control over charter provisions, and a similar result would logically follow as to charter provisions and general laws relating to appointment of such officers and employees. Such a construction would render nugatory the constitutional provisions empowering local governments to control the manner of appointment and removal of their officers and employees. *It thus follows that insofar as general qualification statutes attempt to regulate appointment and removal of local officials, they are subordinate to provisions of freeholders' charters, and valid ordinances enacted* thereunder." (Emphasis added.) See also Hedlund v. Davis, 47 Cal.2d 75, at page 79, 301 P.2d 843, at page 846.

[2] It has been uniformly held that the provisions of a freeholder's charter, granted a city pursuant to sections 8 and 8½ of article XI of the Constitution, relative to the removal or discharge of an appointed and classified officer of the city supersedes the general laws relative to the removal of such an officer upon accusation by a grand jury. Craig v. Superior Court, 157 Cal. 481, 108 P. 310; Dinan v. Superior Court, 6 Cal.App. 217, 91 P. 806.[2]

Respondent seeks to escape the force of the decisions in Pearson v. County of Los Angeles, supra, and the two cases last cited, upon the grounds that under the provisions of section 7½ of article XI it is only general laws enacted by the Legislature pursuant to section 5 of article XI of the Constitution that are superseded by the provisions of the charter, while under the provisions of paragraph (g) of section 8 of article XI the charter granted a city supersedes all laws inconsistent therewith. We see no merit in this contention. The same language as is used in paragraph (g) of section 8, article XI, is found in the paragraph of section 7½ captioned "Ratification of Charter." In that paragraph it is provided that if the charter be approved by a majority of the vote of the members elected to each house of the Legislature "such charter * * * shall supersede all laws inconsistent with such charter relative to the matters provided in such charter." It was upon this language in section 8 of article XI that the court in Dinan v. Superior Court, supra, based its decisions that the charter of the City of San Francisco as to the removal of officers of that city superseded the provisions of sections 758, 759, 766, 767 and 769 of the Penal Code. (These sections of the Penal Code have now been repealed and reenacted as a part of article III of title I, division 4, chapter 7 of the Government Code.) We see no reason why this language when used in section 7½ of article XI should not be given the same meaning as given it by the court in Craig v. Superior Court, supra, and Dinan v. Superior Court, supra, in construing sections 8 and 8½ of article XI. We do not construe the provisions of the paragraph of section 7½ captioned "Effect of Charter," wherein it is provided that the charter when adopted shall supersede the general laws adopted by the Legislature pursuant to section 5 of article XI, as a limitation upon the broad language which we have quoted from the paragraph captioned "Ratification of Charter," but construe it as extending the effect of the charter so as to make it supersede all general laws as to matters which it is competent to make provisions for in a charter, whether consistent or inconsistent with the charter's provisions.

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[2] For the reasons stated in Craig v. Superior Court, supra, we do not believe the decision of the Supreme Court in Coffey v. Superior Court, 147 Cal. 525, 82 P. 75, is applicable in the present case.

Not only does the apt language used in section 7½ of article XI as above quoted operate to make the provisions of the charter supersede any general statute as to the removal of a classified county officer but by section 16 of article XX, it is made clear that the provisions of the charter are to govern the matter of dismissals. It is there provided "that in the case of any officer or employee of any municipality governed under a legally adopted charter, the provisions of such charter with reference to * * * *the dismissal* from office of any such officer or employee shall control." (Emphasis added.)

While it is true that section 16 of article XX refers to employees of a "municipality governed under a legally adopted charter" there seems to be no reason why the provisions of this section should be limited to cities governed by a charter. The Constitution provides for the issuance of charters not only to cities but also to cities and counties and to counties, and the reasons for granting control of the appointment and dismissal of appointive officers and employees of either type of public corporation being the same, the word "municipality" as used must be interpreted as having been used in its larger sense as including any public corporation exercising governmental powers and which may under the Constitution be granted a freeholder's charter. Clements v. T. R. Bechtel Co., 43 Cal.2d 227, at page 234, 273 P.2d 5, at page 10; Siler v. Industrial Accident Commission, 150 Cal.App.2d 157, at page 162, 309 P.2d 910, at page 913; Gadd v. McGuire, 69 Cal.App. 347, at page 368, 231 P. 754, at page 763; Merchants' Nat. Bank of San Diego v. Escondido Irr. Dist., 144 Cal. 329, at page 333–334, 77 P. 937, at page 938.

Respondent agues that under section 18 of article IV of the Constitution all public officers other than those subject to impeachment are subject to removal under general laws passed by the Legislature; that section 3060 et seq. of the Government Code were enacted pursuant to this constitutional provision and that therefore the charter's provisions as to removal do not supersede the provisions of the Government Code. In support of this contention it refers to the provisions of section 18 of article IV which after providing for the impeachment of certain officers provides that all other officers shall be tried for misdemeanors "in such manner as the Legislature may provide." To uphold this contention it would be necessary to read the quoted language as if it read "in such manner as the Legislature may by general law provide." The language used, however, is not subject to that interpretation. The approval by the Legislature of the charter was a legislative act and the charter is a law of the state and by approving a charter providing the manner and means for the removal of officers of the chartered county the Legislature did provide a manner in which they might be removed. Municipal Corporations, § 50, 34 Cal.Jur.2d at page 652 and cases there cited. The method for removal or discharge of officers of the county provided for by the charter is, as we will hereinafter point out, inconsistent with that of the general laws.

[3, 4] It would not be consonant with the purpose sought to be accomplished by the granting of a freeholder's charter, that of granting complete autonomy to the county in those local affairs for which it is competent to provide for in a charter under the expressed provisions of sections 7½ of article XI, to hold that local, classified civil service officers may be removed either by action of the grand jury or by proceedings had under the charter. If such an officer may be removed either by action of the grand jury or by proceedings had under the charter, then it is quite possible that although on a trial before the Civil Service Commission it might hold that the charges were not substantiated, a jury in a removal proceeding commenced pursuant to the provisions of the Government Code might reach a contrary conclusion, with the result that the officer might be removed from office despite the fact that the commission charged with the administration of the civil service provisions of the charter had held to the contrary. The county would thus be deprived of the right expressly granted by its charter to control the appointment and removal of its officers. It follows that the provisions of the Government Code above mentioned are inconsistent with the provisions of the charter and are superseded by the charter.

The alternative writ heretofore issued is discharged. Let a peremptory writ of prohibition issue as prayed for.

FOURT, Acting P. J., and LILLIE, J., concur.

169 Cal.App.2d 307

Homer HUNTER, Charles R. Warren and George Wicka, Partners, under the firm and style of Quinco Tool Products, Plaintiffs, Respondents and Appellants,

v.

Keith B. CROYSDILL et al., Defendants, Mark C. Crawford, Defendant, Appellant and Respondent.

Civ. 23324.

District Court of Appeal, Second District, Division 2, California.

April 1, 1959.

Action to recover money due for credit extended to ostensible partnership. The Superior Court of Los Angeles County, Roger Alton Pfaff, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Fox, P. J., held that there was substantial evidence justifying inference that defendant had represented that he was partner with another in firm to which plaintiffs extended credit.

Affirmed in part and in part reversed with directions.

1. Appeal and Error 🔑989

When finding of fact is attacked on ground that there is no substantial evidence to sustain it, power of reviewing court begins and ends with determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support finding of fact.

2. Partnership 🔑56

In action to recover money due for credit extended to ostensible partnership, evidence sustained finding that defendant had represented that he was currently a partner in firm for which distributorship from plaintiffs was sought. West's Ann. Corp.Code, §§ 15006(1), 15016(1).

3. Partnership 🔑56

There is no requirement that credit be given in reliance upon financial status of apparent partner, but only that party claiming benefit of statute relied on existence of partnership; but even assuming that plaintiffs had to show that they had relied not only upon fact that defendant was a partner, but also upon fact that he was a "safe risk," evidence, in action to recover money due for credit extended to ostensible partnership, would sustain finding of reliance. West's Ann.Corp.Code, § 15016(1).

4. Partnership 🔑34

Defendant was only responsible as an ostensible partner when he represented himself as partner, and unauthorized declarations of another that he and defendant were partners would not bind defendant. West's Ann.Corp.Code, § 15016(1).

5. Partnership 🔑49

Declarations of an alleged partner that another is his partner are corroborative of the other's representations and therefore admissible on issue of reliance once fact of other's representations has been independently established.

6. Partnership 🔑49

In action to recover money due for credit extended to ostensible partnership, there was sufficient independent showing of representations made by defendant himself to warrant admission, on issue of reliance, of evidence that caller had told plaintiff, in telephone conversation, that defendant would be caller's partner. West's Ann. Corp.Code, § 15016(1).

7. Partnership 🔑64

Statute was designed to give public notice of true names of individuals doing business under fictitious name, or names of all members of partnership where firm name does not disclose name of all of partners; but it was not designed to protect person who has made prior representations as to his relationship with one who subsequently files and publishes a certificate apparently at variance with those prior representations. West's Ann.Civ.Code, § 2466.

8. Partnership 🔑64

Filing and publishing by sole owner of debtor firm of certificate of fictitious firm name did not negate effect of defendant's prior representations or in any manner put plaintiffs on notice that defendant was not partner in firm as far as his liability was concerned. West's Ann.Civ.Code, § 2466.

9. Appeal and Error 🔑173(9, 10)

Where defenses of laches and estoppel were not suggested by complaint, were not placed in issue by defendant's answer, and were not litigated, defendant could not rely thereon on appeal.

10. Damages 🔑62(1)

Under the "avoidable consequences" doctrine, a person injured by wrongful act of another is bound to exercise reasonable care and diligence to avoid loss or minimize resulting damage and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part.

See publication Words and Phrases, for other judicial constructions and definitions of "Avoidable Consequences".

11. Damages 🔑163(2)

Burden of proving facts in mitigation of damages rests upon defendant.

12. Damages 🔑184

In action to recover money due for credit extended to ostensible partnership, defendant failed to sustain burden of proving, in mitigation of damages, that plaintiffs' own negligence in not acting sooner, after becoming chargeable with knowledge that defendant was not a partner, had contributed to their loss. West's Ann.Civ. Code, § 1739, rule 4(2).

Stone & Moran, Hugh A. Moran III, Robert W. Anderson, Willard J. Stone, Pasadena, for appellants Hunter, et al.

Leslie C. Tupper, Leo J. Pircher, Lawler, Felix & Hall, Los Angeles, for respondent Crawford.

FOX, Presiding Justice.

Defendant Mark C. Crawford[1] appeals from a judgment entered in plaintiffs' favor in their action to recover money due for credit extended to an ostensible partnership. The plaintiffs appeal on the issue of the extent of the defendant's liability.

Crawford's Appeal.

The plaintiffs are partners in the firm of Quinco Tool Products and manufacture, in Detroit, Michigan, a line of cutting tools which are sold to distributors or dealers. For some six years defendant has been the sole owner of M. C. Crawford Company, a tool component supply business in Los Angeles, California. One Keith B. Croysdill was employed by the Coast Tool Company, which distributed the plaintiffs' line in the Los Angeles area. Croysdill wished to become the west coast distributor for plaintiffs' products and told Homer Hunter, one of the partners of Quinco, that defendant would be his partner and financial backer. Croysdill also told Hunter that defendant would send him a letter of verification. On June 1, 1955, Crawford sent a letter to Quinco Tool Products, the pertinent portions of which are as follows:

> "I have been asked to write and outline to you just how the association of Keith Croysdill and M. C. Crawford would work to your advantage in California, Arizona, and Nevada.
>
> * * * * * *
>
> "Both Mr. Croysdill and myself have many years background in tooling, and not only in selling but in the use of the tools themselves. Mr. Croysdill is not only thoroughly familiar with the jobbing trade but the present users of Quinco products and in almost all cases can take them with him. I might add that Mr. Croysdill has a fine reputation for his ability and integrity. The M. C. Crawford Co. has been in business for a number of years selling tooling specialties and on every line handled has the exclusive selling rights in California and the states mentioned in the first paragraph. The jobbing distributorship will be set up with a separate identity but with the backing of the financial and other resources of M. C. Crawford Co. Mr. Croysdill will be in charge of promotion and sales. Business and financial guidance will be in my hands. The necessary mechanics of the invoicing, accounting, shipping and receiving, are already functioning, and all matters will be handled in a businesslike manner.
>
> "I am sure we can do an excellent job for you out here as we have the necessary experience and knowhow to do the job properly. In fact we can promise an almost immediate increase in your present volume.
>
> "We are ready to start functioning as soon as you can furnish the necessary stock, so any change of distributors can be done without any lost time or sales.
>
> "We can and will furnish you with a complete detailed report on all our financial and business connections so that you can satisfy yourselves as to our business and financial integrity.
>
> "I would appreciate knowing your thinking on the matter discussed also any questions you might want answered. It is sincerely hoped that the above will be considered by you and lead to our mutual profit."

Subsequently, on June 20, 1955, defendant and Croysdill flew to Detroit for five days and met with the plaintiffs there for a portion of each of the five days. Hunter testified that "Mr. Crawford said that he would finance this representation of the West Coast and be the financial backer with the financial and other resources of the M. C. Crawford Company, both when he was with Charles Warren [a Quinco partner], Keith Croysdill and myself and himself and to me personally when Mr. Warren was speaking with Mr. Crawford." Hunter further testified that "Mr. Crawford stated that he would be the financial backer and Mr. Croysdill would be the sales manager and take care of ordering" and "we were informed to ship the tools to Associated Tool Supply at the Slauson address of the M. C. Crawford Company." When asked by whom this instruction was given, Hunter answered "Mr. Crawford and Mr. Croysdill." The court asked Hunter whether either Crawford or Croysdill made any statement as to what Associated Tool Company was, and Hunter answered as follows: "Yes, sir. That was to be the company name that both of them had picked out previously to coming to Detroit, to be their company name to represent the Quinco Tool Products." Hunter, when asked by both the court and defendant's counsel as to who made the above statement, replied that it was "both Mr. Crawford and Mr. Croysdill." With reference to a "stocking" order given by Croysdill, Hunter testified that "Mr. Crawford stated that Mr. Croysdill would be in charge of ordering and he gave Mr.—he told—or Mr. Crawford told Mr. Croysdill to sit down with Quinco and decide on the original stocking order. * * *"

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[1] Keith B. Croysdill and Mary W. Croysdill, also defendants, are not involved in this appeal and reference in the opinion to "defendant" is limited to Mark C. Crawford.

Subsequently, on June 30, 1955, Croysdill wrote two letters to plaintiffs. The first was on his own stationery and stated that Associated Tool Supply would be on Slauson Avenue, temporarily; that principals would be defendant and himself; that financing and accounting was to be by defendant and sales and inventory by himself. The second letter was on defendant's stationery and asked for verification of "* * * an appointment as agents for Quinco Tool in California and Arizona." These two letters were introduced into evidence, over objections by the defendant, as plaintiffs' exhibits 5 and 6.

Hunter testified as follows as to his investigation during June, 1955, into defendant's financial status:

> "A. Mr. Crawford stated, while in Detroit, to me, that he would use the assets or the financial and other resources of M. C. Crawford Company to make payment on these tools.
>
> "Q. Did your conversation go to the question of what the resources of the M. C. Crawford Company were? A. Only through people that knew him that I asked, not on paper work.
>
> "Q. Who were some of the people you asked? A. I can't recall the name in Detroit at the minute. He was selling [to] Mr. Crawford.
>
> "Q. What did you learn from that investigation? A. That he paid his invoice to this account.
>
> "Q. Besides inquiries as to that account, did you make any other inquiries as to his financial condition? A. With people I knew in Los Angeles, through former years association selling tools.
>
> "Q. What did you learn through investigation from these Los Angeles sources? A. I was just only informed that he could pay all his obligations. I did not have a dollar set amount high to go on."

On July 8, 1955, Croysdill filed a certificate of fictitious firm name with the County Clerk of Los Angeles showing him to be the sole proprietor of Associated Tool Supply. This certificate was published on July 15, 22, 29, and on August 5, 1955.

The trial court found that defendant, beginning on or about June 1, 1955, until January 18, 1956, represented himself to plaintiffs as a partner with Croysdill in Associated Tool Supply; that said representation was made for the purpose and with the intent that plaintiffs would rely thereon and to induce plaintiffs, in reliance thereon, to give credit to such apparent partnership; that plaintiffs did in fact rely on these representations and on the faith thereof extended credit, commencing on July 9, 1955, until January 18, 1956, to such apparent partnership. The trial court also found that, as of January 18, 1956, the date plaintiffs became chargeable with notice that defendant was not in fact a partner in Associated Tool Supply, defendant and Croysdill were indebted to the plaintiffs in the net amount of $14,701.20 for cutting tools sold and delivered by plaintiffs between June 1, 1955, and January 18, 1956, to the apparent partnership existing between defendant and Croysdill.

Defendant attacks the judgment on the following grounds: (1) The finding that defendant represented himself to be a partner with Croysdill is not supported by any evidence; (2) the evidence does not show any reliance by plaintiffs on any representation by defendant that he was a partner with Croysdill; (3) error to admit plaintiffs' exhibits 5 and 6 and testimony as to a telephone conversation between Hunter and Croysdill; and (4) the filing by Croysdill of the certificate of doing business under a fictitious name prior to the time plaintiffs' books show actual credit given put plaintiffs on notice and they could not thereafter place reliance on asserted representations made by defendant.

Section 15016(1) of the Corporations Code, provides in part as follows: "When a person, by words spoken or written or by conduct, represents himself * * * as a partner in an existing partnership or with one or more persons not actual partners, he is liable to any such person to whom such representation has been made, who has, on the faith of such representation, given credit to the * * * apparent partnership. * * *"

[1, 2] As previously noted, the trial court found that defendant's conduct placed him within the operation of section 15016(1) and defendant attacks the sufficiency of the evidence to support such a finding. It is well settled that "when a finding of fact is attacked on the ground that there is not any substantial evidence to sustain it, the power of an appellate court *begins* and *ends* with the determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the finding of fact. (Citation.)" Grainger v. Antoyan, 48 Cal. 2d 805, 807, 313 P.2d 848, 850; Martin School of Aviation, Inc. v. Bank of America, 48 Cal.2d 689, 692, 312 P.2d 251.

First, with reference to the letter of June 1, 1955, which defendant sent to plaintiffs, and his personal conferences with them while he was in Detroit, defendant argues that his declarations were never that he was or would become a *partner* with Croysdill, but that the form of business organization which was to be established between Croysdill and himself was indefinite and, therefore, such declarations were insufficient to give rise to an ostensible partnership.

A partnership is merely "* * * an association of two or more persons to carry on as co-owners a business for profit." Corp.Code, § 15006(1). The evidence fully warrants the trial court's determination that this was the type of business relationship to which defendant's representations referred. His letter of June 1, 1955, referred to "the association of Keith Croysdill and M. C. Crawford." Also, the respective parts to be played by Croysdill and defendant in the business were outlined, i. e., "Mr. Croysdill will be in charge of promotion and sales. Business and financial guidance will be in my hands." When in Detroit, defendant substantially repeated his prior written representations. While it is true he did not use the word "partnership," the general business form suggested by what he did say certainly falls within section 15006(1), supra. There was an association of two persons to carry on a business presumably for profit. As to the issue of co-ownership, defendant spoke of a division of responsibilty between himself and Croysdill which did not indicate that he was merely financing Croysdill or acting as a guarantor, for he was to take an active part in the business. Moreover, nothing was said or written which indicated a corporate structure was contemplated.

Defendant next argues that any representations made referred to a future rather than to a past or present business organization, and that an estoppel cannot be invoked where the representations relate to future intentions. It is unquestionably true that the performance of Associated Tool Supply was to be in the future for it would have no obligation to plaintiffs until it was awarded the distributorship. However, the crucial point is whether defendant represented that there was a then existing partnership between Croysdill and himself. Defendant's letter of June 1, 1955, states: "We are ready to start functioning as soon as you can furnish the necessary stock, so any change of distributors can be done without any lost time or sales." When in Detroit, defendant and Croysdill had already selected a name for their business, had decided where the tools were to be shipped, and defendant told Croysdill, while in Detroit, to decide on the original stocking order. Such circumstances strongly suggest that, prior to the time credit was actually extended to Associated Tool Supply, defendant had conveyed the idea that his relationship with Croysdill had matured and was not merely a representation to associate in the future. While we recognize that portions of the June 1 letter are not as clear in this regard as they could have been, we are of the opinion that there was substantial evidence justifying the inference that defendant represented he was currently a partner with Croysdill, and "[w]hen two or more inferences can reasonably be deducted from the facts, a reviewing court is without power to substitute its deductions for those of the trial court." Grainger v. Antoyan, supra. The above amply demonstrates the substantiality of the evidence in support of the trial court's finding that the defendant represented himself as Croysdill's partner.

[3] Attention will now be focused on defendant's contention that there was no substantial evidence showing that plaintiffs, in extending credit to Associated Tool Supply, relied on the fact that defendant was ostensibly a partner thereof. In this regard, there was testimony by Hunter that Croysdill was informed that it would take considerable capital to act as plaintiffs' west coast representative, to which Croysdill replied that he only had a small amount of money but could obtain financial backing through partners or interested parties. Hunter told Croysdill to have these parties or partners write and inform him (Hunter) of their willingness and financial status. Defendant's letter of June 1, 1955, was a result of this conversation. Defendant's letter plus the statements made by him in Detroit that he would be the financial backer, taken in conjunction with Hunter's testimony to the effect that Croysdill's financial status was insufficient to warrant a distributorship, reasonably justifies an inference that plaintiffs extended credit because they believed defendant was a partner.

Defendant takes the position that as plaintiffs did not make exhaustive inquiries into his financial status, they could not have relied thereon. There is no requirement that credit be given in reliance upon the financial status of the apparent partner, but only that the party claiming the benefit of section 15016(1) relied on the *existence* of the partnership. Even assuming, *arguendo,* that plaintiffs had to show they relied not only upon the fact that defendant was a partner, but also upon the fact he was a "safe risk," the evidence shows that they made inquiries—both in Detroit and Los Angeles—regarding defendant's ability to meet his obligations. The trial court impliedly found this investigation evidenced a sufficient showing of reliance and the evidence clearly supports such a finding.

[4–6] We now turn to defendant's contentions that the trial court erred in allowing in evidence testimony by Hunter that Croysdill, in a telephone conversation, said defendant would be his partner, and plaintiffs' exhibits 5 and 6 (letters of June

30, 1955) to which reference has been made in the statement of facts.

It is clear that the unauthorized declarations of Croysdill that he and defendant were partners could not bind defendant, for he is only responsible as an ostensible partner when he represents himself as a partner. Corp.Code, § 15016(1). Defendant concedes, however, that if prima facie proof of a partnership is shown, then evidence of an extrajudicial statement of one partner that other persons were his partners is admissible. Declarations of an alleged partner that another is his partner are corroborative of the other's representations and therefore admissible on the issue of reliance once the fact of the other's representations has been independently established. Cf. Vanderhurst v. De Witt, 95 Cal. 57, 62–63, 30 P. 94, 20 L.R.A. 595; Milstein v. Sartain, 56 Cal.App.2d 924, 932, 133 P.2d 836. In the instant case, there was a sufficient independent showing of representations made by defendant himself to warrant the admissibility of the questioned evidence on the issue of reliance.

[7, 8] Defendant's final argument is that plaintiffs were put on notice that Croysdill was the sole owner of Associated Tool Supply by virtue of his having filed on July 8, 1955, a certificate of fictitious firm name pursuant to Civil Code section 2466, showing him to be the sole proprietor thereof. We are of the view, however, that the filing and publishing of this certificate in Los Angeles did not negate the effect of defendant's prior representations or in any manner put plaintiffs on notice that defendant was not a partner in Associated Tool Supply as far as his liability is concerned. Section 2466 was designed to give public notice of the true names of individuals doing business under a fictitious name or names of all members of a partnership where the firm name does not disclose the names of all the partners, but it was not designed to protect a person who has made prior representations as to his relationship with one who subsequently files and publishes a certificate apparently at variance with those prior representations.

In view of the foregoing, we believe Crawford's appeal is without merit.

Plaintiffs' Appeal.

The trial court found that on January 18, 1956, the date plaintiffs became chargeable with knowledge that defendant was not a partner, he was indebted to plaintiffs in the amount of $14,701.20. Against this sum, however, the court allowed defendant a $7,877.04 credit, making the amount of the judgment against him, exclusive of interest, $6,824.16. The court apparently arrived at this figure in the following manner: (1) $7,522.87 (Associated Tool Supply inventory of tools as of January 18, 1956, purchased from plaintiffs) plus (2) $354.17 (credit allocated by plaintiffs to the pre-January 18 indebtedness) which equals $7,877.04. Although Croysdill had this $7,522.87 inventory on hand in January, when it was relinquished to plaintiffs on June 1, 1956, it only amounted to $5,285.61. Also, Croysdill increased his net indebtedness by $309.49 after January 18 by additional purchases.

It is plaintiffs' position that as the inventory was not returned in January but in June, defendant should only be credited with $5,285.61, and not $7,877.04. Furthermore, argue plaintiffs, the sum of $309.49 should be subtracted from the amount of the June inventory and applied against Croysdill's increased indebtedness alone. Plaintiffs are willing to give defendant an additional credit of $1,125 (amount applied against Croysdill's indebtedness for reasonable value of his services rendered to plaintiffs from June 1 to August 15, 1956). Therefore, the plaintiffs contend their judgment against defendant should have been in the principal amount of $8,245.91,[2] rather than $6,824.16.

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[2] This figure is arrived at by subtracting the following credits from $14,701.20: (1) $354.17 (conceded by plaintiffs), (2) $1,125 (conceded by plaintiffs), and (3) $4,976.12 (June 1 inventory less Croysdill's post-January 18 increase in indebtedness in the amount of $309.49).

The crux of plaintiffs' argument is that as title to the goods in question passed to Croysdill upon delivery (Civ.Code, § 1739, Rule 4(2)), the only credit in this respect available to either Croysdill or defendant depended upon the value of the property actually returned to and accepted by plaintiffs and not on the value of the inventory on January 18, 1956, for no goods were returned to plaintiffs before June 1, 1956.

In opposition to plaintiffs' contentions, defendant justifies fixing January 18 as the proper date to calculate the value of the inventory for credit purposes upon three grounds, namely: (1) plaintiffs' own negligence in not acting sooner was the proximate cause of the inventory dissipation; (2) plaintiffs are estopped to hold him responsible for the dissipation in the inventory by their failure to inform defendant they intended to hold him liable after they learned he was not a partner; and (3) laches.

In response to this argument, plaintiffs draw attention to the fact that defendant's answer contained only a general denial and the above three defenses are suggested on appeal for the first time, that no evidence was tendered on these issues nor any findings made thereon. Plaintiffs assert that these are special defenses which are waived if not specifically pleaded, and further question these defenses on their merits.

[9] Defendant may not rely on laches or estoppel. These were not placed in issue by his answer, which contained only a general denial; they were not suggested by a reading of the complaint; nor were these defenses litigated. Balestrieri v. Sullivan, 142 Cal.App.2d 332, 343, 298 P.2d 688; Medeiros v. Cotta, 134 Cal.App.2d 452, 457, 286 P.2d 546; see also Pacific Finance Corp. v. Foust, 44 Cal.2d 853, 858, 285 P.2d 632.

[10–12] However, his contention that plaintiffs' own conduct was the responsible cause for the inventory dissipation calls for a consideration of the "avoidable consequences" doctrine. Generally, "[a] person injured by the wrongful act of another is bound * * * to exercise reasonable care and diligence to avoid loss or minimize the resulting damages and cannot recover for losses which might have been prevented by reasonable efforts and expenditures on his part." Valencia v. Shell Oil Co., 23 Cal.2d 840, 844, 147 P.2d 558, 560. The burden of proving facts in mitigation of damages rests upon the defendant. Vitagraph, Inc. v. Liberty Theatres Co., 197 Cal. 694, 699, 242 P. 709; Gray v. American Surety Co., 129 Cal.App.2d 471, 476, 277 P.2d 436. We are of the opinion that defendant has not sustained this burden. "Moreover, inasmuch as * * * [defendant] pleaded no facts in mitigation of damages * * * [he is] in no position to rely upon this affirmative defense. (Citations.)" Danelian v. McLoney, 124 Cal.App.2d 435, 443, 268 P.2d 775, 780.

On the record before us, there is no sufficient basis for allowing as a credit to defendant the value of the inventory as of January 18. Against the $14,701.20 obligation due on January 18, defendant is entitled to the following credits: (1) $354.17 (Civ.Code, § 1479 (Two) conceded by plaintiffs); (2) $1,125 (conceded by plaintiffs); and (3) $5,285 61 (June inventory), for a total of $6,764.78. Therefore, his liability exclusive of interest, after deducting the above credits, is $7,936.42. The inventory returned on June 1 is to be applied in full against defendant's indebtedness and, contrary to plaintiffs' contention, is not to be applied, first, to the indebtedness of $309.49 incurred by Croysdill subsequent to January 18. (Civ.Code, § 1479 (Three [3]).)

The principal sum awarded plaintiffs having been altered, interest will necessarily have to be recalculated. Since defendant's liability was fixed as of January 18, 1956 ($14,701.20), interest commences as of that date and continues until the entry of the judgment herein directed, credit of course being given to defendant as follows: (1) January 18, 1956, $354.17 (amount allotted to pre-January 18 indebtedness); (2) June 1, 1956, $5,285.61 (returned inventory); (3) July 1, 1956, $450 (salary credited to Croysdill); (4) August 1, 1956, $450 (salary credited to Croysdill); and (5) August 15, 1956, $225 (salary credited to Croysdill).

That portion of the judgment from which defendant appeals is affirmed. That portion from which plaintiffs appeal is reversed with directions to make new findings of fact and conclusions of law and to enter a new judgment thereon not inconsistent with the views herein expressed.

ASHBURN and HERNDON, JJ., concur.

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169 Cal.App.2d 150

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Ben I. RANKIN and James H. Morrison,
Defendants.

James H. Morrison, Appellant.
Cr. 6148.

District Court of Appeal, Second District,
Division 1, California.
March 26, 1959.
Rehearing Denied April 22, 1959.
Hearing Denied May 20, 1959.

Defendants were convicted of, inter alia, violation of Corporate Securities Law in issuance or sale of security interests in mining claims in nonconformity with permit from commissioner of corporations. The Superior Court of Los Angeles County, Herbert V. Walker, J., rendered judgment and order denying motion for new trial, and a defendant appealed. The District Court of Appeal, Lillie, J., held, inter alia, that sufficient showing was made that an interest in a mining title was a security within the meaning of the Corporate Securities Law when it appeared directly or inferentially that the instrument of conveyance made the buyer a mere investor who contemplated receipt of profits from activities of other persons connected with the enterprise.

Affirmed.

1. Statutes 🔑206

It is a cardinal rule of statutory construction that all parts of a statute must be read and considered as a whole so that the enactment may stand in its entirety.

2. Criminal Law 🔑13
Licenses 🔑8(1)

In the section of the Corporate Securities Law relating to public offenses, the subdivision pertaining to issuance or sale of security in nonconformity with permit must be read in conjunction with the preceding or opening paragraph and, when so read, it properly defines offenses and is not ineffective on any theory that it is a sentence without a subject, lacking any declaration that matter is a public offense and referring to no person or persons. West's Ann.Corp. Code, § 26104 and subd. (a).

3. Licenses 🔑42(3)

Under statute making it a public offense to knowingly authorize, direct, or aid in issuance of, or issue, or sell, or cause or assist in causing to be issued, executed, or sold, any security, in nonconformity with a permit from the commissioner of corporations, information charging that defendant sold and issued, and caused to be sold and issued for value a security without having secured such required permit was not invalid or insufficient for failing to allege whether defendant directed or aided, in the issuance or sale of security or whether he issued or sold or assisted in causing it to be issued or sold without a permit. West's Ann.Corp.Code, § 26104.

4. Criminal Law 🔑1032(1)

When accused party fails to demur upon any of the grounds mentioned in statute relating to demurrers in criminal cases, any objection based upon such a ground is deemed waived and cannot be presented for first time on appeal. West's Ann.Pen.Code, § 1004.

5. Indictment and Information 🔑65

In view of statute providing that accusatory count is sufficient if it contains in substance a statement that accused has committed some public offense therein specified, notice of particular circumstances of offense is to be given not by detailed pleading but by transcript of evidence before committing magistrate. West's Ann.Pen.Code, § 952.

6. Licenses 🔑42(3)

Information charging defendant with violating statute penalizing issuance or sale of security in nonconformity with permit from commissioner of corporations was not rendered insufficient by fact that it substituted phrase "without first having applied for and secured * * * permit so to do", for "in nonconformity with a permit". West's Ann.Corp.Code, § 26104.

7. Commerce 🔑63
Constitutional Law
🔑62, 75, 87, 230(3), 287
Licenses 🔑7(1)
Statutes 🔑47

The Corporate Securities Law is not unconstitutional in any sense; it is not vague or indefinite, it is not invalid for failure to set up proper standards, it does not deny due process or equal protection of law, it does not interfere with right to acquire, possess or dispose of property, it does not constitute an unlawful delegation of legislative or judicial power or impose an unreasonable burden on interstate commerce but it is a valid exercise of state's police power. West's Ann.Corp.Code, § 26104; U.S.C.A.Const. Amend. 14.

8. Licenses 🔑18½(10)

In determining whether an instrument is a security within the meaning of the Corporations Code, court may look through mere form and substance and consider facts and circumstances surrounding its execution to determine true intent of parties, their mutual purpose and expectation and the potentialities of the rights acquired by the purchaser according to the facts in each case. West's Ann.Corp.Code, § 25008.

9. Criminal Law 🔑260(11)

In prosecution for violation of Corporate Securities Law, a finding that a transaction in question was within the proscription of the law as involving a security as defined therein will not be disturbed if there was substantial evidence to support it. West's Ann.Corp.Code, §§ 25008, 26104.

10. Licenses 🔑42(4)

In prosecution for violation of Corporate Securities Law, and for conspiracy and grand theft therein, a sufficient showing is made that an instrument is a "security", as defined in the Law, as applied to interests in a mining title where it appears, directly or inferentially, that by the instrument of conveyance, buyer is a mere investor who contemplates receipt of profits from activities of other persons connected with enterprise, as may occur in case of limited partnership. West's Ann.Corp.Code, §§ 25008, 26104; West's Ann.Pen.Code, §§ 182, subds. 1, 4, 487.

11. Licenses 🔑42(4)

In prosecution for issuance or sale of security in nonconformity with permit of commissioner of corporations, wherein defendant was charged with improper sales of security interests in mining claims, evidence was sufficient to support finding that instruments sold by defendant were securities. West's Ann.Corp.Code, §§ 25008, 26104.

12. Licenses 🔑18½(23)

In determining whether a defendant violated Corporate Securities Law in issuance or sale of security in nonconformity with a permit, the fact that multiple instruments were required to effectuate general promotional plan was of no moment. West's Ann.Corp.Code, §§ 25008, 26104.

13. Licenses 🔑18½(23)

In determining whether there has been compliance with provisions of Corporate Securities Law in issuance of securities, two or more documents relating to same matters between same parties and consisting substantially of one transaction should be construed together. West's Ann.Corp. Code, §§ 25008, 26104.

14. Licenses 🔑18½(23)

In prosecution for issuance or sale of security interests in mining claims in nonconformity with permit, where transactions consisted in part of a limited partnership, and partnership agreement made reference to mining claims listed in a conveyance from their alleged owners it was proper to consider the partnership agreement and the conveyance together to determine whether a violation had occurred. West's Ann. Corp.Code, §§ 25008, 26104.

15. Licenses 🔑42(4)

In prosecution for issuance or sale of security interests, involving use of limited partnership, in mining claims, in nonconformity with permit, evidence would not support a finding that transactions were mere interim steps to formation of a corporation. West's Ann.Corp.Code, §§ 25008, 26104.

16. Criminal Law 🔑447

Since prosecution for issuance or sale of security interests in mining claims in nonconformity with permit was a criminal and not a civil proceeding, state was not bound therein by written provisions of instruments but could establish by parol real intention of parties. West's Ann.Corp. Code, §§ 25008, 26104.

17. Criminal Law 🔑260(11)

It is function of trial court, not reviewing court, to resolve inconsistencies and contradictions in testimony and while trial court is free to believe and accept a portion of the testimony of witness and disbelieve the remainder, on appeal that portion which supports the judgment must be accepted.

18. Licenses 🔑18½(22)

The Corporate Securities Law prohibits the solicitation or sale, in California, of stock or similar interests in a foreign company, in nonconformity with a permit from the California commissioner of corporations even where, in good faith, the issuance and transfer of title are to take place in a foreign state. West's Ann.Corp.Code, § 26104.

19. Indictment and Information 🔑122(1)

Under statute making it duty of District Attorney to file information charging defendant with either the offense or offenses named in order of commitment or any offense or offenses shown by evidence taken before magistrate to have been committed, offenses indicated by testimony received upon preliminary examination could be properly charged in information even if they were not designated in order of commitment rendered by magistrate. West's Ann.Pen.Code, §§ 739, 995, 996.

20. Criminal Law 🔑1044

Where defendant failed to move, in the trial court, to have amended information set aside because it assertedly improperly charged violations not designated in order of commitment rendered by magistrate, he could not successfully present such objection on appeal.

David H. Caplow, Beverly Hills, for appellant.

Edmund G. Brown, Atty. Gen., Elizabeth Miller, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

Defendant and one Rankin were jointly charged by amended information in Count I, with criminal conspiracy in violation of Section 182, subds. (1) and (4) Penal Code; in Counts II, III, IV, VI, VIII, IX, X, XII, and XIII, with violations of the Corporate Securities Law (Section 26104(a) Corporation Code); and in the remaining counts with grand theft, in violation of Section 487, subd. 1, Penal Code. A motion to set aside the information under Section 995, Penal Code, having been denied, both defendants pleaded not guilty and personally waived trial by jury as to the counts charging violations of the Corporate Securities Law, which as a group were designated by stipulation as Information A.

In addition to the jury waiver, the parties stipulated to the submission of the cause on the transcript of proceedings and the exhibits received on the preliminary hearing, reserving the right to produce additional evidence. At the trial no additional evidence was received, although an agreed statement of facts was filed with the court. Both defendants were found guilty of all the offenses charged in Information A and motions for a new trial were denied. Morrison has appealed from the judgment of conviction and the order denying a new trial; proceedings as to Rankin, who likewise appealed, have abated by reason of his death.

The evidence, necessarily viewed in the light most favorable to the respondent, reveals that defendant's method of operation varied but little in dealing with the several persons, all residents of Los Angeles county, who invested in defendants' enterprises which consisted of mining claims located outside California. The technique employed is illustrated by the activities hereinafter summarized, involving Dr. Pangman, the prosecution's witness in Count I.

In December of 1954, Morrison made the acquaintance of one Livingston, a securities salesman, who, having indicated an interest in uranium mining, was invited to call at Morrison's office. Livingston met with Morrison the next day. The latter mentioned "a very spectacular uranium deal" in Wyoming that had been brought to him by one Rankin, referred to by him as "the big oil man" who, it appears, Livingston had once met casually. After having been shown a copy of a geological report to Rankin, Livingston said he was interested and in response to Morrison's inquiry stated that he had several clients who also might wish to invest if the report stood up under investigation. After a second or third meeting with Morrison, Livingston subsequently contacted Dr. Pangman, one of his customers, and showed him the report. He told Pangman that Morrison, ostensibly a reputable business man in the community, had advised him of the availability of a group of claims controlled by Rankin in a certain section of Wyoming; that "the ore was right on the ground" and ready for immediate loading and hauling to the buying station eighty miles away. According to Livingston, a five percent interest was obtainable for $2,000, such interest to be reflected by instruments, which would secure clearance from the Corporation Commissioner with whom Rankin had assertedly conferred. At the same time, Livingston explained to Pangman that he himself was investing $1,000 and securing an equal interest for the lesser sum by way of a bonus or commission.

Shortly thereafter Pangman met with Morrison and Livingston; he was told by Morrison that Rankin had a group of claims in the Crooks Gap area of Wyoming and that by arrangement with Rankin they were going to "break out" twenty of these claims which had a commercial grade of uranium that "could be simply scooped up and taken to the buying station." Upon Livingston's recommendation, and after other attractive features of the claims had been described, Pangman indicated his willingness to invest. For $2,000 he was to receive a 5% interest on a limited partnership basis in the group of twenty claims. Pangman testified: "I insisted that this was going to be a limited partnership because I didn't want to be a general partner in something I didn't know too much about." With that understanding (the papers to be drawn up later), Pangman issued two checks for $1,000 to the order of Rankin and gave them to Livingston.

Subsequently Pangman and Livingston received and signed two instruments captioned "Agreement" and "Agreement of Limited Partnership." By the terms of the first mentioned document, dated January 17, 1955, one Frost (therein referred to as "grantor") undertook to sell to Rankin, Livingston, Pangman, Morrison and Lee Luecke (referred to as "grantees") all of his interest in 20 mining claims therein described for the agreed price of $40,000, payable $12,000 upon the execution of the instrument and the balance payable monthly, but not less than $1,000, in the form of a percentage royalty on all minerals produced. Upon the receipt of the full purchase price, Frost agreed to convey title to the claims (although his ability to do so must be gravely suspect), reserving for himself and his predecessors in interest a 20% overriding royalty. Rankin and the other "grantees" undertook to do all assessment work necessary to keep the claims in full force and effect and to diligently mine the claims in a good and workmanlike manner for not less than ten days per month unless prevented by forces beyond their control. The second instrument, "Agreement of Limited Partnership," was likewise effective January 17, 1955, and formed a limited partnership under the firm name of Ponderosa Uranium Company to engage in the business of mining, selling and dealing generally in uranium and other minerals on the claims conveyed to the partners by Frost, all of which claims were in turn transferred to the partnership. Rankin and Morrison were declared to be general partners, having a 60% and 25% interest, respectively, in the net profits; Luecke, Livingston and Pangman were listed as limited partners, each with a 5% interest. Article VII of the agreement provided, in part, that the general partners "shall have the sole control and management of the partnership business" whereas "(t)he limited partners shall not take part in the management of the business or transact any business for the partnership," unless and until there be a disagreement between the general partners incapable of settlement.

Shortly after they had financially committed themselves to the first of defendants' enterprises, Livingston and Pangman had another meeting relative to a further investment in Rankin's ventures. Morrison had previously represented to Livingston that Rankin had a second group of 20 claims known as the Blue Moon Uranium group and would give them a larger interest, ten per cent, for the same amount of money. At about the same time, another prospective investor, one Holmes, was told by Morrison that he ought to receive a return of $50 a day for five days a week, and possibly $250 a day. Subsequently, Pangman delivered to Livingston two checks for $1,000 each; Livingston issued a check in the sum of $1,000 payable to Rankin. Pangman, Holmes and Livingston later signed and received copies of two documents containing provisions substantially similar to the Ponderosa agreements—the partnership was named Blue Moon Uranium Company; Rankin and Morrison being designated general partners, and Livingston, Pangman and Holmes limited partners with interests of 15%, 10% and 5%, respectively.

The record reveals, and it is not otherwise contended, that during the next six months ten more companies were organized in much the same manner. In every instance, Rankin and Morrison were designated as general partners (sometimes being joined in that capacity by Livingston), and the investors as limited partners obtained specified percentages of the profits of the business, ranging upward from 2½ per cent for each $1,000. Asked to relate the role he or she expected to play in the partnership, each witness thus concerned testified substantially as did Pangman in that regard. It is undisputed that neither defendant nor any of the partnerships in question sought or secured a permit from the Corporation Commissioner.

Morrison, the sole appellant, contends that (1) the information failed to give him due notice of the offenses charged; (2) sections 26104 and 26104(a) of the Corporations Code are unconstitutional in that they are vague, deny appellant the right to obtain and dispose of his property, impose a previous restraint and fail to set up proper standards for the granting of permits; (3) the evidence failed to show either a sale or a security; (4) the court had no jurisdiction over the subject matter of the transactions; (5) the court lacked jurisdiction to try appellant on Counts III, IV, VI and VIII because there was no finding by the magistrate as to probable cause; (6) the judgment is contrary to the law and the evidence; (7) there exists a fatal variance between the proof and the information; and (8) the court improperly denied the motion to dismiss the information (Penal Code, section 995).

[1–6] Section 26104 of the Corporations Code declares that "(E)very officer, agent, or employee of any company and every other person, who does any of the following acts is guilty of a public offense punishable by imprisonment * * * or by a fine * * * or by both such fine and imprisonment." There then immediately follows a series of subdivisions, (a) through (g), appellant being charged with violating subdivision (a) which reads: "(K)nowingly authorizes, directs, or aids in the issue or sale of, or issues or executes, or sells, or causes or assists in causing to be issued, executed, or sold, any security, in nonconformity with a permit of the commissioner then in effect authorizing such issue, or contrary to the provisions of this division, or of the Constitution of this State." The several counts in Information A accused Rankin and appellant "of the crime of Violation of Corporate Securities Law, Section 26104(a), Corporations Code, a felony, committed as follows: That the said Ben I. Rankin and James H. Morrison on or about (the day, month and year being specified) at and in the County of Los Angeles, State of California, did wilfully, unlawfully, feloniously and knowingly sell and issue, and cause to be sold and issued for value, to-wit, (the amount being specified) a security, to-wit, a certificate of interest in a mining title and lease, without first having applied for and secured from the Commissioner of Corporations of the State of California, a permit so to do." Appellant argues that he was charged with violating subdivision (a) only, which commences with the word "Knowingly," is lacking in any declaration that the matter is a public offense, and refers to no person or persons, being assertedly a sentence without a subject. The contention lacks any semblance of substance in light of the cardinal rule of statutory construction that all parts of a statute must be read and considered as a whole so that the enactment may stand in its entirety. In the instant case, the subdivision (a) should be read with direct reference to the preceding (and opening) paragraph which, furthermore, makes use of the conjunctive word "following." Appellant further urges that the information omitted to accord him due notice of the crime purportedly charged in that it failed to allege whether he directed, or aided, in the issue or sale of a security, or whether he issued or sold or assisted in causing a security to be issued, executed, or sold without the necessary permit. The contention is without merit, even if notice were not taken of the amendments liberalizing the rules of pleading in criminal cases (People v. Pierce, 14 Cal.2d 639, 645, 96 P.2d 784). In the first place, all of the acts set out in the pertinent portions of the statute are coupled with the disjunctive "or," one of which, or all of which joined, constitute but one offense (People v. Clemett, 208 Cal. 142, 145, 280 P. 681; People v. Kuder, 93 Cal.App. 42, 45–46, 269 P. 198, 200). In the Kuder case, supra, the court declared that "not only is it a violation of the Corporate Securities Act to act contrary to its provisions in any one respect, but it is equally illegal and violative of the act to do so in all of them combined. To say that they are distinct offenses is equivalent to the assertion that an indictment charging the issuance of securities contrary to the provisions of a permit, and a failure to comply with the provisions of the act, would embrace two offenses, for each of which a separate sentence might be imposed." Hence, assuming the validity of appellant's argument, he is the gainer thereby as only one penalty can be imposed. Secondly, unlike the situation in People v. Kuder, 93 Cal.App. 42, 269 P. 198, no demurrer was here interposed. When a party accused fails to demur upon any of the grounds mentioned in section 1004, Penal Code, the objection is to be deemed waived and cannot be presented for the first time on appeal (People v.

Yant, 26 Cal.App.2d 725, 730, 80 P.2d 506). Lastly, Section 952, Penal Code, declares that the accusatory count is "sufficient if it contains in substance a statement that the accused has committed *some* public offense therein specified." As stated in People v. Roberts, 40 Cal.2d 483, 486, 254 P.2d 501, 503: "Notice of the particular circumstances of the offense is given not by detailed pleading but by the transcript of the evidence before the committing magistrate," which was done in the instant case. Appellant's final claim that the information does not charge the offense in the language of the statute in that it substitutes the phrase "without first having applied for and secured * * * a permit so to do" in place of "in nonconformity with a permit," is sheer sophistry. Thus, in People v. Scott, 74 Cal.App.2d 778, 779, 169 P.2d 967, criticism of the information was found unsubstantial; but it was not there even suggested that the use of similarly substituted language was open to challenge.

[7] Although the Corporate Securities Act "has withstood numerous assaults upon its constitutionality" (People v. Sears, 138 Cal.App.2d 773, 791, 292 P.2d 663, 674), appellant's next contention challenges the validity of the legislation upon various grounds, all of which have been previously presented to reviewing courts, exhaustively argued and decided adversely to appellant's claims. Since it would needlessly prolong this opinion to deal extensively with each specified question, we merely state the ground of attack and the authority dispositive thereof without repetition of the reasoning followed. The legislation is neither vague nor indefinite, and its language provides adequate warning of what is within its prohibitions (People v. Sears, supra, 138 Cal.App.2d 793, 292 P.2d 663), and hence, not invalid for the asserted failure to set up proper standards (People v. Sears, supra, 138 Cal.App.2d 793, 292 P.2d 663). Nor does it deny due process (People v. Hoshor, 92 Cal.App.2d 250, 256, 206 P.2d 882), or equal protection of the laws (Agnew v. Daugherty, 189 Cal. 446, 448–449, 209 P. 34). It does not interfere with the right to acquire, possess and dispose of property as guaranteed by the Fourteenth Amendment to the Federal Constitution (People v. Yant, 26 Cal.App.2d 725, 739–740, 80 P.2d 506); and does not constitute an unlawful delegation of legislative or judicial power to the commissioner of corporations (Dominguez Land Corp. v. Daugherty, 196 Cal. 453, 466, 238 P. 697, 44 A.L.R. 1) or impose an unreasonable burden on interstate commerce, being a valid exercise of the state's police power (B. C. Turf & Country Club v. Daugherty, 94 Cal.App.2d 320, 329, 210 P.2d 760, 765). True, the last cited case, as appellant points out, declares that the act "may impose *some* restraint on interstate commerce and place *some* restriction on free speech" (emphasis added), but the court concludes that the legislation is free from attack on those grounds. In short, the Corporate Securities Act "is not unconstitutional in any sense" (People v. Hoshor, 92 Cal.App.2d 250, 256, 206 P.2d 882, 886).

Appellant next contends that the interest purchased by the numerous investors did not constitute a "security" within contemplation of the act, and that the transaction in each instance was not a sale as proscribed by the statute. He argues that the trial court erroneously received the two agreements or documents signed by the respective purchasers as one exhibit and considered them together as a security; that private transactions being presumed to be fair and legal, the parties here did not participate in an unlawful enterprise; that the term "securities" in its ordinary meaning does not include deeds or grants to real property, including mining claims; that since the agreements contemplated active participation by the grantees under the agreement of purchase and sale, (and the limited partners in the instance of that agreement) no security was involved; and finally, that appellant did not in fact sell a certificate of interest in a mining claim, as charged, because he himself was a grantee under the purchase agreement and a co-purchaser of the mining claims. None of these contentions, for reasons hereinafter appearing, is sustainable.

Section 25008 of the Corporation Code in pertinent part provides: "'Security' includes all of the following: (a) * * * any certificate of interest in an oil, gas, or mining title or lease * * *."

[8–12] The principle has long been recognized that in ascertaining whether an instrument is a security within the meaning of the code, the court may look through mere form to substance and consider the facts and circumstances surrounding its execution to determine the true intent of the parties, their mutual purposes and expectations and the potentialities of the rights acquired by the purchaser (Oil Lease Service v. Stephenson, 162 Cal.App.2d 100, 327 P.2d 628.) Accordingly, whether a particular instrument is to be considered a security within the meaning of the statute is a question to be determined in each case (People v. Syde, 37 Cal.2d 765, 768, 235 P.2d 601), and a finding that the transaction in question was within the proscription of the statute will not be disturbed if there was substantial evidence to support it (Stoner v. Bisno, 162 Cal.App.2d 164, 327 P.2d 922). Applied to interests in a mining title, a sufficient such showing is made when it appears, directly or inferentially, that by the instrument of conveyance the buyer is a mere investor who contemplates the receipt of profits from activities of other persons connected with the enterprise (People v. Rankin, 160 Cal.App.2d 93, 97, 325 P.2d 10), as may occur in the case of a limited partnership (People v. Dutton, 41 Cal.App.2d 866, 107 P.2d 937). Evidence produced by the prosecution in the case at bar fully justified the trial court following the test discussed in People v. Rankin and People v. Dutton, supra, in reaching the conclusion now challenged by appellant. The fact that multiple instruments are required to effectuate the general promotional plan is of no moment (El Claro Oil & Gas Co. v. Daugherty, 11 Cal.App.2d 274, 281, 53 P.2d 1028, 55 P.2d 488), for in that event the scheme must be "viewed in its entirety" (Moore v. Stella, 52 Cal.App.2d 766, 773–774, 127 P.2d 300, 303).

[13, 14] Notwithstanding the foregoing principles, appellant asks us to conclude that the trial court erroneously considered the two subject agreements as one document; thus, he asserts that since neither instrument, taken separately, was a security, they could not be so construed in combination, and that the circumstances of their execution did not warrant their reception in evidence, stapled together, as one exhibit. A similar contention was raised and rejected in El Claro Oil & Gas Co. v. Daugherty, 11 Cal.App. 274, 281, 53 P.2d 1028, 55 P.2d 488, in which the court pointed out that for the purposes of determining compliance with the Corporate Securities Law, as well as to give force and effect to the fundamental rule governing the interpretation of written instruments, two or more documents, relating to the same matters between the same parties and constituting substantially one transaction, should be taken together. In the present case, the partnership agreement made specific reference to the mining claims listed in the conveyance from their alleged owners; also in every instance the execution of one instrument corresponded closely in time with the execution of the other—only a few days at most intervened.

[15] Likewise unavailing is appellant's assertion that he and the other investors "as tenants in common" under the purchase and sale agreement subsequently transferred the property into a partnership "as an interim step to the formation of a corporation," thus purportedly making the factual situation analogous to that found in Nicholl v. Ipsen, 130 Cal.App.2d 452, 278 P.2d 927, and Polizzi v. Porcaro, 110 Cal.App.2d 395, 242 P.2d 949, where the evidence established the existence of a bona fide joint venture based on an expressed intention to incorporate in the future. In the case at bar, there was no such expressed intention, and any efforts to in-

corporate took place several months after the formation of the various partnerships and then only after the numerous investors grew restless over the failure of the ventures to become productive. Finally, there is no basis for appellant's claim that the trial court was precluded from considering evidence of the partnership agreement because of asserted language in the stipulation which designated the counts triable as Information A. We do not so construe the stipulation; furthermore, an agreed statement of facts was submitted to the trial court and pursuant thereto it was clearly authorized to act as it did.

[16] Similarly without merit is the claim that appellant must have intended to enter into a legal, as distinguished from an illegal, transaction—all private transactions, he argues, are presumed to have been fair and regular. This being a criminal prosecution, the state is not bound by the written provision of the instruments in question and may establish by parol the real intention of the parties (People v. Sidwell, 27 Cal.2d 121, 126, 162 P.2d 913). Also, we do not agree with appellant's premise that the prosecution failed to show that the agreements contemplated a violation of the law. As heretofore pointed out, the mere form of the agreement does not affect or determine its status with relation to the Corporate Securities Law. This conclusion disposes of still another assertion by appellant that the term "security" does not "in its ordinary meaning" cover deeds or grants to real property and the further claim in that connection that a mining claim is real estate. He cites early California decisions which were handed down either long before the initial enactment of the pertinent legislation or prior to the effective date of amendments covering the type of conveyance in suit—none of these cases are in point.

[17] Appellant's remaining claims on this phase of the appeal, while tending to overlap prior contentions, reassert in substance that there was neither a sale nor a security. The difficulty with appellant's argument, as extensively developed, is that he has taken a wholly partisan approach to the evidence adduced in the court below, quoting at length from testimony of prosecution witnesses which assertedly discredits the findings reached by the trier of the fact. However, "(I)t was the function of the trial court, not this court, to resolve inconsistencies and contradictions * * [and] The trier of the fact may believe and accept a portion of the testimony of a witness and disbelieve the remainder. On appeal that portion which supports the judgment must be accepted * * *." People v. Thomas, 103 Cal.App.2d 669, 672, 229 P.2d 836, 838. The representations made by appellant in the course of his transactions with Dr. Pangman have heretofore been recounted, and it is not argued that signatories to subsequent partnership agreements were not similarly persuaded to part with their money. Irrespective of the fact that an offer or an attempt to make a sale comes within the statutory definition of sale (Corp.Code, Sec. 25009; People v. Whelpton, 99 Cal.App.2d 828, 831–832, 222 P.2d 935), due consideration must be given to the circumstance that the interests granted by the agreements in the instant action were small fractional interests in uranium and other minerals to be produced from unproven and undeveloped acreage, located in Utah or Wyoming, and that such interests were sold to residents of California, either unacquainted or inexperienced in mining operations. It is properly inferrable that such interests are not ordinarily issued to persons who expect to reap a profit from their own services and efforts exerted in the management and operation of such property, but to those in the category of investors who, for a consideration, stipulate for a right to share in the profits or proceeds of a venture to be conducted by others. Likewise inferrable under the circumstances is the fact that provisions in the agreements giving the investors the right of ingress and egress for the pur-

pose of mining the claims were purely formal and manifestly illusory, and appellant's failure to testify emphasizes the weight of such inference (People v. Ashley, 42 Cal.2d 246, 268, 267 P.2d 271).

[18] Nor are we in accord with appellant's next proposition which challenges the jurisdiction of the trial court over the subject matter of the present controversy. He argues that the Corporate Securities Law does not attach to transactions consummated, or to be completed, outside the state, pointing out in the instant case that the last signature (usually Rankin's) to one or the other, or both, of the documents in question was affixed either in Colorado, Utah or Wyoming; and that the principal place of business of each partnership business was declared to be Rawlins, Wyoming, where the general partners were to select a bank as the depositary of the company's funds. Accordingly, he concludes, pronouncements found in Oakley v. Rosen, 76 Cal.App.2d 310, 314, 173 P.2d 55, are determinative of the matter; however, in that case "(C)ertain incontestable facts determined the forum of the agreement" which, as found by the trial court, was a legitimate joint venture wherein it was expressly agreed that the funds invested would not be used until $12,000 had been subscribed and hence the agreement was not complete until the last subscriber had signed it and paid his money in New York. In the case at bar the facts are otherwise. Furthermore, as in People v. Sears, 124 Cal.App.2d 839, 850, 269 P.2d 683, most of appellant's activities occurred in Los Angeles county where he acquainted prospective investors with the needs of the pending enterprise, attended meetings for the discussion of the interests to be conveyed, and actually made sales and received funds in payment therefor. Also, copies of the agreements evidencing their interest in the venture were delivered to the purchasers in Los Angeles county. These are not the "preliminary" acts which confronted the court in Oakley v. Rosen, 76 Cal.App.2d 310, 173 P.2d 55. The statute prohibits the solicitation or sale of stock or similar interest in a foreign company even where, in good faith, the issuance and transfer of title are to take place in the foreign state (B. C. Turf & Country Club v. Daugherty, 94 Cal.App.2d 320, 329, 210 P.2d 760). Clearly, sufficient evidence was thus received establishing venue beyond a reasonable doubt.

[19, 20] The trial court's jurisdiction is further challenged on the ground that the district attorney was without authority to include in the amended information four additional violations of the statute not designated in the order of commitment rendered by the magistrate. He cites the holdings in People v. Bomar, 73 Cal.App. 372, 238 P. 758, and People v. Nogiri, 142 Cal. 596, 76 P. 490, which were decided before the amendment of section 809, Penal Code, which has since been incorporated into section 739. The history of the pertinent legislation is extensively discussed in People v. Bird, 212 Cal. 632, 637-638, 300 P. 23. By the controlling provisions of section 739, the duty devolves upon the district attorney to file an information "which may charge the defendant with either the offense or offenses named in the order of commitment or any offense or offenses shown by the evidence taken before the magistrate to have been committed. * * *" The testimony received upon the preliminary examination clearly showed the commission of the offenses against the victims named in all four counts. Additionally, at no time did appellant move in the court below, as authorized by section 995, Penal Code, to have the amended information set aside on the grounds now raised and he is precluded from taking the objection at this stage of the proceedings (Section 996, Penal Code; People v. Ahern, 113 Cal.App.2d 746, 750, 249 P.2d 63).

Although submitted without argument or citation of authority, appellant's remaining points have been carefully examined. They are mostly repetitious of matters previously discussed and considered and are devoid of merit.

For the reasons herein set forth, the judgment and order appealed from are, and each is, affirmed.

WHITE, P. J., and FOURT, J., concur.

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169 Cal.App.2d 135

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Albert H. WOJAHN, Defendant and Appellant.
Cr. 3559.

District Court of Appeal, First District, Division 1, California.
March 26, 1959.
Hearing Denied May 20, 1959.

Prosecution for rape. The Superior Court, Monterey County, Stanley Lawson, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Bray, J., held that evidence was sufficient to sustain conviction of rape by use of drugs, and there was no error by trial court in permitting prosecutrix to refresh her memory as to conversations with defendant by referring to notes made by police stenographer.

Affirmed.

1. Rape 🔑51(1)

Evidence was sufficient to sustain conviction of rape by use of drugs given by defendant during a medical examination. West's Ann.Pen.Code, § 261.

2. Rape 🔑51(1)

Rape by use of drugs may be proven by circumstances and surroundings. West's Ann.Pen.Code, § 261.

3. Witnesses 🔑255(4)

In prosecution for rape, where tape recording of prosecutrix' subsequent conversation with defendant had been made, there was no error in allowing prosecutrix, testifying as to conversation with defendant, to refresh her memory by allowing her to read notes made by police secretary at prosecutrix' direction after listening to repeated playings of tape recording made of conversation. West's Ann.Code Civ. Proc. § 2047.

4. Criminal Law 🔑394.1(2)

Where prosecutrix had complained to police that she had been raped by defendant during course of medical examination and by arrangements with police procured another appointment and carried a concealed microphone on her person, which was used in defendant's office to record conversation which included incriminating statements by defendant, wire recording was not illegally obtained and hence was not inadmissible for that reason. West's Ann.Pen.Code, § 653h.

5. Criminal Law 🔑438

In prosecution for rape, where there were introduced wire tape recordings of prosecutrix' subsequent conversation with defendant concerning prior alleged rape, and defendant failed to point out a single instance of anything favorable to him which was not clearly audible or which was omitted from transcripts of recording which were furnished to the jury, there was no error in admitting recording on the ground that it was defective.

6. Criminal Law 🔑398(1)

Where a tape recording of conversation between prosecutrix and defendant was made by means of concealed microphone on prosecutrix' person, and a re-recording was made of the original tape, which was also played before the jury to demonstrate accuracy of reproduction, admission of re-recording could not be objected to on ground that it was not the best evidence.

7. Criminal Law 🔑663

In prosecution for rape, where tape recording of conversation between prosecutrix and defendant was admitted in evidence, there was no error in allowing jurors to have police stenographer's transcript of recording during the playing of recording.

8. Criminal Law 🔑372(1)

Evidence of a prior rape or attempt to rape is admissible to show a plan or scheme to commit crime in the particular fashion in which it was committed, even though prior rape or attempt was committed on a person other than the prosecutrix.

9. Criminal Law 🔑372(1)

In prosecution for rape by means of drugs given during a medical examination, there was no error in admitting testimony of another person that defendant had allegedly attempted to rape her in the same manner. West's Ann.Pen.Code, § 261.

10. Criminal Law 🔑1172(7)

Where instruction given by court was actually milder than the similar one offered by defendant which contained no qualifications, defendant could not complain that instruction given by court was insufficient since it should have contained certain qualifications.

11. Criminal Law 🔑720(1)

In prosecution for rape, where counsel were discussing the admissibility of testimony of an alleged victim of defendant's attempted rape, statement of prosecutor that the fact that no other offenses had been shown between the prior attempted rape and the alleged actual rape of prosecutrix did not render testimony inadmissible did not constitute misconduct, since statement, if at all intelligible, was favorable to defendant because it showed that he had committed no offense between the attempted rape and the one charged.

12. Criminal Law 🔑730(3)

In prosecution for rape, where court had already ruled that witness could not testify as to statements made by prosecutrix on the ground that they were hearsay, and then district attorney asked whether prosecutrix had made statements or not, such action, which was reprimanded by court, did not constitute wilful misconduct.

13. Criminal Law 🔑730(7)

In prosecution for rape, where prosecutor in closing argument alluded to persons having mental aberrations that cause them to expose themselves to small children, admonition of court that statement should be disregarded by jury was sufficient to obviate any prejudicial error.

Rosendale, Thomas & Muller, Salinas, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

BRAY, Justice.

Defendant appeals from a judgment on a jury verdict finding him guilty of the crime of rape by use of drugs in violation of section 261, Penal Code, and from the order denying new trial.

Questions Presented.

1. Sufficiency of evidence.
2. Alleged error in permitting prosecutrix to refresh her memory.
3. Was the recorded conversation between defendant and the prosecutrix obtained illegally?
4. Was the recording inadmissible (a) because defective; (b) because of the best evidence rule?
5. Was it error to distribute transcripts to the jury?
6. Testimony of similar attempt with another woman.
7. Instruction concerning that testimony.
8. Alleged misconduct of district attorney.

1. Evidence.

[1] Bonnie, aged 21, a married housewife and mother, being bothered by chest

pains and fearing tuberculosis, went to defendant, a physician and surgeon, for an X-ray. She had visited him twice before, once for a tetanus shot for herself and once for treatment of her son. Defendant was alone in his office. After explaining her symptoms to him, defendant had her disrobe and put on an examination robe. Bonnie testified that he gave her a shot which he said was to cut the mucous in her throat and a capsule to quiet her nerves. Thereafter she was unable in standing against a wall with her eyes closed to touch her nose with her fingers. She felt light and relaxed, her feet felt glued to the floor, and she felt as though her body were swaying. She detailed his actions, which culminated in one or more acts of sexual intercourse with her. She became frightened and dizzy and almost blacked out. He told her he "did that" to bring up her blood pressure. As she was leaving he made an appointment for the following Monday, and attempted to kiss her, saying, "What is the matter, honey? Didn't you like that?" Bonnie denied consenting to defendant's actions. Leaving his office Bonnie unsuccessfully attempted to find her husband, and then went to her neighbor, Mrs. Trail, who testified she complained of being raped by defendant, was nervous, upset, her eyes were red, her lipstick smeared and her hair mussed. Her legs were shaking. Mrs. Trail accompanied Bonnie to the police station where she related what had happened. The police captain testified that Bonnie's hair was disheveled, she was red-eyed, crying, hysterical, and appeared to be drugged. Later she was taken to the County Hospital where she was examined by a doctor. She seemed nervous and excited, a condition consistent with the possibility of a sexual assault. The doctor saw no bruises, tears or evidence that any brute force was exerted on the external genitalia or thighs, nor was any spermatozoa revealed as a result of a vaginal smear.

Pursuant to arrangements with the police, Bonnie returned to defendant's office. Defendant had invited her to return on Monday. She telephoned defendant cancelling that appointment and asking for another date. She carried a concealed minaphone which recorded her conversation with defendant. The police instructed her what to say. The wire recording of this conversation concerned itself with the events of Bonnie's prior visit to defendant and contained admissions by him of his relations with her.

A medical doctor testified that, in his opinion, a woman with symptoms similar to Bonnie's on the date of the alleged offense would be under the influence of drugs.

To show plan, design or scheme of defendant, a Mrs. Donati detailed an attempted rape of her by defendant under similar circumstances about a year earlier.

Defendant denied in substance most of plaintiff's testimony, stating that his conduct towards Bonnie was of a professional nature and the extent of the examination was guided by his professional opinion. While examining her neck Bonnie kissed him. He said he gave her a shot of penicillin and a capsule containing a tranquilizing drug called compazine, to calm her prior to examination. He took the capsule from a package of 12, giving her the other 11 to take home. (Bonnie stated that he gave her two packages of 6 capsules each to take home to calm her nerves. The capsules were similar to the one she took at his office.) As to the recorded conversation defendant stated that he agreed and went along with her leading questions concerning the events of her prior visit because (1) she was talking so loudly, and (2) "there was no point in trying to argue with her" because she was apparently undergoing an emotional disturbance.

A medical doctor called by defendant testified that in his opinion the administration of the tranquilizer in combination with a narcotic drug could not have created the condition described by Bonnie, namely, that her will, but not intellect and capacity to remember, was affected.

Defendant concedes that Bonnie's testimony that she felt defendant have intercourse with her may be sufficient evidence to prove the element of intercourse, although he contends that it is somewhat improbable because she never observed his penis nor saw his clothes disarranged. In view of her testimony that she was lying down at the end of the examining table with her feet in stirrups, a position in which she could not see below defendant's waist, that defendant had her close her eyes and that when she opened them he would sit down on a stool at the side of the table, and the other circumstances, her story is not inherently improbable.

[2] Defendant's main attack is on the sufficiency of evidence of drugging. Rape by drugs may be proved by circumstances and surroundings. See People v. Crosby, 1911, 17 Cal.App. 518, 120 P. 441, 443, where the drug administered made the prosecutrix "weak and dizzy." Here there was sufficient evidence on this subject. (1) Admittedly defendant administered a shot and a capsule. He testified to a familiarity with and administration of anesthetics, involving combinations of drugs. (2) Bonnie felt "groggy." She felt calm, very relaxed, and her body seemed swaying while her feet would not move. The police captain testified that she appeared to be drugged. (3) The People's expert testified that her symptoms as related would indicate that she was under the influence of drugs. True, defendant's expert testified to the contrary but that was a matter to be, and it was, resolved by the jury. The fact that Bonnie was not given any tests for drugs on the day of the attack, while regrettable, is not fatal to the prosecution's case. Generally, from the very nature of the offense there can be no direct evidence of the administration of a drug. While the prosecution's case here may not be altogether satisfactory, it does support the theory of the prosecution and its weight was a matter for the jury and is sufficient to sustain the verdict. See People v. Crosby, supra, 17 Cal.App. at page 524, 120 P. at page 443.

2. Refreshing Memory.

[3] Plaintiff asked Bonnie if she recalled the conversation with defendant on her return to his office. She replied, "No, not completely." The court asked if she had a sufficient present recollection. She replied "No." Over objection she was permitted to read notes made by a police secretary at Bonnie's direction after listening to repeated playings of a tape recording made from the original wire recording of the conversation. Bonnie testified that when the notes were made she had an independent recollection of the conversation, and that the notes were a correct version of the conversation. The notes were not offered in evidence. (They would have been inadmissible. Hawkins v. Sanguinetti, 1950, 98 Cal.App.2d 278, 284, 220 P.2d 58.) Section 2047, Code of Civil Procedure, provides: "A witness is allowed to refresh his memory respecting a fact, by anything written * * * under his direction, at the time when the fact occurred, or immediately thereafter, or at any other time when the fact was fresh in his memory, and he knew that the same was correctly stated in the writing. * *" All of the requirements of this section were met and the witness was entitled to refresh her memory, even though, as contended by defendant, it was not clearly shown that Bonnie did not have a present recollection. Although Bonnie was specific about the events of her first visit to defendant, and it would seem that she might have had a similar recollection about a conversation a few days later, it is not always as easy to remember accurately a conversation as it is to remember a series of events. Here it was important for the prosecution to bring out the entire conversation in order to show defendant's incriminating statements.

3. Recorded Conversation.

[4] Defendant contends that the wire recording obtained by the use of the microphone carried by Bonnie was illegally obtained and hence under the ruling in People v. Cahan, 44 Cal.2d 434, 282 P.2d

905, 50 A.L.R.2d 513, inadmissible. However, defendant has cited no pertinent authority to support his contention. The authorities cited by him such as People v. Tarantino, 45 Cal.2d 590, 290 P.2d 505, and Irvine v. People of State of California, 347 U.S. 128, 74 S.Ct. 381, 98 L.Ed. 561, dealt with entirely different situations than the situation here. In those cases entry was made into a defendant's premises without his permission, constituting a trespass, and microphones installed and conversations which the defendant had no way of knowing could be repeated on the outside were recorded. Here, Bonnie was invited to return to defendant's office, and defendant knew that whatever he said to Bonnie could be repeated by her to others. Actually, the method used made the retelling of the conversation more accurate than its retelling by Bonnie could possibly be. The situation was no different than if Bonnie had her hands concealed in a muff and thereby was enabled to take down defendant's statements. In On Lee v. United States, 1952, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270, the majority court (5 to 4) refused to hold illegal, evidence obtained when a "stool pigeon," an old acquaintance and former employee of the defendant entered the latter's place of business along with customers and engaged the defendant in conversation, which conversation was relayed to a receiving set in the hands of the police outside the building by means of a transmitter concealed on the "pigeon's" person. The court held that there was no trespass, saying that the defendant's contention (the same contention is made here) that the defendant's consent to the entry was obtained by fraud, because the real purpose of the visit, namely, to get evidence against the defendant, was concealed, requires rejection of "such finespun doctrines for exclusion of evidence." 343 U.S. at page 752, 72 S.Ct. at page 971. It is true that four of the justices dissented. However, it must be remembered that the case did not deal with a situation comparable to ours. There the defendant was talking to a former employee with whom he had the right to assume he was talking in confidence. The dissenters placed their opinions on the claim that it was "dirty business" to allow such type of conversation to be carried to third persons listening on the outside. As pointed out above, the conversation between defendant and Bonnie was such that defendant reasonably must have known that it would be communicated to others. They were dealing with each other at arm's length. There was no "dirty business" connected with Bonnie making an accurate record of what defendant said to her.

Section 653h, Penal Code, provides: "Any person who, without consent of the owner, lessee, or occupant, installs or attempts to install or use a dictograph in any * * * office * * *" is guilty of a misdemeanor. It is doubtful if the microphone used here is a "dictograph." Assuming that it is, the section could not have been intended to cover a recording device of the type and use made of it under the circumstances of this case.

The California courts have ruled that evidence obtained by somewhat similar recording devices under similar circumstances to those here is not illegal and is admissible. In People v. Avas, 144 Cal.App.2d 91, 300 P.2d 695, a person whom defendant characterizes as a "planted stool pigeon" had a microphone concealed on her person when she met the defendant in her car and in his home, to which she had been invited. Her conversation with him was transmitted to special agents at an outside "listening post" and the conversation was there recorded. The court held that one invited to enter is not a trespasser. In People v. MacKenzie, 144 Cal.App.2d 100, 300 P.2d 700, an invitee of the defendant equipped with a microphone concealed on her person, entered his parlor and her conversation with him was transmitted to a recording set in a nearby police car. In People v. Goldberg, 152 Cal.App.2d 562, 314 P.2d 151, an invitee of the defendant who had a concealed microphone on his person sat with the defendant in the latter's automobile. Their conversation was recorded outside the car. The court said that the person equipped with the microphone "did not become a trespasser merely because he was ready and eager to hear and record what the enemies of the State might say." 152 Cal.App.2d at page 573, 314 P.2d at page 159. Further, "The recorded conversation which occurred in the automobile was the result of a prearranged meeting. In no sense was it inadmissible as the product of an unreasonable seizure." 152 Cal.App.2d at page 573, 314 P.2d at page 159. Hearings by the Supreme Court were denied in all three cases.

In People v. Tarantino, supra, 45 Cal.2d 590, 290 P.2d 505, the court in holding that section 653h which excludes from its provisions the use of dictographs by a peace officer under the conditions there set forth, did not permit such use if it was in violation of constitutional guarantees. It then stated that the secret entry of the defendant's room and the hiding of the microphone therein did violate such guarantees because such act was an unreasonable violation of the defendant's right of privacy, as well as a trespass. In our case, Bonnie was not trespassing nor in view of the fact that the defendant knew that any statements made by him to her would be mentally carried by her from the room and probably repeated to others, was there any violation of defendant's privacy. People v. Avas, supra, 144 Cal.App.2d 91, 99, 300 P.2d 695, distinguished the Tarantino case in that in that case "there was criminal conduct in the way of unlawful entry, a breaking and entering without the will of the defendant" (144 Cal.App.2d at page 99, 300 P.2d at page 699), while in the Avas case "the element of unlawful entry is absent. One invited to enter is not a trespasser. His entry does not become a trespass because he may be alerted to learn facts or to hear damaging declarations either by his natural faculties of hearing and sight or with mechanical and electronic aids of science. On Lee v. United States, 343 U.S. 747, 72 S.Ct. 967, 96 L.Ed. 1270 draws this distinction after an extensive review of the search and seizure cases of the United States courts." 144 Cal.App.2d at page 99, 300 P.2d at page 699. In the Avas case and in People v. MacKenzie, supra, 144 Cal.App.2d 100, 300 P.2d 700, the microphone was hidden on the person of one Mickey Jones under arrangement with special agents of the attorney general's office. In People v. Goldberg, supra, 152 Cal.App.2d 562, 314 P.2d 151, the microphone was installed on the defendant's invitee by a police officer. While section 653h is not discussed in any of the three last mentioned cases, it is obvious that the court in each case could have considered that the provision in section 653h excluding from the operation of the section the use of a "dictograph" by a "salaried peace officer," etc., was met when such peace officer arranged for the installation of such instrument on the person of another to be used under instruction of the officer. For this reason we deem it unnecessary to determine whether a "microphone" is a "dictograph" as mentioned in the section.[1]

4. Admissibility of Recording.

(a) *Was it defective?*

[5] The recording was played to the jury and a transcript of it made by the

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[1] Webster's International Dictionary, 2d ed., defines "Dictograph": "A trademark for a telephonic instrument having a sound-magnifying device that makes possible the transmission of sounds from a room in which the transmitter is stationed or concealed; hence * * * the instrument bearing this trade-mark. The ordinary mouthpiece is not required. The Dictograph is used as an interoffice telephone, esp. for dictating to a stenographer in another room, and is also employed to obtain evidence for court use." 26A C.J.S. 935, defines "Dictagraph": "A telephone capable of reproducing sounds made at considerable distance from the transmitter and audible at corresponding distance from the receiver; and so not necessarily a recording machine like a phonograph, but a concealed telephone transmitter which reproduces the sound in the next room by a receiver."

police secretary and testified by Bonnie as being correct was admitted in evidence and copies given to the jury. Defendant contends that in the transcript there are 78 instances where the secretary inserted dots to indicate that she did not understand what was said and that at these places the recording was either inaudible or unintelligible. Nevertheless the court determined that the recording presents a lucid reproduction of the conversation and that the portions not clearly understandable in no wise affected the general tenor of the conversation. Defendant has not pointed out a single instance of anything favorable to him which was not clearly audible or which was omitted from the transcripts.

In People v. Stephens, 117 Cal.App.2d 653, 660, 256 P.2d 1033, a forgery conviction was reversed on the grounds that, as a matter of law, the evidence was insufficient. Recordings of conversations between the defendant and others were played for the jury. The reviewing court noted that the record revealed that the conversations were unintelligible and inaudible in many parts. Witnesses who heard the conversations were available. However, the unintelligible recordings were nonetheless used and apparently were susceptible to various interpretations. Here, the nature of the unintelligibility is not explained by defendant. However, it does not appear that the recording was subject to various interpretations as in the Stephens case, supra. The admission of the recordings was not prejudicial to defendant.

If there were matters in the recordings foreign to the case, we find no suggestion or request by defendant that they be deleted.

(b) *Best evidence rule.*

[6] Admission of the tape re-recording was objected to under that rule. In People v. Stephens, supra, 117 Cal.App.2d at page 660, 256 P.2d at page 1038, the court said: "It would appear to be the law that such recordings are admissible in evidence and that the best evidence rule is not applicable; that the recordings are more reliable and satisfactory evidence than testimony of conversations given from memory by those who overheard them." The "such recordings" referred to were re-recordings made from original tape and wire recordings.

A re-recording is apparently clearer. The original was played to demonstrate the accuracy of the reproduction. Therefore, both were before the jury and, considering the language of the Stephens case, supra, the best evidence rule appears inapplicable.

5. Transcripts Given Jury.

[7] The accuracy of the transcripts was established and no objection was made as to their possible inaccuracy. The transcript was given to the jury only during the playing of the two recordings. They would appear to have been an aid to the jury in following the recordings. Defendant fails to point out how he was prejudiced by this procedure. In United States v. Schanerman, 3 Cir., 150 F.2d 941, cited by defendant, recorded conversations were played before the jury. As to the instant issue, the court merely said, "Transcribed notes, made by a stenotype operator from hearing the records repeatedly 'played,' were properly excluded * * *." At page 944. No reasons were given nor any authority cited. Whether or not such transcripts may be used is a matter in the discretion of the court. At most, the statement in the Schanerman case means that a refusal to permit their use would not constitute an abuse of discretion. Under the circumstances here we see no prejudice to the defendant nor any abuse of discretion by the trial court, in the limited use of the transcript while the recordings were being played.

6. Similar Attempt.

[8, 9] Defendant contends that the testimony of Mrs. Donati was inadmissible, citing at great length writers and decisions considering the rule that evidence of other

offenses is ordinarily inadmissible and the exceptions to this rule. People v. Albertson, 1944, 23 Cal.2d 550, 576–578, 145 P.2d 7; People v. Peete, 1946, 28 Cal.2d 306, 314–315, 169 P.2d 924; and II Wigmore on Evidence, 3rd ed., §§ 304, 357. It serves no purpose to review these authorities, since defendant's argument is not with the law, but rather its application. Suffice to say, in People v. Cassandras, 1948, 83 Cal. App.2d 272, 188 P.2d 546, evidence of a prior rape or attempt, committed under circumstances remarkably similar to the one charged, was admissible to show a plan or scheme to commit the crime in that fashion, even though the prior rape or attempt was committed on a person other than the prosecutrix. See also People v. Albertson, supra, 23 Cal.2d 550, 145 P.2d 7; People v. Dabb, 32 Cal.2d 491, 500, 197 P.2d 1; People v. Sykes, 44 Cal.2d 166, 170, 280 P.2d 769.

In the Cassandras case, supra, the defendant was accused of approaching a needy woman near an employment agency, luring her to a room with the promise of a job, and forcing her to submit under a threat of having her arrested and her children taken from her. The prosecution offered an "other offense" witness who testified that defendant had approached her near an employment agency and similarly lured her to a room and forced her to submit under similar threats.

In the present case, the circumstances of the alleged rape were unusual, to say the least. Therefore, if a similar offense were shown, it would obviously corroborate Bonnie's testimony and be of great probative value in proving that Dr. Wojahn probably committed the offense charged in the manner described by Bonnie. Mrs. Donati's testimony bears a striking similarity to the present charge. About a year previously, she visited Dr. Wojahn with a complaint about a hip dislocation. She was told to put on a robe, received an unsolicited pelvic examination from defendant who did not use gloves. Defendant unprofessionally fondled her breasts and pulled her nude body against his. He additionally wanted to give her something to relax her, but she insisted on leaving. (Defendant admitted giving her a pelvic examination, but denied any improper conduct.)

Defendant contends that this testimony reveals neither a prior rape or attempted rape and that it does not constitute evidence that defendant intended to rape Bonnie a year later. The prosecution need not prove all elements of a prior offense beyond a reasonable doubt, since the defendant is not on trial for that offense. People v. Albertson, supra, 23 Cal.2d 550, 579, 145 P.2d 7. It is clear defendant did not rape Mrs. Donati. However, there is more than a mere suspicion that an attempted rape or criminal assault was committed. The important consideration is not establishing beyond doubt a prior offense, but in showing the similarity of prior acts as tending to show that defendant committed the present charge in the manner described by the prosecutrix. People v. Cassandras, supra, 83 Cal.App.2d at page 282, 188 P.2d at page 552. Similarly, the "prior offense" testimony is not offered to show a plan or intent to commit rape a year later as defendant suggests. It is the "fashion" of committing the offense that constitutes the design, not a plan formed a year earlier to commit rape. Defendant concedes that the year interval does not render Mrs. Donati's testimony too remote.

As recognized in many cases (see People v. Albertson, supra, 23 Cal.2d at page 577, 145 P.2d at page 20) this "other offense" evidence must be cautiously received because of its great prejudicial nature. However, this danger must be weighed against the probative value of the evidence. Mrs. Donati's testimony revealed a sufficiently high degree of common features with the alleged rape of Bonnie to warrant the inference that if Dr. Wojahn committed those acts towards Mrs. Donati, he probably committed the offense charged by Bonnie. People v. Cassandras, supra, 83 Cal.App.2d at pages 279–280, 188 P.2d at pages 550–551.

7. Instruction.

[10] The court gave an instruction concerning Mrs. Donati's testimony based somewhat on CALJIC No. 33. Defendant does not complain of it as far as it went but contends that it should have been qualified. The instruction given is actually milder than a similar one offered by defendant, which also contained no qualification. Therefore, defendant cannot now complain that the instruction given was not sufficient. See People v. Bradbury, 155 Cal. 808, 103 P. 215.

8. Alleged Misconduct.

[11] In discussing the admissibility of the testimony of Mrs. Donati, and replying to the statement of defendant's attorney that the fact that the incident concerning which she was testifying occurred a year prior negatived any plan or scheme on defendant's part, the district attorney said, "I might also indicate to the Court that the mere fact that other offenses might not be shown in between does not—" The court interrupted, saying, "We have no proof of any other offense." The court then denied defendant's motion for mistrial but did instruct the jury to disregard the statement. We see no misconduct by the district attorney nor error in the court's action. If the statement is at all intelligible it was favorable to the defendant, showing that he had committed no other offenses between the Donati one and the one charged.

[12] The captain of the Salinas Police Department was testifying to Bonnie's condition the afternoon of the day she was assaulted by defendant. He said, "She was so hysterical she couldn't give me a good story on the thing except that she had been drugged * * *." Later the district attorney asked, "Now, the Judge mentioned a conclusion. Was it your conclusion that she was drugged or was that what she said?" The court interrupted, saying "* * what she said is obviously hearsay and the jury is admonished to disregard such statements." The district attorney then called attention to the fact that the witness had already mentioned that she said it. The court then ordered the statement out of the record and admonished the jury to disregard it, saying that what she told him was "hearsay and doesn't follow any of the rules." The district attorney then asked, "Did she say it or not?" The court then reprimanded him. While the district attorney should not have again asked the question in view of the court's ruling, it appears to be merely one of those things which occur in the heat of a hardly fought legal battle and did not constitute wilful misconduct.

[13] Nor did the following: In his closing argument the prosecutor, in discussing the crime of rape, stated that when a person acts out of passion he does things which do not make sense to "the rest of us. For example, if a person has some physical or mental aberration that causes him to expose himself to small children, why, this—" Defendant cited this as misconduct. The court then stated: "That's a very dangerous example in a case like this," and admonished the jury to disregard it. In each of the above instances the admonition of the court was sufficient to obviate any prejudicial effect.

The judgment and order are affirmed.

PETERS, P. J., and FRED B. WOOD, J., concur.

Hearing denied; PETERS, J., not participating.

169 Cal.App.2d 356

Ronald Anthony GASCON, Petitioner,

v.

SUPERIOR COURT of the State of California, In and For the COUNTY OF LOS ANGELES, Respondent.

Cr. 23728.

District Court of Appeal, Second District, Division 1, California.

April 3, 1959.

Hearing Denied May 27, 1959.

Proceeding for writ of prohibition on ground that there was no competent evidence before committing magistrate to establish probable cause for petitioner being held to answer charge. The District Court of Appeal, Nourse, J. pro tem., held that where police officers saw petitioner lawfully on street at night and notwithstanding fact that there was nothing to arouse their suspicions about petitioner they started questioning him and made threats to search him and during petitioner's flight he threw away a package containing marijuana, since no probable cause existed for the arrest of defendant, evidence obtained was the product of illegal acts of police officers and was inadmissible.

Peremptory writ issued.

1. Arrest ⚷63(4)

Where party was lawfully upon the public streets at night and had not committed any acts which would tend to arouse suspicion of police officers prior to his flight from them, officers had no probable cause to arrest him.

2. Criminal Law ⚷394.4(13)

If police officers had no probable cause for arrest of defendant and had carried out threat to search defendant's person and had found contraband in the process of search, there would be no question but that evidence had been illegally obtained and was therefore inadmissible.

3. Criminal Law ⚷394.4(2)

Where police officers found defendant lawfully on public street at night and without any acts being committed by defendant which would tend to arouse suspicion of police officers started to question him and make threats of searching him, and defendant began to run and threw away package of marijuana during flight, evidence being the product of the illegal acts of officers, was illegally obtained and hence inadmissible in evidence. U.S.C.A.Const. Amend. 4; West's Ann.Const. art. 1, § 19; West's Ann.Pen.Code, §§ 995, 999a.

Robert A. Ortiz, Los Angeles, for petitioner.

William B. McKesson, Dist. Atty., and Lewis Watnick, Deputy Dist. Atty., Los Angeles, for respondent.

NOURSE, Justice pro tem.

Pursuant to the provisions of 999a of the Penal Code, petitioner seeks a writ of prohibition predicated upon the grounds that there was no competent evidence before the committing magistrate to establish probable cause for his being held to answer and that the respondent court erred in denying his motion, made pursuant to section 995 of the Penal Code, to set aside the information. We have concluded that the peremptory writ of prohibition should issue as prayed for.

The facts as established by the evidence taken before the committing magistrate are: About 8 p. m. on January 7, 1959, two police officers of the city of South Gate observed an automobile lawfully parked on Hildreth Street near the intersection of Firestone in the city of South Gate. This is a commercial and industrial area but both Hildreth and Firestone are well lighted and a liquor store facing on Firestone a short distance from the intersection was open. The officers observed a woman sitting in the car and approached the car and questioned her. She stated she was waiting for her boy friend who had gone to the liquor store to purchase some cigarettes. At that time the officer saw the defendant approaching the parked car. They intercepted him before he reached it. They questioned him, asking where he had been, to which he replied that he had been to the liquor store to purchase some cigarettes for his girl friend. They asked him his name and he gave it. They asked him whether he had been "busted" before, to which he answered in the affirmative. They asked him several other questions but did not ask him for his driver's license. He appeared nervous while being questioned. After questioning, the officers told petitioner they were going to search him, whereupon defendant attempted to flee. He was overtaken when he had gone 25 to 35 feet but during his flight he threw some objects from his sweater pocket which included a small tinfoil package which the officers later recovered. It was found to contain marijuana.

At the time of the incident above recounted, defendant was at liberty on bail but the officers did not know this fact and had no reason to suspect that the defendant had committed a crime nor did they have any search warrant or warrant for his arrest. At the preliminary hearing, over timely objections, the marijuana was admitted into evidence. This evidence constituted the only proof of the corpus delicti.

[1] That the officers did not have probable cause to arrest petitioner is not disputed by the People nor could it be for he was lawfully upon the public streets at night and had not committed any acts which would tend to arouse suspicion prior to his flight. People v. Brown, 45 Cal.2d 640, 290 P.2d 528; People v. Simon, 45 Cal.2d 645, 650–651, 290 P.2d 531; People v. Harvey, 142 Cal.App.2d 728, 731, 299 P.2d 310.

[2] If probable cause had existed for the petitioner's arrest it would be of no moment that they attempted a search of defendant's person before making the arrest rather than afterward. People v. Simon, supra. There being no probable cause for arrest, if the officers had carried out their threat to search petitioner's person and had found the contraband in the process of the search, there would be no question but that the evidence was illegally obtained and, therefore, inadmissible. People v. Harvey, supra; People v. Simon, supra; People v. Brown, supra.

In the present case petitioner's flight was caused by the threat of the officers to illegally search his person which they could, without question, have put into effect, and the discarding by the petitioner of the evidence upon his person was but a product of the threat. We cannot distinguish this case in principle from that of Badillo v. Superior Court, 46 Cal.2d 269, 294 P.2d 23. In that case the petitioner fled from the premises which had been illegally entered by the investigating officers. In fleeing he threw from his person and into the hands of an officer waiting outside the front door of the premises certain contraband. In holding that the evidence was erroneously admitted into evidence at petitioner's preliminary hearing and in issuing a peremptory writ of prohibition against his trial upon the information which resulted from that hearing the Supreme Court said (46 Cal.2d at page 273, 294 P.2d at page 25):

> "The Attorney General contends that defendant abandoned the evidence when he threw it toward Agent Hipkins and that therefore he may not object to its use against him. It clearly appears, however, that defendant's flight out the front door and attempted disposal of the evidence was the direct result of Officer Getchell's illegal entry, and accordingly, the evidence was obtained in violation of constitutional guarantees."

[3] In the cited case as well as in the case at bar, the petitioner was fleeing from the attempted illegal invasion of his constitutional rights (4th Amendment, U.S. Const.; Cal.Const. art. I, § 19), and in each case, during the flight, he attempted to dispose of the evidence which the officers would have obtained had they been able to complete the threatened unlawful act. In each case the evidence, being the product of the illegal acts of the officers, was illegally obtained.

Let a peremptory writ of prohibition issue.

FOURT, Acting P. J., and LILLIE, J., concur.

Hearing denied; SHENK and SPENCE, JJ., dissenting.

169 Cal.App.2d 188

SULTAN TURKISH BATH, INC., a California corporation, Petitioner and Appellant,

v.

BOARD OF POLICE COMMISSIONERS OF CITY OF LOS ANGELES, Defendant and Respondent.

Civ. No. 23122.

District Court of Appeal, Second District,
Division 3, California.

March 27, 1959

Hearing Denied May 20, 1959.

Owner of Turkish bath brought mandamus proceeding against city's board of police commissioners to compel board to annul its order revoking permit to operate Turkish bath for 1956 and denying application for renewal of permit for 1957 and to grant a permit for 1957. The Superior Court of Los Angeles County, Bayard Rhone, J., entered judgment adverse to the owner, and the owner appealed. The District Court of Appeal, Vallée, J., held that evidence sustained findings of board that owner's business was carried on in such a manner as to permit patrons to engage in conduct which was indecent, lewd, lascivious, and prohibited by law, and that business had been carried on in an unlawful, improper and irregular manner within meaning of city ordinance dealing with revocation of permit, and that city ordinance providing that it shall be duty of city's board of police commissioners to revoke permit to operate Turkish bath whenever it shall appear to board that such business has been carried on under permit in an unlawful, improper or irregular manner, establishes a sufficiently clear and ascertainable standard to guide board in revoking and denying permits, and does not violate due process.

Judgment affirmed.

1. Municipal Corporations ⇨181

City's board of police commissioners, acting as a quasi-judicial body, is empowered to make final adjudications of fact in connection with matters properly submitted to it.

2. Municipal Corporations ⇨181

Where city's board of police commissioners, acting as a quasi-judicial body, makes final adjudications of fact in connection with matters properly submitted to it, reviewing court does not have right to judge of intrinsic value of evidence or to weigh it, and power of court is confined to determining whether there was substantial evidence before board to support its findings.

3. Municipal Corporations ⇨181

Where city's board of police commissioners, acting as a quasi-judicial body, makes final adjudications of fact in connection with matters properly submitted to it, reviewing court is bound to disregard all evidence contrary to that received in support of findings of board.

4. Mandamus ⇨168(3)

In mandamus proceeding by owner of Turkish bath to compel city's board of police commissioners to annul its order revoking owner's permit for 1956 to operate Turkish bath and owner's application for a 1957 renewal, hearing examiner's view of Turkish bath with consent of owner's counsel was evidence in the case and could be used alone or with other evidence to support board's findings.

5. Mandamus ⇨168(4)

Evidence sustained findings of city's board of police commissioners that business of owner of Turkish bath had been carried on in such a manner as to permit patrons to engage in conduct which was indecent, lewd, lascivious, and prohibited by law and that business had been carried on in an unlawful, improper, and irregular manner, so as to require revocation of permit for 1956 and denial of application for a 1957 renewal of permit. West's Ann.Pen. Code, §§ 286, 288a, 647, subd. 5.

6. Licenses ⚷38

In hearing before city's board of police commissioners with respect to revocation of permit of owner of Turkish bath to operate Turkish bath and application for renewal of permit, testimony of police officers that, as to some of the patrons arrested at Turkish bath, there were convictions in court, was admissible, over objection that testimony was hearsay, where officers testified as to their own knowledge and the only arrest reports, to which objection was made, were those in which there was no disposition shown. West's Ann.Gov.Code, § 11513.

7. Constitutional Law ⚷62

The delegation of an absolute legislative discretion to an administrative body is not proper, but if delegating statute establishes an ascertainable standard to guide administrative agents, no objection can properly be made to it.

8. Municipal Corporations ⚷121, 122(2)

Constitutionality of a city ordinance must be upheld unless its nullity is clearly apparent, and all presumptions and intendments are in favor of its validity.

9. Municipal Corporations ⚷111(1)

That in city ordinace is certain, which can be made certain by simple reference to the dictionary.

10. Constitutional Law ⚷287

City ordinance providing that it shall be duty of city's board of police commissioners to revoke permit to operate Turkish bath whenever it shall appear to board that such business has been carried on under permit in an unlawful, improper or irregular manner, establishes a sufficiently clear and ascertainable standard to guide board in revoking and denying permits, and does not violate due process.

Wirin, Rissman & Okrand, Fred Okrand, Los Angeles, Danning & Bartfield, and Irvin S. Bartfield, North Hollywood, for appellant.

Roger Arnebergh, City Atty., Philip E. Grey, Asst. City Atty., and D. H. von Wittenburg, Deputy City Atty., Los Angeles, for respondent.

VALLÉE, Justice.

The Board of Police Commissioners of Los Angeles revoked the 1956 permit of Sultan Turkish Bath, Inc., to conduct a Turkish bath, and denied its application for a 1957 permit. The appeal is from a judgment denying a writ of mandate to compel the board to annul its order and to grant a permit for 1957.

Section 27.02 of the Los Angeles Municipal Code provides for the licensing of Turkish baths through an annual permit issued by the board. Section 27.02(c) provides:

> "It shall be the duty of the Board, in addition to the other penalties provided by this Code, to revoke such permit whenever it shall appear to the Board that such business has been carried on under said permit in an unlawful, improper or irregular manner."

A permit may be renewed on the filing of an affidavit by the permittee stating he has conducted the business in a proper, regular, and lawful manner. The board has the power to deny an application for renewal "for any ground which would have justified a denial of the original application for a permit."

The complaint against Sultan alleged:

> "(a) Said business has been carried on under said permit in an unlawful, improper and irregular manner, to wit:
>
> "(1) Said business has been carried on in such a manner as to constitute a public nuisance;
>
> "(2) Said business has been carried on in such a manner as to permit patrons to engage in conduct which is indecent, lewd, lascivious and prohibited

by law. A list of such patrons, the date and nature of the conduct is attached hereto as 'Schedule A' and incorporated herein by reference.

"[Schedule A]

"(3) Permittees have knowingly refused and failed to take proper precautions to prevent the occur[r]ence of the acts complained of in said attached 'Schedule A';

"(b) The operation of said business under said permit does not comport with the public welfare, to wit:

"(1) Said business has been carried on in such a manner as to constitute a public nuisance;

"(2) Said business establishment is a hangout for male degenerates of all types who have committed on the premises indecent, lewd, lascivious acts prohibited by law. A list of such male degenerates who have committed said acts together with the date and nature thereof is attached hereto as 'Schedule A' and incorporated herein by reference."

The hearing examiner who heard the evidence reported to the board:

"A. The Department's exhibits as well as the testimony of the officers have proved by substantial evidence of numerous arrests and a number of convictions of patrons of the respondent bathhouse on charges, including vag. lewd (Penal Code 647 [subd.] 5), Sex perversion (Penal Code 288a), and Sodomy (Penal Code 286). The arrests referred to at Respondents premises covered a period from March, 1956, to and including May, 1957. They present a continuous pattern of lewd and immoral acts by patrons of Respondents during that period of time.

"The Respondents have, by evidence presented, shown that they employ watchmen to check the dressing rooms where most of the illegal acts occur, that they have peepholes in the dressing room doors and try to prevent loitering or more than one man in a room. Respondents further have presented evidence and testified that they do not knowingly allow any sexual perverts on the premises or permit the illegal and immoral activities referred to above. Further, that at the request of respondents, this Examiner in the presence of Respondents' counsel and Sergeant L. H. Reiner, visited Respondents' premises.

"B. It is the opinion of this Examiner that there is a continuous pattern of illegal sexual and immoral acts committed by some of the patrons of Respondents' bathhouse who use the bathhouse as a place to meet and congregate, and that although Respondents have attempted to prevent this illegal activity, they have not been successful."

The hearing examiner found:

"A. That the arrests referred to in the complaint, particularly Paragraph III thereof, Department's Exhibit 1, occurred at Respondents' premises on the dates referred to and on charges, including vag. lewd (Penal Code 647 [subd.] 5), sex perversion (Penal Code 288a), and sodomy (Penal Code 286).

"B. That the convictions of some of the persons on the charges above referred to occurred as testified to by the Police Officers and as contained in Department's Exhibits 4 through 7.

"C. That Respondent corporation employs watchmen to prevent the occurrence of illegal activities on the premises and does not knowingly permit illegal, immoral acts but that such acts notwithstanding have continuously occurred.

"D. That Respondents' business as alleged in the complaint has been carried on in such a manner as to permit patrons to engage in conduct which is indecent, lewd, lascivious, and prohibited by law.

"E. That as alleged in the complaint, Paragraph III thereof, that Re-

> spondents' business has been carried on in an unlawful, improper and irregular manner, and that the operation of said business under Police permit does not comport with the public welfare."

He recommended to the board that Sultan's permit for 1956 be revoked and that its application for a 1957 renewal be denied.

After notice to Sultan, the board conducted a hearing on the report and recommendations of the hearing examiner, at which written exceptions were presented; and counsel for Sultan, Louis Bartfield, its president, and the chief investigator of the board made statements. The findings and recommendations of the hearing examiner were adopted by the board as its decision. A request for reconsideration was denied. Thereafter the superior court denied a writ of mandate after reviewing the record before the board. Sultan appeals, contending first that the evidence does not support the order of the board.

[1–3] The Board of Police Commissioners, acting as a quasi-judicial body, is empowered "to make final adjudications of fact in connection with matters properly submitted to it." English v. City of Long Beach, 35 Cal.2d 155, 158, 217 P.2d 22, 24, 18 A.L.R.2d 547. On review the "court does not have a right to judge of the intrinsic value of the evidence nor to weigh it. The power of the court is confined to determining whether there was substantial evidence before the board to support its findings." Odden v. County Foresters etc. Board, 108 Cal.App.2d 48, 49, 238 P.2d 23, 24. In reviewing proceedings before the board this court is bound to disregard all evidence contrary to that received in support of the findings of the board. Thompson v. City of Long Beach, 41 Cal.2d 235, 241, 259 P.2d 649; Chenoweth v. Office of City Clerk, 131 Cal.App.2d 498, 501, 280 P.2d 858.

Viewing the evidence and the reasonable inferences to be drawn therefrom in the light most favorable to the board and disregarding conflicting evidence and inferences, the record shows these facts:

Sultan Turkish Bath is a corporation. Louis Bartfield is its president and owns half of the stock. Myron Glatt and his mother own the other half of the stock. Bartfield acquired his interests in December 1953; Glatt and his mother acquired theirs about 8 months later. Bartfield and Glatt were comanagers. The bath was located in the basement at 607 South Hill Street in Los Angeles. The establishment consisted of a gymnasium, steam room, hot room, showers, massage tables, swimming pool, and lounge. In addition there were 45 booths or "cubicles." Each cubicle contained a cot with a mattress on it, a table, and a chair. An electric light fixture was attached to the wall in each cubicle. The cubicles had plywood doors about 6 feet high, raised about 6 inches from the floor. Holes about an inch in diameter had been drilled into the doors at eye level; about three had half-inch holes; some had three holes in a triangular pattern. Springs had been installed on the doors so they would remain closed. A person inside a cubicle could lock the door. The diagram of the establishment used at the hearing is not in the record.

The Los Angeles Police Department received numerous complaints of homosexual and sex perversion activities at Sultan. The vice squad of the police department went through the place three and four nights a week. Officer Blakley was there 35 or 40 times between March 1 and July 30, 1957. On about "a fourth to a third of the number of times" he was there he made no arrests. On those occasions "there was hardly no one in the place." He and his partner made about 50 arrests "for Vag Lewd or 288a or Sodomy" between February 1, 1957 and July 30, 1957. He testified that as to those arrested, a number were convicted and he could not recall the disposition of the cases of the others. On July 21, 1957, he made four arrests in the place and did not "see any watchman at all that time." He personally saw the arrestees in immoral acts.

Officer Blakley told the management to "keep two men out of a booth, take the locks off the doors so there is no opportunity of hiding behind it or locking a door. Things like that. Keep the area well-lighted." In one section the lighting was very poor, one needed a flashlight to get around and see in the cubicles. On Saturdays and Sundays most of the arrests were made in the dark section; during the week arrests "were liable" to be made in any cubicle. Officer Blakley did not recall any time he was there when there were 15 or more registered when he was not "able to make an arrest."

Eleven arrest reports made by Officer Blakley and his partner between February 15, 1957 and May 5, 1957, were identified by him and introduced in evidence. In each instance Officer Blakley or his partner personally saw two men together in an adjoining cubicle engaging in some form of sex perversion.

Officer Judd testified he was in the establishment two or three times a week between March 1956 and July 26, 1957, except in June 1956; that of those times he made no arrests slightly more than one-third of the times. He further testified: "Q. Have you made any suggestions to him [Louis Bartfield] concerning improvements he might make or additional precaution that he might take in the management of the business? A. Yes, we discussed that, I believe, on two occasions. Q. What was the substance of that conversation? A. Mr. Bartfield asked me if there was anything I might recommend he could do to cut down the number of violations taking place in his establishment, and I suggested, as I recall, brighter lighting which he stated would discourage many of his customers, because they like to come in and sleep over-night. I also mentioned that the doors be kept open, and he stated that was not enough privacy." One light only was changed. He made arrests while the watchman was standing right next to him. Officer Judd testified: One watchman told him that he (the watchman) was doing the best job he could without looking into the booths that were locked. "So I told him my experience was probably 9 out of 10 I made in the place were made from booths where the doors were latched, and in order to break up any illegal activity, he would have to break into the booths, and he said Mr. Bartfield had told him he didn't want them disturbed, because he thought they were sleeping and he thought it was an invasion of their privacy." On one occasion the watchman did not attempt to look into a cubicle which had a towel over the peephole; "he said he wasn't expected to do that by the management." Officer Judd went into the cubicle adjoining which was empty, stood on a cot, looked over, and there was illegal activity inside the cubicle.

Eight arrest reports made by Officer Judd and his partner between April 21, 1956 and November 27, 1956, were identified by him and introduced in evidence. In each instance but one Officer Judd or his partner personally saw two men together in an adjoining cubicle engaging in some form of sex perversion, and on the other occasion three men engaging in such activity.

Officer Catlin, assigned to "Central Vice," who had made arrests in Sultan's identified two arrest reports made by him and his partner with respect to arrests they made on March 18 and 19, 1956. In each instance Officer Catlin observed two men together in an adjoining cubicle engaging in sex perversion.

Sergeant Sheets, assigned to the Police Commission investigative staff, testified that when Sultan's application was received he checked the vice files and secured photostatic copies of reports. These reports were introduced in evidence. They showed violations of section 647 subd. 5, of the Penal Code in the cubicles between December 12, 1956 and May 7, 1957, all at night.

It appears from the exhibits in evidence that the officers who made the arrests personally observed the criminal activities of those arrested and that they experienced no difficulty in doing so. They located two men in a cubicle by looking through open doors, by looking through the holes in the doors, looking under the doors, by hearing a squeaking cot, by hearing voices in a cubicle, or by going into an adjoining cubicle. On locating two men in a cubicle, they usually went into an adjoining one, stood on the cot or on a chair, looked over the partition, and in each instance saw two men engaging in homosexual activity or sex perversion.

The hearing examiner, with the consent of Sultan's counsel, viewed the premises.

There is no conflict in the evidence that numerous and frequent illegal, immoral, disgusting, and indecent acts were committed on the premises. Bartfield and Glatt knew of their numerous and frequent occurrence. Bartfield was present on occasions when arrests were made. He testified he was not surprised that there were arrests. The management told the watchman they were not expected to look over the tops of cubicles. The watchman had no difficulty observing the officers. On one occasion a watchman walked around the place telling the patrons an officer was there. The evidence supports an inference that the illegal, immoral, disgusting, and indecent activities which took place were not mere isolated, casual, unexpected, unpreventable, and uncontrollable incidents, as Sultan would have us hold. It is a reasonable and almost inescapable inference that the owners did not take adequate steps to stop the practices. The board may have reasonably inferred from Bartfield's statement to Officer Judd to the effect that he would not keep the doors on the cubicles open because he wanted his patrons to have privacy, that he was not concerned with what went on in them. Bartfield was willing to sacrifice morality, decency, and lawfulness in order that his patrons have privacy. The board may also have reasonably inferred that if the owners of Sultan had any real intention of conducting the establishment in a lawful, proper, and regular manner, they could have removed the cubicles and made one large room out of the area with cots in it, as exists in most such establishments, with a watchman constantly in the room, if necessary. The board could fairly infer there was inadequate inspection, insufficient lighting in at least one area, loose control of personnel, and improper design.

[4] The hearing examiner's view of Sultan's establishment with the consent of its counsel "is evidence in the case and 'may be used alone or with other evidence to support the findings.'" McCarthy v. City of Manhattan Beach, 41 Cal.2d 879, 889, 264 P.2d 932, 937.

[5] There is substantial evidence that Sultan suffered and permitted its premises to be used not only as a gathering place for homosexuals and sexual perverts but as a place where they openly solicited partners and actually engaged in homosexual practices and sex perversion. The evidence supports the findings of the board that Sultan's business "has been carried on in such a manner as to permit patrons to engage in conduct which is indecent, lewd, lascivious, and prohibited by law" and that it "has been carried on in an unlawful, improper and irregular manner." Kershaw v. Dept. of Alcoholic Bev. Con., 155 Cal.App.2d 544, 318 P.2d 494; Nickola v. Munro, 162 Cal. App.2d 449, 328 P.2d 271.

Tarbox v. Board of Supervisors, 163 Cal. App.2d 373, 329 P.2d 553, relied on heavily by Sultan, is not factually analogous. Tarbox operated a motion picture theater under a license from the county. The theater was operated in the same manner as similar theaters in the county are operated. From October 25, 1956, to March 17, 1957, nineteen men were arrested in the theater during the showing of pictures on charges of violating Penal Code, § 647 subd. 5 (vagrancy, lewd). The arrests were based on attempts by the persons arrested to place their hands upon the private parts of members of the sheriff's vice squad, who had seated themselves as decoys. All arrests occurred when the theater was dark for the purpose of exhibiting a picture. It was held that Tarbox did not conduct his theater in any other manner than motion picture theaters are conducted; that he did not countenance, consent to, or in anywise permit any lewd or immoral acts on the premises. We think the distinction between the facts in Tarbox and those at bar is obvious. Men do not run around nude in a theater; they do in Sultan's. There are no cubicles with cots in them in a theater; there are in Sultan's. A motion picture theater must be dark to exhibit pictures. There is no real necessity for Sultan's bath to be dark. A proprietor of a darkened motion picture theater has practically no control over persons watching a picture. Sultan has complete control of its patrons, if it exercises it. The theater was operated as a normal theater. Sultan's bath was not operated as a normal Turkish bath. In Tarbox criminal activity was discovered only by personal conduct of the deviates with the officers. Here the criminal activity was readily observable and could easily have been prevented by adequate control, by removing the doors of the cubicles, or by eliminating the cubicles and providing different facilities for resting.

[6] Sultan asserts the sole evidence before the board was improperly admitted hearsay. Counsel say the hearing examiner, over Sultan's objection, admitted in evidence the arrest reports and the officers' oral testimony that as to some of those arrested there were convictions in court. Counsel are in error. The only arrest reports to which objection was made were those "in which there is no disposition shown." The officers testified in most instances without objection as to convictions. We think it sufficiently appears they did so of their own knowledge. Such testimony was admissible. See Vaughn v. Jonas, 31 Cal.2d 586, 594–596, 191 P.2d 432; Weiss v. Wasserman, 91 N.H. 164, 15 A.2d 861, 864. No objection was made to the arrest reports of Officer Catlin. Furthermore, the officers identified their own arrest reports. Section 11513 of the Government Code in part provides:

> "The hearing need not be conducted according to technical rules relating to evidence and witnesses. Any relevant evidence shall be admitted if it is the sort of evidence on which responsible persons are accustomed to rely in the conduct of serious affairs, regardless of the existence of any common law or statutory rule which might make improper the admission of such evidence over objection in civil actions. Hearsay evidence may be used for the purpose of supplementing or explaining any direct evidence but shall not be sufficient in itself to support a finding unless it would be admissible over objection in civil actions."

The record shows that the evidence which was hearsay was used solely for the purpose of supplementing and explaining the direct evidence. See Cooper v. State Board of Health, 102 Cal.App.2d 926, 932, 229 P.2d 27; Witkin, California Evidence, 12, § 10 and cases there collected.

[7, 8] Sultan contends the standard fixed to guide the board in revoking and denying permits, "that such business has been carried on * * * in an unlawful, improper or irregular manner," is no standard and that it violates due process. The point is wholly without merit. "The delegation of an absolute legislative discretion to an administrative body is not proper, but if the delegating statute establishes an ascertainable standard to guide the administrative agents no objection can properly be made to it." Wotton v. Bush, 41 Cal.2d 460, 468, 261 P.2d 256, 260. The constitutionality of an ordinance must be upheld unless its nullity is clearly apparent, and all presumptions and intendments are in favor of its validity. Lawton v. Board of Medical Examiners, 143 Cal.App.2d 256, 260–261, 299 P.2d 362.

[9] "To comply with the constitutional requirement of due process of law, the crime for which a defendant is being prosecuted must be clearly defined, but it is only necessary that the words used in the statute be well enough known to enable those persons within its reach to understand and correctly apply them. 'To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and

specifications of the acts or conduct prohibited.' [Citation.] Although higher standards of certainty will be required of penal than of civil statutes [citation], a statute is sufficiently certain if it employs words of long usage or with a common law meaning, 'notwithstanding an element of degree in the definition as to which estimates might differ.' [Citations.] For example, the courts have upheld statutes employing such terms as: 'to make diligent effort to find the owner' [citation]; 'unreasonable speed,' [citation]; 'unjustifiable physical pain or mental suffering' [citation]; 'practice law', [citation]; and 'to the annoyance of any other person' [citation]." Lorenson v. Superior Court, 35 Cal.2d 49, 60, 216 P.2d 859, 866. "Where a statute contains a reasonably adequate disclosure of the legislative intent regarding an evil to be combatted in language giving fair notice of the practices to be avoided, a court will be slow to say that such a statute is too indefinite to be enforced. The complexities of the social problems dealt with by the Legislature require that a practical construction be given to the language employed by the draftsmen of legislation lest their purposes be too easily nullified by over-refined inquiries into the meanings of words. 'Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible.' [Citation.] The use of words of general meaning is the essence of our code system." People v. Deibert, 117 Cal.App.2d 410, 418, 256 P.2d 355, 360. That is certain which can be made certain by simple reference to the dictionary. Cozad v. Board of Chiropractic Examiners, 153 Cal.App.2d 249, 257, 314 P.2d 500.[1]

Webster defines "unlawful" as "1. Not lawful; illegal. 2. Irregular; contrary to normal or acceptable procedure; esp. not morally right or conventional. 3. Acting contrary to, or in defiance of, the law; disobeying or disregarding the law." Black defines "unlawful" as "that which is contrary to law or unauthorized by law." Bouvier defines "unlawful" as "that which is contrary to law."

Webster defines "improper" as "not suited to the circumstances," and gives "indecent" as a synonym. Black and Bouvier both define "improper" as "not suitable; unfit; not suited to the character, time, and place." Bouvier also defines "improper" as "improper conduct is such as a man of ordinary and reasonable care and prudence, under the circumstances, would not have been guilty of."

Webster defines "irregular" as "Not regular; not according to established law, method, or usage; not conformable to nature, to the rules of moral rectitude, or to established principles; not normal; disorderly." Black and Bouvier define "irregular" as "not according to rule."

[10] The standard set by the ordinance is one of conducting the bath in a lawful, proper, and regular manner. This is adequate to apprise those operating such a

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[1] See Brecheen v. Riley, 187 Cal. 121, 200 P. 1042, 1043, in which the standard "guilty of any act 'which constitutes dishonest dealing'" was held adequate; Dominguez Land Corp. v. Daugherty, 196 Cal. 468, 483–487, 238 P. 703, commissioner of corporations determining whether directors of a corporation shall be permitted to pay dividends from other than surplus profits; Agricultural Prorate Commission of California v. Superior Court, 5 Cal.2d 550, 55 P.2d 495, committee to determine the method, manner, and extent of prorating agricultural products; Keck v. Superior Court, 109 Cal.App. 251, 293 P. 128, suspend or revoke a driver's license if specified officers find an operator is a reckless, negligent, or incompetent driver; Redevelopment Agency of City and County of San Francisco v. Hayes, 122 Cal.App.2d 777, 806, 266 P.2d 105, agency given power to determine whether an area is blighted; Drucker v. State Bd. of Med. Examiners, 143 Cal.App.2d 702, 300 P.2d 197, words "furnish," "employ," and "maintain" have certain and definite meanings in section 2556 of Business and Professions Code; Kershaw v. Dept. Alcoholic Bev. Control, 155 Cal.App.2d 544, 549, 318 P.2d 494, "sex pervert." Also see People v. Daniel, Cal.Super., 337 P.2d 247, in which a number of illustrations of language held to establish a sufficient standard are given.

business of the standard required. The ordinance establishes a sufficiently clear and ascertainable standard.

Affirmed.

PARKER WOOD, J., concurs.

SHINN, Presiding Justice.

I concur in the judgment. This controversy could have been resolved by a little mature thinking on one side or the other. Sultan, operating as a combined bathhouse and hotel, serves some 3500 customers a month; half of them sleep through the night. An exceedingly small proportion of them cause serious trouble and have created an intolerable condition. The findings acquit the managers of knowingly permitting illegal acts upon the premises. There is no basis in the findings or the evidence for attributing to them base motives and evil character, nor is there any such contention. They had a duty to use extreme measures to remedy the condition and they failed in this duty.

As a result of the surprising lack of common sense in handling the situation the business is to be closed up and a great number of worthy citizens who have need for the beneficent advantage of being steamed out in a Turkish bath will be seriously discommoded. There has never been a doubt of the cause of the trouble and the cure for it. All the management had to do was remove the doors from the sleeping rooms and provide adequate lighting. This it stubbornly refused to do. Upon the other hand, the Board should have exercised its power under the City Charter to regulate the business. It should have imposed as a condition to the continued operation of the business that the doors of the sleeping rooms be removed and the place well lighted throughout. When a legitimate business is shown to be in need of regulation its operation cannot properly be prohibited if it can be successfully subjected to regulation by the authorities. A public authority which has the power to license businesses, and to regulate them, is remiss in its duties if it permits them to be operated without regulation and exercises only its power to refuse permits or to revoke them. However, in view of the positions taken by the parties in the litigation I do not think it is incumbent upon this court to order the matter to be remanded to the Board for further consideration. No doubt there will be an occasion for that at some future time.

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169 Cal.App.2d 352

Philip P. CROWELL, Plaintiff, Cross-Defendant and Respondent,

v.

Benjamin F. BRALY, Defendant, Cross-Complainant and Appellant.

Civ. 6002.

District Court of Appeal, Fourth District, California.

April 2, 1959.

Assignee of lessee brought action against lessor for specific performance of option in lease to purchase leased premises, and the lessor filed a cross-complaint. The Superior Court of Tulare County, W. G. Machetanz, J., entered judgment decreeing specific performance, and the lessor appealed. The District Court of Appeal, Shepard, J., held that where lessee's assignee gave notice to lessor of exercise by assignee of option under lease to purchase leased premises, and whole amount of purchase price was deposited by assignee with title company before consummation of transaction, attempt by lessor to raise a technical objection to the form of the tender almost two months later was ineffectual.

Judgment affirmed.

1. Appeal and Error 🔑907(3)

Where no transcript of evidence received in action was brought to District Court of Appeal on appeal, District Court of Appeal was required to assume that there was substantial evidence to support trial court's findings. West's Ann.Rules on Appeal, rule 5.

2. Landlord and Tenant 🔑92(4)

Not all defaults on part of lessee necessarily terminate or prevent exercise by lessee of option to purchase leased premises, and not all defaults, of themselves, work a forfeiture.

3. Landlord and Tenant 🔑112(2)

Acceptance of rent by lessor after breach by lessee may be a waiver by lessor of breach.

4. Landlord and Tenant 🔑92(4)

Ordinarily, lessor may not declare a forfeiture after lessee has tendered purchase price under provision of lease giving lessee option to purchase.

5. Landlord and Tenant 🔑92(4)

Where lessor did not, in original instance, make objection to form of tender by lessee's assignee of purchase price when lessee's assignee exercised option under lease to purchase leased premises, lessor would be deemed to have waived any technical objections to the tender.

6. Specific Performance 🔑101

Where lessee's assignee gave notice to lessor of exercise by assignee of option under lease to purchase leased premises, and whole amount of purchase price was deposited by assignee with title company before consummation of transaction, attempt by lessor to raise a technical objection to the form of the tender almost two months later was ineffectual in action by lessee's assignee for specific performance of option to purchase. West's Ann.Civ. Code, § 3392.

7. Trial 🔑9(1)

Pretrial order sets up contentions of the parties and is deemed to control subsequent course of case, unless modified at or before trial. West's Ann.Superior Court Rules, rule 8.8.

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Guy Knupp, Jr., Porterville, for appellant.

Alfred G. Mortimore, Shafter, for respondent.

SHEPARD, Justice.

This is an appeal from a judgment decreeing specific performance of an option to purchase 320 acres of land in Tulare County. The appeal is taken from the clerk's transcript, which contains only the judgment roll, the pre-trial statement and order, and certain minute orders, and is apparently under Rule 5, Rules on Appeal, 50 Cal.2d 5.

The court found that defendant, as lessor, made a lease agreement with plaintiff's assignor on 14 February 1949, and that plaintiff is the lessee thereunder; that said lease agreement contains an option clause granting an option to buy the land described in plaintiff's complaint for $150 per acre at any time during the tenure of the lease, lessor agreeing to furnish clear and merchantable title with a reservation to lessor of 50% of petroleum and mineral rights and the option to be exercised by 30 days' written notice to lessor; that on 18 December 1956, at a time when said written lease agreement was in full force and effect, plaintiff exercised said option and gave written notice thereof to defendant; that plaintiff timely and properly tendered to defendant the purchase price; that any defect in the form of the tender was waived by defendant; that defendant failed, refused and neglected to comply with the option agreement; that plaintiff has duly performed all the conditions in said written lease agreement on the part of the lessee to be performed; that plaintiff is still ready and willing to pay said purchase price as provided in the option clause; that there is an encumbrance of $25,000 in the form of a deed of trust to a third party; that the agreement was fairly entered into and was and is in all respects just and reasonable; that the consideration was fair and adequate for the agreement, and the purchase price was a fair and adequate consideration for the conveyance of said real property and is the fair and reasonable value of said real property; that defendant refuses to convey said property to the plaintiff; and that plaintiff did not prove additional damages. From the pleadings and from the pre-trial order it appears that long prior to the exercise of the option the parties were in contention and dispute over the meaning of a certain clause in the lease wherein it is said:

> "The lessee covenants and agrees to pay the said rental at the time and in the manner hereinabove set out and to pay or reimburse lessor, when due, for the amount of taxes assessed against all improvements made by the lessee upon the leased land during the term of this lease."

From defendant's brief and pleadings it appears that there was a substantial increase in taxes on the land due to plaintiff's betterment of the land; litigation and suit followed as a result of this dispute over the meaning of the word "improvements", and the ultimate decision was against plaintiff herein; the amount of the judgment in that action was paid by this plaintiff to this defendant; and that before said payment was made this defendant gave notice of default and made demand that said taxes be paid within sixty days. Defendant contends that the plaintiff on 18 December 1956, when he gave notice of election to exercise his option to purchase, was in default. This default involves the failure to pay a portion of certain taxes under the conditions hereinbefore described. Defendant further contends that there was no legally effective exercise of the option, and that there was no effective legal tender.

[1] Due to the fact that there has been brought to this court no transcript of the evidence received in the action, we are compelled to assume that in the evidence adduced at the trial there was substantial evidence to support the findings. Transportation Guarantee Co. v. Jellins, 29 Cal. 2d 242, 245(1a), 174 P.2d 625; White v. Jones, 136 Cal.App.2d 567, 569(3), 288 P. 2d 913; Kompf v. Morrison, 73 Cal.App. 2d 284, 286(1), 166 P.2d 350.

[2–4] In dealing with defendant's first point, that plaintiff was not entitled to exercise the option to purchase at a time when he was in default in the performance of a material covenant of the lease, it must be remembered first that all defaults do not necessarily terminate or prevent the exercise of an option nor do they, of themselves, work a forfeiture. Schnittger v. Rose, 139 Cal. 656, 73 P. 449. The acceptance of rent by the lessor after breach by the lessee may often be considered a waiver of the breach. Randol v. Tatum, 98 Cal. 390, 33 P. 433; Group Property, Inc. v. Bruce, 113 Cal.App.2d 549, 556 (2, 3), 248 P.2d 761; Julien v. Gossner, 103 Cal.App.2d 338, 344(6), 229 P.2d 786; Kern Sunset Oil Co. v. Good Roads Oil Co., 214 Cal. 435, 440(2), 6 P.2d 71, 80 A.L.R. 453; Bedford Investment Company v. Folb, 79 Cal.App.2d 363, 366(3), 180 P.2d 361; Guerin v. Blair, 33 Cal.2d 744, 746(2), 204 P.2d 884. This rule is consistent with the rule announced in Katemis v. Westerlind, 120 Cal.App.2d 537, 543(8), 261 P.2d 553, 558, where the court states that:

> "* * * the modern view that valuable contractual rights should not be surrendered or forfeitures suffered by a slight delay in performance unless such intention clearly appears from the contract or where specific enforcement will work injustice after a delayed tender."

This liberal construction is fortified by our legislature in Civil Code Section 3392, where it permits specific performance if the failure to perform by the buyer is "only partial, and either entirely immaterial, or capable of being fully compensated, in which case specific performance may be compelled, upon full compensation being made for the default." Other jurisdictions in the United States apparently follow this general rule. Helbig v. Bonsness, 227 Wis. 52, 277 N.W. 634, 115 A.L.R. 378. It must be remembered also that the lessor may not ordinarily declare a forfeiture after a lessee has tendered the purchase price (Gordon v. Dufresne, 205 Cal. 512, 514(1), 271 P. 1066.

[5] The defendant's second point is that there is no legally effective exercise of the option. From the findings of the court it appears that defendant did not, in the original instance, make an objection to the form of tender, and for that reason must be deemed to have waived any technical objections. Hunt v. Mahoney, 82 Cal. App.2d 540, 546(3), 187 P.2d 43; Cates v. McNeil, 169 Cal. 697, 701, 147 P. 944.

[6, 7] The third point raised by defendant is covered by the same rules. It is not disputed in the papers available to us that a notice of the exercise of the option was given, and that the whole amount of the $48,000 purchase price was deposited with the title company before the consummation of the transaction. We think an attempt by defendant to raise a technical objection to the form of tender almost two months later must be deemed ineffectual. In any event, the trial court found against defendant on this issue, and we are compelled to assume that on the trial there was sufficient evidence to support the findings of the court. The pre-trial order sets up the contentions of the parties and is deemed to control the subsequent course of the case unless modified at or before trial. Rule 8.8, Rules of Superior Courts, 47 Cal. 2d 7.

On the entire record before us and in consideration of the fact that we are required to assume there was sufficient evidence to support the findings of the trial court, we are unable to see that there was any inconsistency between the pleadings and the findings.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

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169 Cal.App.2d 283

PEOPLE of State of California, Plaintiff and Respondent,

v.

Pete SHEPHARD, Defendant and Appellant.

Cr. 6451.

District Court of Appeal, Second District, Division 1, California.

March 31, 1959.

Hearing Denied May 27, 1959.

Defendant was convicted of agreeing to sell heroin and thereafter selling another substance in lieu of heroin, and from the judgment of the Superior Court, Los Angeles County, Walter H. Odemar, J., the defendant appealed. The District Court of Appeal, Fourt, J., held that under record the conviction would be affirmed.

Affirmed.

Poisons ⚷9

Under record, conviction of agreeing to sell heroin and thereafter another substance in lieu of heroin would be affirmed. West's Ann.Health & Safety Code, § 11502.

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Cary G. Branch, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., John M. Huntington, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction of the crime of violation of section 11502, Health and Safety Code.

In an indictment filed in Los Angeles county, the appellant was charged with a violation of section 11502, Health and Safety Code, in that he did, on or about March 11, 1958, agree to sell and give heroin to George Renty, and did thereafter sell and give to George Renty another substance in lieu of heroin. It was also alleged that the appellant had previously been convicted of the crime of violation of section 11500, Health and Safety Code, and judgment thereon was pronounced about January 4,

1954. The appellant pleaded not guilty and denied the prior conviction. The matter was tried before the court without a jury. Appellant was found guilty as charged.

It is difficult, from the record, to determine just what the situation is as to the prior conviction. The form prepared by the Clerk (entitled "Minutes") which is set forth in the clerk's transcript recites that "no finding having been made as to the prior conviction." The reporter's transcript sets forth the following as being the words of the judge: "and the Court not having presented to it any evidence regarding the truth or falsity of the prior as alleged and as heretofore stated as being alleged, the Court, of course, finds the prior not to be true because of lack of evidence.

"Thereafter, you asked and were granted leave to make written application for probation. This is the time and place to which that matter has been finally continued."

However, there had been introduced into evidence fingerprints records and a certified copy of the prior commitment papers with reference to the prior conviction alleged in the indictment, and a stipulation by the defendant to the effect that he was the person mentioned in the documents referred to.

Immediately after the statement of the court to the effect that there was no evidence regarding the truth or falsity of the prior, the judge said, "You were arrested and convicted in 1950, 1953, 1955, 1956, 1957. Each time for narcotics." And with reference to the same matters, the court said, "last time he got nine months; the time before a year; the time before that he got nine months; the time before that he got a year."

The defendant, in any event, made an application for probation and the court permitted the filing of such application, though, under the evidence and circumstances of this case the defendant was, as a matter of law, ineligible to be granted probation. Probation was denied. Judgment was pronounced and the defendant was sentenced to the state prison as a first offender.

A résumé of the facts is as follows: Officer Renty of the Los Angeles Police Department was working as an undercover plain-clothes agent of the police department narcotic bureau. He saw the defendant on March 11, 1958, about noontime at the corner of 42nd Street and Central Avenue in Los Angeles. The policeman was with an informant named Earl Jones, whom he had met at the police station, and who resided on West 54th Street. Jones was acquainted with the defendant and at or about the time of the transaction with which we are concerned had said to officer Renty, "That's Pete Shephard. We will be able to buy stuff from him. * * * He is a peddler." The officer and Jones then approached the defendant and Jones asked the defendant if he had anything. The defendant replied, "Yes. I have it stashed. Have you got a short?" The officer replied, "Yes." The officer, Jones and the defendant then walked to the officer's car, and at the defendant's direction drove to the Ruth Hotel on Fifth Street, which was several blocks from where they then were. Nothing in particular was said about money on the way down to the hotel. The officer drove the car, Jones sat in the middle of the front seat and the defendant sat next to the door in the front seat. When they arrived at the location of the hotel the defendant got out of the automobile and was gone a few minutes and then returned and said, "Let's go back on the avenue." Jones had remained in the car at the hotel. While riding back to 42nd Street and Central Avenue, Jones gave the defendant nine-dollars in exchange for a small balloon which appellant said was $9 worth. Upon receiving the balloon, Jones immediately passed it to officer Renty. The defendant was then driven back to 42nd Street and Central Avenue, and defendant got out of the car. The officer then drove to the police building, marked and booked the balloon and its contents as evidence. The balloon contained a white powder resembling heroin, and an expert testified that the powder was not a narcotic.

Another expert in terminology and methods with respect to the narcotic traffic testified that the balloon has a significance in that it is one of the ways in which narcotics are packaged; that it is done so, in order that the container can be carried in the mouth or other body cavity without the narcotic dissolving or otherwise being affected. It was further testified that in a narcotics transaction, the question, "Do you have anything?" would mean, "Do you have any narcotics?" The phrase, "I have it stashed," would mean, "I have it hidden," and the term, "Do you have a short?" would mean, "Do you have a car?" Further that such terms as "stash" and "short" are used frequently by people engaged in the trafficking of narcotics.

The appellant testified in his own behalf and denied that he had made any sale of narcotics or supposed narcotics to anyone. He did state, on examination, however, that he did know something about narcotics and that he had been convicted for the use of it. He stated that he knew what to do in making a purchase of it, that is, to give it the taste test to be sure it was heroin and not some other substance.

The defendant also testified that he knew Jones by the name of "Yocum Slim" and knew him to be a "dope fiend. That's because I did time with him a couple of times for narcotics."

The appellant contends:

(1) That section 11502, Health and Safety Code is unconstitutional;

(2) That the indictment does not state a public offense;

(3) That the evidence is insufficient to support the charge in the indictment;

(4) That the testimony of officer Renty is inherently improbable, and

(5) That it was a denial of due process not to produce Earl Jones as a witness in any stage of the proceedings.

Considering the first contention of the appellant; he insists that the statute is an improper exercise of the police power, and that the statute is vague, uncertain and unintelligible. It cannot be questioned that the police power of the state extends to matters having to do with the sale or possession of narcotics, and certainly the legislature has the power to prohibit the possession or use of narcotics, whether such drugs are beneficial or detrimental. People v. Mistriel, 110 Cal.App.2d 110, 112, 241 P.2d 1050; In re Weisberg, 215 Cal. 624, 627, 12 P.2d 446; In re Rameriz, 193 Cal. 633, 649, 226 P. 914, 34 A.L.R. 51.

Apparently, the appellant questions whether the legislature can enact such a statute under the guise of protecting the health and morals of the people, when in fact the statute prohibits a person from offering to sell a narcotic and delivering a substance in lieu of the narcotic.

The Progress Report to the Legislature, 1953 Regular Session, by the Assembly Interim Committee on Judiciary, Jan., 1953, Part XV, Final Report of Subcommittee on Narcotics, p. 254, sets forth the following:

> "2. Section 11502 is added to the code and will be entirely new law. This will cover the individual who agrees to sell, furnish, transport, or give away any narcotic, and then delivers some other liquid, substance, or material. These individuals are known to be in a position to violate the law; but, for some reason, they may feel that they are dealing with a law enforcement officer and thus deliver tobacco, water, or some other substance with the result that they have had the intent to commit the crime but are testing out the officer. At the present time, nothing can be done to that person, except to charge with with (sic) 'bunco.' Under this statute it provides a penalty of not more than one year in the county jail or the state prison for 10 years."

In any event, without the assistance of the Interim Committee Report, it is apparent that the legislature had the intention of discouraging anyone from engaging or appearing to engage in the narcotics traffic. Anything which gives sustenance, solace, comfort or encouragement in the selling of narcotics or in the agreeing to sell narcotics, can be condemned, and properly so, by the legislature. It is clear that the statute in question was aimed at discouraging any traffic in narcotics and is therefore within the police power of the state.

It has been held that except where a court can say that a police regulation has no just relation to the object which it purports to carry out, and no reasonable tendency to protect the public safety and health, the decision of the legislative body as to the necessity or reasonableness of the regulation, is conclusive. Sullivan v. City of Los Angeles, 116 Cal.App.2d 807, 810, 254 P.2d 590; Odd Fellows' Cemetery Ass'n v. City & County of San Francisco, 140 Cal. 226, 233, 73 P. 987.

Section 11502 of the Health and Safety Code reads as follows:

"Every person who agrees, consents, or in any manner offers to unlawfully sell, furnish, transport, administer, or give any narcotic to any person, or offers, arranges, or negotiates to have any narcotic unlawfully sold, delivered, transported, furnished, administered, or given to any person and then sells, delivers, furnishes, transports, administers, or gives, or offers, arranges, or negotiates to have sold, delivered, transported, furnished, administered, or given to any person any other liquid, substance, or material in lieu of any narcotic shall be punished by imprisonment in the county jail for not more than one year, or in the state prison for not more than 10 years."

A reading of the section answers the assertions of the appellant to the effect that it is vague, uncertain and unintelligible. Men of common intelligence do not have to guess at what it means. People v. McCaughan, 49 Cal.2d 409, 414, 317 P.2d 974. There is a reasonably adequate disclosure of the legislative intent regarding the evil to be combatted in language giving fair notice of practices to be avoided. In re Clarke, 149 Cal.App.2d 802, 806, 309 P.2d 142. A reading of the section discloses that it is a crime for a person to agree to sell a narcotic to someone, and then to deliver instead a non-narcotic substance.

The appellant's second contention is to the effect that the indictment is defective in not stating a public offense, and that there is a fatal variance between the pleading and the proof. In brief, the appellant asserts that the indictment charges the defendant with unlawfully agreeing to sell a narcotic, and that it does not charge the defendant with agreeing to unlawfully sell a narcotic. The indictment set forth that, "Pete Sheppard did willfully, unlawfully and feloniously agree to sell, furnish and give heroin to George Renty, and did thereafter sell, give and furnish to said George Renty another substance and material in lieu of said heroin, in violation of section 11502, Health and Safety Code of the State of California."

In effect, the code section reads, "Every person who *agrees, consents, or in any manner offers to unlawfully sell* * * * any narcotic to any person, * * * and then sells, delivers * * * or negotiates to have sold, delivered * * * to any person any other * * * substance * * * in lieu of any narcotic shall be punished * * *." (Emphasis added.)

The purpose of an indictment is to inform the defendant of the charge he must meet at the trial. People v. Schoeller, 96 Cal.App.2d 61, 64, 214 P.2d 565; People v. Pierce, 14 Cal.2d 639, 645, 96 P.2d 784. Under section 952, Penal Code, a charge is sufficient if it contains in substance a statement that the accused has committed an offense specified therein. People v. Benenato, 77 Cal.App.2d 350, 361, 175 P.2d 296.

We believe that the essential facts are set forth in the indictment, and if there is a defect, it is at most one of uncertainty. There was no objection made in the trial court, and the appellant is deemed to have waived such defect, if any there was, by a failure to demur. People v. Burke, 22 Cal.App.2d 280, 70 P.2d 953; People v. Benenato, supra, 77 Cal.App.2d 350, 363, 175

P.2d 296; People v. Brac, 73 Cal.App.2d 629, 634–635, 167 P.2d 535.

The appellant has not seen fit to advise us as to how, or in what fashion he was prejudiced by any failure to state the offense in the literal language of the statute. We are unable to find where there has been any miscarriage of justice in this case. People v. Schoeller, supra, 96 Cal. App.2d 61, 64, 214 P.2d 565; Penal Code, § 960.

There was no fatal variance between the pleading and the proof in this case. The appellant has made no effort to demonstrate that he was in any wise misled in the making of his defense, or that he will be deprived of making a plea of former jeopardy in the event there ever should be another trial for the same offense. People v. Williams, 27 Cal.2d 220, 226, 163 P.2d 692; People v. Braddock, 41 Cal.2d 794, 799, 264 P.2d 521. The appellant does not even state, at this time, how or in what fashion he was misled.

As to the claim that the testimony of the officer was inherently improbable, the rule "is well settled that to warrant a rejection of statements given by a witness who has been believed by a jury, or trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions * * *." People v. Simpson, 43 Cal.2d 553, 562, 275 P.2d 31, 36.

The appellant has failed to point out in what particular the evidence is insufficient. Even if we were inclined to reverse the judgment, we are not authorized to do so upon the ground of insufficient evidence unless it clearly appears that upon no hypothesis whatever is there sufficient substantial evidence to support the conclusion arrived at by the trier of fact. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. From the recital of the facts heretofore set forth, it is clear that there was a violation of the provisions of section 11502 of the Health and Safety Code.

The appellant's final contention is to the effect that the defendant was denied due process of law for the reason that Jones, the informant, was not produced at the trial. There is no merit to such a contention. The informant in this case was a participant and a material witness to the sale, and under the circumstances, his identity must be disclosed upon cross-examination at the trial. People v. McShann, 50 Cal.2d 802, 806, 808, 330 P.2d 33. The officer was asked, on cross-examination, the name and address of the informant and he disclosed the same. The prosecution, however, is not required to call any particular witness to the witness stand as long as there is fairly presented to the court the material evidence bearing upon the charge for which the defendant is on trial. People v. Tuthill, 31 Cal.2d 92, 98, 187 P.2d 16; People v. Parry, 105 Cal. App.2d 319, 323, 232 P.2d 899; People v. Chapin, 145 Cal.App.2d 740, 748, 303 P.2d 365. Further, the appellant in this case testified that he had known the informant for some time.

A thorough reading of the entire record in this case convinces us that the appellant was properly and fairly convicted of a violation of section 11502, Health and Safety Code, and that if there was any error it was not prejudicial and there was no miscarriage of justice.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur in the affirmance of the judgment.

168 Cal.App.2d 215

DEPARTMENT OF MENTAL HYGIENE, Plaintiff and Appellant,

v.

Marian MANNINA, etc., Defendant and Respondent.

No. 18143.

District Court of Appeal, First District, Division 2, California.

March 27, 1959.

Proceedings on claim against decedent's estate. The Superior Court, Santa Clara County, Harold Holden, J., made findings favorable to the claimant, but thereafter granted a new trial, and claimant appealed. The District Court of Appeal reversed, 335 P.2d 694. On petition for rehearing, the District Court of Appeal held that under the statute stating that certificate of the medical superintendent of the state hospital with respect to insanity of a patient therein shall be prima facie evidence that the patient is not likely to recover, the certificate is not conclusive of the facts stated therein.

Petition for rehearing denied.

Mental Health ⚷10

Under the statute stating that certificate of the medical superintendent of the state hospital with respect to insanity of a patient therein shall be prima facie evidence that the patient is not likely to recover, the certificate is not conclusive of the facts stated therein. West's Ann.Welfare & Inst.Code, § 6655.

◆

Stanley Mosk, Atty. Gen., Wiley W. Manuel, Deputy Atty. Gen., for appellant.

Machado, Feeley & Machado, John H. Machado, San Jose, for respondent.

PER CURIAM.

Section 6655, Welfare & Institutions Code provides: "If a certificate from the medical superintendent of the State hospital in which the person is confined as a patient is filed * * * in which certificate the medical superintendent states that the patient is suffering from a chronic form of insanity, and that in his opinion a recovery is beyond reasonable hope and that the patient will in all probability continue to be a charge in a State hospital until death, such certificate shall be prima facie evidence that the patient is not likely to recover or to be released from the hospital * * *."

Respondent argues that because such a certificate was filed in the guardianship proceeding in this case before the orders fixing the amounts of the payments were made the probate court could only have made its orders "by impliedly finding that the Director consented to such a reduction, cancellation or remission." This argument ignores the fact that the certificate is not made *conclusive* but only *prima facie* evidence by the terms of the section relied upon.

The petition for rehearing is denied.

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169 Cal.App.2d 209

Merry Katrinka WHITNEY, by Merry Kathleen Whitney, her Guardian ad litem, Plaintiff and Appellant,

v.

Gerald C. WHITNEY, Defendant and Respondent.

Civ. 18194.

District Court of Appeal, First District, Division 2, California.

March 30, 1959.

Hearing Denied May 27, 1959.

Proceeding by child by a guardian ad litem for temporary support pending trial. From an adverse judgment in the Superior Court, County of Marin, Thomas B. Keating, J., the child appeals. The District Court of Appeal, Dooling, J., held that where child was born on September 27, 1957, after the parents had separated on December 4, 1956, a pregnancy of 297 days calculated from the date of intercourse as distinguished from the last menstruation was sufficiently infrequent to justify the court in holding that it was not within the normal and usual range of pregnancies, and hence the conclusive presumption of legitimacy with respect to issue of a wife cohabiting with the husband did not apply.

Order affirmed.

1. Bastards ⚷72, 92

In a proceeding by a child for temporary support, order denying support was appealable independently of the judgment, but any implied finding concerning paternity of the child was not determinative of that issue at the trial.

2. Bastards ⚷69

In proceeding by child for temporary support from putative father, while the jurisdictional prerequisite of parentage may be put in issue at a hearing on the motion, the evidence need not be so extensive as at the trial of the action.

3. Bastards ⚷3

The statute creating conclusive presumptions that the issue of a wife "cohabiting" with her husband who is not impotent is presumed to be legitimate, uses the term "cohabiting" as living together of a man and woman, ostensibly as husband and wife. West's Ann.Code Civ.Proc. § 1962, subd. 5.

See publication Words and Phrases, for other judicial constructions and definitions of "Cohabiting".

4. Bastards ⚷3

In proceeding by child for support where parents separated on December 4, it must be presumed that the parties had intercourse on December 3 or 4 the last day of opportunity of access of the husband and wife before their separation. West's Ann.Code Civ.Proc. § 1962, subd. 5.

5. Bastards ⚷69

In proceeding by child for support where the child was born on the 297th day after the date the parents separated, in determining the legitimacy of the child, it was the 297 days which actually elapsed that were determinative, and there was no requirement that the actual number of days should be disregarded, and the months without regard of their actual length should each be calculated at 30 days, thereby arriving at a figure of 294 instead of 297. West's Ann.Code Civ.Proc. § 1962, subd. 5; West's Ann.Civ.Code, § 194.

6. Evidence ⚷363

In determining the legitimacy of a child seeking support from alleged putative father, court was entitled in determining whether the 297 days after the last coitus of the parents was usual or normal and not merely the average period of gestation to consult the published technical works and articles by those recognized as authorities in such branch of human knowledge. West's Ann.Code Civ.Proc. § 1962, subd. 5.

7. Bastards ⚷8

In determining legitimacy, the length of most pregnancies is calculated from the first day of the last menstrual period, since normally although not invariably, menstruation does not occur during pregnancy, and generally the average period of pregnancy calculated from the first day of the last menstruation is about 280 days. West's Ann.Code Civ.Proc. § 1962, subd. 5.

8. Bastards ⚷8

In determining the length of pregnancy in determining legitimacy of child of putative parent from fruitful coition, 8 to 14 days should be subtracted from the normal figure of gestation when it has been calculated from the onset of the last menstruation. West's Ann.Code Civ.Proc. § 1962, subd. 5.

9. Bastards ⚷3

In proceeding for support of child who was born on September 27, 1957, after the parents had separated on December 4, 1956. a pregnancy of 297 days calculated from the date of intercourse as distinguished from the last menstruation was sufficiently infrequent to justify the court in holding that it was not within the normal and usual range of pregnancies, and hence the conclusive presumption of legitimacy with respect to issue of a wife cohabiting with the husband did not apply. West's Ann.Civ. Code § 194; West's Ann.Code Civ.Proc. § 1962, subd. 5.

◆

Delger Trowbridge, San Rafael, Theodore M. Monell, San Francisco, for appellant.

Noal R. Gray, San Francisco, Bette P. Callahan, Mill Valley, for respondent.

DOOLING, Justice.

Plaintiff, Merry Katrinka Whitney, through her guardian ad litem, Merry Kathleen Whitney, appeals by a settled statement from the minute order denying her motion for temporary support pending trial.

Merry Kathleen Whitney, the mother of appellant, married respondent on November 26, 1956 and separated on December 4, 1956 On February 11, 1957, the marriage was annulled. Thereafter, on September 27 1957, appellant was born weighing 6 pounds and 9 ounces. Mrs. Whitney had her last normal menstrual period in the latter part of December 1956 and experienced a shorter than normal period in the latter part of January 1957. She did not discover that she was pregnant until early in March 1957.

Mrs. Whitney testified that she had sexual intercourse with respondent on November 26, 1956 and two or three times in December before the date of separation, December 4. She testified that there was further intercourse in February 1957 when "we went back for a reconciliation."

Respondent testified that she was without money and he let her stay in his home from February 19 to 22 but denied having intercourse with her during that period. Appellant makes no contention on this appeal based upon the former wife's testimony of intercourse during this period. Respondent further denied that he had sexual intercourse with Mrs. Whitney at any time.

An affidavit of a physician, referred to in the complaint, states that "it is my opinion, based upon experience, that said child could *possibly* have been conceived within a few days prior to or on December 4, 1956." (Emphasis ours.)

[1, 2] The order denying temporary support is appealable independently of the judgment but any implied finding concerning paternity is not determinative of that issue at the trial. Carbone v. Superior Court, 18 Cal.2d 768, 772, 117 P.2d 872, 136 A.L.R. 1260. While the jurisdictional prerequisite of parentage may be put in issue at a hearing on the motion, the evidence need not be so extensive as at the trial of the action. 18 Cal.2d at page 772, 117 P.2d at page 874.

Appellant asserts that the conclusive presumption of legitimacy (Code Civ.Proc. § 1962(5)) is applicable in this case and that therefore it was error to deny the motion.

Section 1962, subdivision 5, provides that:

> "The following presumptions, and no others, are deemed conclusive:
>
> * * * * * *
>
> "5. Notwithstanding any other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is indisputably presumed to be legitimate."

[3] As stated in Daniels v. Daniels, 156 Cal.App.2d 371, 319 P.2d 662: "The term 'cohabiting', used in the statute, means, as set forth in the leading California case on the subject, In re Estate of Mills, 137 Cal. 298, 301, 70 P. 91, 92, 'the living together of a man and woman ostensibly as husband and wife', in which case the parties are not permitted to contradict or question the conclusive presumption created by the statute." (156 Cal.App.2d at page 373, 319 P.2d at page 664.) Section 1962, subdivision 5, refers to cohabitation at the time of conception of the child. In re Estate of McNamara, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313.

[4] It must be presumed that the parties had intercourse on December 3 or 4, 1956, the last day of opportunity of access of the husband and wife before their separation. In re Estate of McNamara, supra, 181 Cal. 82, 88, 183 P. 552, 7 A.L.R. 313; In re Estate of Mills, 137 Cal. 298, 70 P. 91. "It is thoroughly settled by these and other cases that if there was access to the wife

by the husband during the period that conception normally would occur, the presumption, except in certain cases, not here relevant, is conclusive." Williams v. Moon, 98 Cal.App.2d 214, 219, 219 P.2d 902, 905; citing In re Estate of Mills, supra; In re Estate of Walker, 180 Cal. 478, 181 P. 792; People v. Kelly, 77 Cal.App.2d 23, 26, 174 P.2d 342; Dazey v. Dazey, 50 Cal.App.2d 15, 17, 122 P.2d 308; People v. Hamilton, 88 Cal.App.2d 398, 400, 198 P.2d 907.

[5] The child was born on the 297th day after December 4, the date of the separation of the parties. Appellant argues that the actual number of days should be disregarded and the months, without regard to their actual length, should each be calculated at 30 days, thus arriving at a figure of 294 instead of 297. The laws of nature take no account of man-made calendars and it is the 297 days which actually elapsed that must be determinative. This was the rationale of the holding in Re Estate of McNamara, supra, 181 Cal. 82, 92, 183 P. 552, 7 A.L.R. 313, that in construing section 194, Civil Code (which creates a rebuttable presumption that a child born within ten months after the dissolution of a marriage is legitimate), the months should be calculated at 30 days each, thus arriving at the same maximum of 300 days in all cases for the application of this presumption. This holding is not authority that in calculating the days actually elapsed the months should be arbitrarily regarded as containing 30 days each, but quite the contrary.

The leading case in California on the application of the conclusive presumption of legitimacy provided in Code of Civil Procedure section 1962(5) in cases of prolonged pregnancies is In re Estate of McNamara, supra, 181 Cal. 82, 183 P. 552, 7 A.L.R. 313. In that case the Court posed the question of law to be decided (181 Cal. at page 89, 183 P. at page 555): "Does the conclusive presumption of legitimacy apply where the period of gestation necessary in order that the husband be the father is not an impossible one, but is yet exceptional, and not according to the usual operation of the laws of nature?"

The Court answered this question in the negative holding that the conclusive presumption does not apply where the necessary period of gestation while a possible one is nonetheless exceptional and not according to the usual operation of the laws of nature.

The test thus laid down, as pointed out in the dissenting opinion of Mr. Justice Melvin in that case (181 Cal. 101, 183 P. 560) is burdened with uncertainty. In McNamara, 181 Cal. at page 89, 183 P. at page 555, the question of fact to be decided was stated:

> "Is the period of 304 days [the time involved in that case] greater than the usual or normal—not merely the average—period of gestation, that is, is it contrary to the usual operation of the laws of nature?"

[6] The question which we must answer in this case therefore is whether 297 days after the last coitus is a "usual or normal —not merely the average—period of gestation"? To answer this question we must, of necessity, put a more definite construction upon the words "usual or normal." We start with the premise that the "usual or normal" is not "the average" (i. e., a fixed number arrived at by dividing the total of all known cases by the number of such cases) but a range between some minimum and some maximum period of gestation beyond which, although births may occur, they are of such infrequency that we may fairly say that they fall outside of the "usual or normal" range. In determining this question we are entitled to consult "published technical works and articles by those recognized as authorities in this branch of human knowledge." In re Estate of McNamara, supra, 181 Cal. at page 89, 183 P. at page 555.

[7] Most of the statistics in such works to which we have access deal with averages and hence are not particularly valuable in answering the question of the normal or usual range. However they make one point clear which we must bear in mind in considering the question here presented.

The length of most pregnancies is calculated from the first day of the last menstrual period, since normally, although not invariably, menstruation does not occur during pregnancy. There is a general agreement among the authorities that the average period of pregnancy calculated from the first day of the last menstruation is about 280 days. Webster, Legal Medicine and Toxicology, p. 199; De Lee-Greenhill, Principles and Practice of Obstetrics, 9th Ed., p. 86; II Taylor's Principles and Practice of Medical Jurisprudence, 11th Ed., p. 30; III Wharton & Stille's Medical Jurisprudence, 5th Ed., p. 39; Houts, Courtroom Medicine, p. 223.

Many of the same authorities, however, point out that impregnation rarely, if ever, takes place at that time and the actual length of pregnancy from the time of coitus and subsequent fertilization of the ovum is for that reason a shorter period. In considering statistics of cases calculated from the first day of the last menstruation and applying those cases to the last day of coitus between husband and wife we must therefore subtract from the total days shown in such statistics such number of days as will normally elapse between the onset of the last menses and actual fruitful coitus.

Thus in II Taylor's Principles and Practice of Medical Jurisprudence, 11th Ed., supra, we find at page 30:

> "The usually accepted *average* is 280 days, which is the period used in clinical tables provided for estimating the date of term.
>
> "The principal difficulty in the way of exact determination is the impossibility of fixing the exact moment of impregnation. Ovulation occurs about 14 days before the onset of the ensuing menstrual period, but it is subject to many influences, and there are cases in which it has seemingly occurred on almost any day in the intermenstrual cycle. It is generally accepted that the ovum has a very short life and probably does not survive more than 24 hours after ovulation unless it is fertilised. We have no means of knowing the exact moment of the union of the ovum and the spermatozoon which is the beginning of pregnancy.
>
> "* * * Labour usually starts about 280 days from the first day of the last menstrual period, so that the actual period of gestation is 270 days or less."

In De Lee-Greenhill, Principles and Practice of Obstetrics, 9th Edition, supra, we find at pages 86–87:

> "The most reliable datum from which to estimate the beginning of pregnancy is the date of fruitful coition and, reckoning from this day, pregnancy has been found to vary from two hundred and twenty to three hundred and thirty days; the average being two hundred and seventy days. From time immemorial women have reckoned two hundred and eighty days, ten lunar or nine calendar months, from the first day of the last period as the length of normal gestation. This is incorrect since ovulation occurs fourteen days before the next expected menses, the duration of pregnancy is two hundred and eighty minus fourteen, or two hundred and sixty-six days."

Webster, Legal Medicine and Toxicology, supra, at page 200, says: "The computations of various obstetricians as to the duration of pregnancy, dating the beginning from the date of a single coitus, lead to the average figure of 272 days."

Wharton & Stille in their Medical Jurisprudence, 5th Edition, supra, Volume III at page 39, summarize their conclusion from the many statistics that are set out in this work in the following language:

> "From the foregoing facts we can but come to the conclusion that, though the normal period of gestation is 275 to 282 days from the end of the last menses, or 270 days from a single coition, the pregnancy may be protracted

to 334 days after coitus, or 344 days after the menses * * *."

[8] It will thus be seen that it is the conclusion of these authorities that in determining the length of pregnancy from fruitful coition 8 to 14 days should be subtracted from the figure when it has been calculated from the onset of the last menstruation. It seems somewhat significant that adding only 7 days to the 297 here involved we arrive at 304 days, the exact length of pregnancy considered in McNamara.

Most of the statistics which are available to us deal with averages and maximum and minimum periods of pregnancy, e. g., III Wharton & Stille's Medical Jurisprudence, 5th Edition, supra, where extensive statistics of this character are collected at page 29 (dating from a single coition) and page 28 (dating from the last day of the last menstruation). These statistics are of little value in the solution of the question here presented since they furnish no information as to the number of cases of prolonged gestation included in the averages.

In II Peterson and Haines, Text-Book of Legal Medicine and Toxicology at pages 66–67 more pertinent statistics have been set out. From these we learn that Merriman collected 150 cases in which the duration is counted from the date of the last menstruation. These showed 5 cases or 3.33% in which birth occurred in the 37th week; 16 or 10.67% in which it occurred in the 38th week; 21 or 14% in the 39th week; 46 or 30.67% in the 40th week; 28 or 18.67% in the 41st week; 18 or 12% in the 42d week; 11 or 7.33% in the 43d week; and 5 or 3.33% in the 44th week. In these cases nearly 50% of the births occurred within 7 days before or after the 280th day, or within the range of that accepted as the generally expected length of pregnancies. More important to the consideration of the question before us, the 43d week ends with the 301st day. If we substract as little as 7 days to approximate the length of pregnancy measured from the last menses to its length measured from the date of probable fruitful coition those cases listed as occurring in the 43d week after the last menstruation fall into the 42d week after fruitful coition and the 42d week ends with the 294th day. So calculated from the probable date of fruitful coitus in only 5 of these 150 cases or 3.33% did pregnancy extend beyond the 294th day after the actual coition.

The same authors quote 40 cases collected by Reid in which the impregnation was the result of a single act of intercourse. In these 40 cases 5 or 12.50% were delivered in the 38th week after the single coition; 7 or 17.5% in the 39th week; 18 or 45% in the 40th week; 6 or 15% in the 41st week; and 4 or 10% in the 42d week ending on the 294th day. Thus in none of these 40 cases did the length of pregnancy after a single act of intercourse exceed 294 days.

Similarly the same authors cite 56 cases collected by Montgomery in which the date of fruitful intercourse was known, and used as the starting date, with the following results: 1 or 1.79% born in the 35th week; 2 or 3.58% in the 37th week; 2 in the 38th week; 10 or 17.84% in the 39th week; 22 or 39.28% in the 40th week; and 9 or 16.7% in the 41st week; 8 or 14.28% in the 42d week; and 2 or 3.58% in the 43d week. Thus only 2 out of the 56 pregnancies observed extended beyond the 294th day after the known date of fruitful coition.

If we take the sum of these cases, adjusting the 150 calculated from the date of menstruation by subtracting 7 to approximate the date of fruitful coition, only 7 out of 246 or 2.08% or 1 out of every 50 extended beyond the 294th day.

Judge Woodside in a dissenting opinion in Commonwealth v. Watts, 179 Pa.Super. 398, 116 A.2d 844, at page 848, refers to a record of 14,079 cases calculated from the last menstrual period, found in Williams Obstetrics (1950), which text-book is not available to us. We therefore quote from that opinion (116 A.2d at page 848):

> "Nicholson J. Eastman, M.D., a professor of Johns Hopkins Universi-

ty, states in the 10th Edition of Williams Obstetrics (1950) 'The average duration of human pregnancy, counting from the first day of the last menstrual period is about 280 days or 10 lunar months. Since the interval between the first day of menstruation and ovulation averages approximately 13 days, the mean duration of actual pregnancy, counting from the day of conception must be close to 267 days'.

"He refers to a record of 14,079 cases in which only 42 had pregnancy extending more than 31 days after the expected date. This would mean that only 3 cases out of a thousand had pregnancies extending more than 298 days computed from conception to birth."

In McNamara, 181 Cal. at pages 89–91, 183 P. at pages 555–556, the court reviewed several medical authorities who had assembled data on prolonged periods of gestation. The court concluded that since the authorities had particularly concerned themselves with cases exceeding 300 days this fact itself "strongly evidences the exceptional character of such cases * * *". (181 Cal. at page 90, 183 P. at page 555.) At page 91 of 181 Cal., at page 555 of 183 P., the court refers to a study made by Von Winckel in 1900 and 1901 of 30,500 cases "in which as best we can judge from the references to the article, he found but 31 cases, or less than one-tenth of one per cent., wherein it was reasonably certain the period was 302 days or more."

Since the opportunity for calculating the length of pregnancy from a single act of intercourse is relatively infrequent we must assume that in the great preponderance of all such cases the length is computed from the last menses. Deducting the conservative figure of 7 days to approximate such figures to the length of pregnancy from inseminating intercourse would reduce all cases calculated from the last menses which extended 302 days to 295 days in length from actual coition. While the decided cases generally have apparently taken no account in dealing with such statistics of the shorter length of pregnancies calculated from the date of fruitful coition, in dealing with cases calculated from the last menses this factor must be considered if the conclusions are to be realistic.

No case in California since McNamara except McKee v. McKee, 156 Cal.App.2d 764, 320 P.2d 510, deals with a prolonged pregnancy. All of the other later cases deal with pregnancies shorter than the average. Anderson v. Anderson, 214 Cal. 414, 5 P.2d 881; Murr v. Murr, 87 Cal. App.2d 511, 197 P.2d 369; Dazey v. Dazey, supra, 50 Cal.App.2d 15, 122 P.2d 308. These latter cases are of no assistance in deciding the problem of an extended pregnancy. Nor does McKee v. McKee, supra, 156 Cal.App.2d 764, 320 P.2d 510, help us. In that case the period was 304 days as in McNamara and we held, as required by McNamara, that the conclusive presumption of legitimacy did not apply. The case in fact was decided by application of the rebuttable presumption of section 194, Civil Code.

[9] It is our conclusion that, taking into account the available statistics and opinions of experts in the field, a pregnancy of 297 days calculated from the date of intercourse, as distinguished from the last menstruation, is sufficiently rare and infrequent to justify us in holding that it is not within the normal and usual range of pregnancies and hence that the trial judge's conclusion that the conclusive presumption of legitimacy does not apply under the facts of this case must be upheld.

Cases cited from other jurisdictions (which have no conclusive presumption) in which legitimacy was determined in cases of extended pregnancy are no more helpful in the solution of this problem than is McKee v. McKee, supra, 156 Cal.App.2d 764, 320 P.2d 510, in which we affirmed an adjudication of legitimacy where the length of such pregnancy was 304 days as supported by the evidence although conceding that the conclusive presumption of legitimacy was not applicable.

Since we have concluded that the conclusive presumption does not here apply the trial judge's finding from the conflicting evidence in making his interim order must be accepted on appeal. As we have heretofore pointed out this order will have no legal effect upon the final determination of the issue of paternity after a full trial of that issue on the merits. Carbone v. Superior Court, supra, 18 Cal.2d 768, 772, 117 P.2d 872, 136 A.L.R. 1260.

Order affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

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169 Cal.App.2d 372

Gary L. JONES, a minor, by his Guardian ad litem, Floyd Jones, Plaintiff and Appellant,

v.

Emmett Boyd WRAY and Faye Summers, Defendants and Respondents.

Civ. 22737.

District Court of Appeal, Second District, Division 1, California.

April 6, 1959.

Rehearing Denied May 5, 1959.

Action for injuries sustained when boy who was of the age of five years and three months was struck in the street by defendant's automobile. The Superior Court of Los Angeles County, Charles T. Smith, J., rendered judgment after verdict of jury in favor of defendants. The plaintiff appealed. The District Court of Appeal, Fourt, J., held that instruction as to the standard of care applicable to a child and instruction as to duty of pedestrian crossing street at place other than crosswalk to yield right of way were prejudicially contradictory.

Reversed.

1. Automobiles 🔑246(35)

In action for injuries sustained when boy who was of the age of five years and three months was struck in the street by defendant's automobile, the court properly refused to instruct the jury that a child of such age was not guilty of contributory negligence as a matter of law.

2. Appeal and Error 🔑1064(1)
Trial 🔑243

In action for injuries sustained when boy who was of the age of five years and three months was struck in the street by defendant's automobile, instruction that child is not held to same standard of conduct as an adult and is only required to exercise degree of care ordinarily exercised by children of like age, mental capacity, and experience and that there is no precise age when child is held to an adult's standard of care and that jury must determine the boy's mental capacity and experience and whether his conduct might reasonably have been expected from child of like age, capacity and experience under similar circumstances and that such is true even though the child is charged with violation of statute, and instruction that statute requires pedestrian crossing street at place other than crosswalk to yield right of way to vehicles and requires motorists to exercise due care for safety of such a pedestrian, were prejudicially contradictory. West's Ann.Vehicle Code, § 562(a, b).

3. Trial 🔑203(1)

Each party is entitled to have instructions of law given to jury applicable to his theory of the case and the evidence.

4. Automobiles 🔑246(22)

In action for injuries sustained when boy who was of the age of five years and three months was struck in the street by defendant's automobile, defendant's instruction on unavoidable accident may have confused the jury by giving them the impression that unavoidability was an issue to be decided and that if true it constituted a separate ground of the defendant's nonliability.

Pray & Price, William C. Price, Long Beach, for appellant.

Parker, Stanbury, Reese & McGee, Harry D. Parker, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal from a judgment after a verdict of a jury in favor of the defendants in a personal injury action brought by a minor plaintiff.

The accident occurred in the city of Long Beach on August 17, 1955, at about 1:50 o'clock p. m., at a point on Gaviota Street about 120 to 125 feet north of Hungerford Street. Gaviota is an ordinary residential street thirty feet wide, located in a general north-south direction, and intersects Hungerford Street, which is located in a general east-west direction. There were houses on both sides of Gaviota Street, and some trees were growing in the parkway. About 120 to 125 feet north of Hungerford Street two automobiles were parked on the east side of Gaviota Street. Opposite these parked automobiles, and on the sidewalk area on the east side of Gaviota Street several small children were playing. The plaintiff, a boy of the age of five years and three months, resided with his parents in a house on the west side of Gaviota Street just north of where the accident occurred.

At the time in question, the defendant Wray, was familiar with the area and had driven in an easterly direction on Hungerford Street, and then had made a left turn off of Hungerford Street onto Gaviota Street, heading north, at which time he was traveling about fifteen to twenty miles per hour. He noticed the children on the sidewalk on the east side of Gaviota Street and north of Hungerford Street. He saw the parked automobiles and continued northward at a speed not exceeding fifteen miles per hour. Wray looked at the children out of the corner of his eye and looked at the street ahead and he testified that he saw no children in the street. Wray stated that when he was about opposite the rear of the second parked automobile he heard a thud or noise on the right side of his car. He testified that he did not see the child until afterwards, although he was looking at the children until he heard the thud. At the time of the thud the left wheels of Wray's car were approximately in the center of the street. There were no skid marks attributable to the Wray car. Wray brought his automobile to a stop, got out and saw the child lying in the street.

There apparently were no witnesses to the actual impact itself, excepting the driver Wray and the child who was injured, and there was no direct testimony as to how the boy got into the street or that he was in the street as Wray drove northward on Gaviota Street. However, several neighbors heard the impact and rushed out of their respective houses and saw the boy lying at about the center of the street at the rear of the left rear tire of the automobile. The boy was dressed in shorts and had grease on the back of his body.

The appellant complains that the court refused to instruct the jury that a child of the age of five years and three months was not guilty of contributory negligence as a matter of law, and instead instructed the jury, in effect, concerning the standard of care applicable to a child; further, that the court gave other instructions which were in conflict and prejudicial, and that the court refused to give plaintiff's proposed instructions with reference to the rights of a minor pedestrian in crossing the street.

[1] The Supreme Court in Courtell v. McEachen, 51 Cal.2d 448, 334 P.2d 870, answered the first contention of appellant. In that case a child five years and nine months of age was injured from burns received upon coming into contact with some debris which was being burned by the defendants on a lot belonging to them. The trial court in the Courtell case instructed the jury, in effect, that, as a matter of law, the child was not guilty of contributory negligence. The Supreme Court said (at page 454 of 51 Cal.2d, at page 873 of 334 P.2d):

"The questions whether a child was capable of exercising care to avoid the particular danger encountered and whether, if so, the child failed to exercise due care, thereby contributing to the injury, are normally for the trier of fact to determine. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 139, 138 P. 712. In keeping with this rule courts have rejected the theory that a child of plaintiff's age, namely, between 5 and 6, is incapable of contributory negligence as a matter of law. Smith v. Harger, 84 Cal.App.2d 361, 370, 191 P.2d 25; Carrillo v. Helms Bakeries, Ltd., 6 Cal.App.2d 299, 304, 44 P.2d 604. The evidence was conflicting as to whether plaintiff's dress caught fire because she played near flames or because she squatted down on embers, and a determination of this conflict was obviously essential in order to resolve the questions of plaintiff's capacity to exercise care for her safety and of her contributory negligence. Accordingly, those questions could not properly have been decided as matters of law.

"Plaintiff appears to take the position that, in cases involving injury to young children, the trial judge may determine the issue of contributory negligence even though questions of fact are presented. She relies on a statement in Mayne v. San Diego Elec. Ry. Co., 179 Cal. 173, 177, 175 P. 690, 692, that 'as a rule courts upon appeal have not interfered with the discretion of trial courts in referring or in refusing to refer to juries the question as to whether the contributory negligence of children of the age of 14 years or under was such as to prevent their recovery * * *.' In that case, however, the trial judge had not decided the issue of contributory negligence but had submitted it to the jury. Thus, the case on its facts does not support plaintiff's position, and the quoted language should not be construed in the manner urged. Contributory negligence is a matter bearing directly upon the outcome of a suit, and, where, as in the present case, the facts are in dispute, there is no rational basis for permitting the judge, rather than the jury, to resolve that matter. So far as has been called to our attention, the existence of such an exceptional power is not recognized anywhere."

[2] The trial court in the instant case, at the request of the plaintiff, gave B.A. J.I. No. 147 as the twenty-ninth instruction, which read as follows:

"A child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience. There is no precise age at which, as a matter of law, a child comes to be held accountable for his actions by the same standard as applies to an adult. It is for you to determine the mental capacity and experience of Gary L. Jones and whether his conduct was or was not such as might reasonably have been expected from a child of like age, capacity and experience, under the same or similar circumstances.

"The rule just stated applies even when a child is charged with having violated a statute, or the evidence shows such a violation. The question whether or not the child was negligent still must be answered by the standard applicable to children as I have stated it to you."

The court also instructed the jury as follows: "You are instructed that at the time of the accident in question, Section 562(a) of the Vehicle Code of the State of California read as follows:

"'*Crossing at Other than Crosswalks.*

"'(a) Every pedestrian crossing a roadway at any point other than within a marked crosswalk or within an unmarked crosswalk at an intersection shall yield the right of way to all vehicles upon the roadway.'"

Subdivision (b) of section 562 of the Vehicle Code reads as follows:

"(b) [*Duty of driver to exercise care.*] The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway."

It is the belief of the appellant that the instructions as given are prejudicially contradictory. We are of the opinion that the appellant is correct.

In Cole v. Ridings, 95 Cal.App.2d 136, 212 P.2d 597, a minor plaintiff was injured in a collision between her and a motorcycle operated by a defendant. A jury returned a verdict for the defendants and against the plaintiff. The accident in the Cole case occurred on a residential street in Long Beach in an area where there were no marked crosswalks. An ice cream vendor, traveling south on the street in question where the accident occurred, stopped his truck across the street from where the child was staying. The child crossed the street and, with other children, waited at the back of the truck to buy ice cream. While waiting, the grandmother of the child called to her to inquire if she needed any money. The child looked and then started toward the grandmother and was struck and rendered unconscious by the motorcycle. The driver of the motorcycle saw the ice cream truck about one hundred feet away, *he saw no people about the truck* until the front of his cycle was about even with the front end thereof when he saw the child for the first time. He testified that the little girl "darted right out in front of the motorcycle * * *. From behind the truck. * * * Running * * *. Right in front of the motorcycle." The trial court instructed the jury substantially in the language of section 562(a), Vehicle Code. The appellant child argued in that case substantially as the appellant argues in the instant case that, "the jury was told as a matter of law that if a minor failed to yield the right of way or failed to observe traffic conditions, she was guilty of contributory negligence;" that such an instruction placed a greater burden on the minor than is required of an adult and gave the driver of the vehicle an absolute right where none existed; that is, the court did not include in the instructions subdivision (b) of section 562 of the Motor Vehicle Code. The court in the Cole case appropriately said, among other things (95 Cal.App.2d at pages 140–142, 212 P.2d at page 600):

"It is conceded by both sides that the court correctly instructed the jury on the conduct required of a minor, to-wit:

"'A child is not held to the same standard of conduct as an adult and is only required to exercise that degree of care which ordinarily is exercised by children of like age, mental capacity and experience. There is no precise age at which, as a matter of law, a child comes to be held accountable for her actions by the same standard as applies to an adult. It is for you to determine the mental capacity and experience of Leola June Cole, and whether her conduct was or was not such as might reasonably have been expected from a child of like age, capacity and experience, under the same or similar circumstances.'

"However, appellants maintain that the court erroneously instructed the jury to the effect (1) that under sec. 562(a), Vehicle Code, every pedestrian crossing a roadway at any point other than within a marked or unmarked crosswalk shall yield the right of way to all vehicles upon the roadway; (2) that if a pedestrian crosses other than within a marked or unmarked crosswalk at an intersection, the law requires the pedestrian to yield the right of way to all vehicles upon the roadway so near as to constitute an immediate hazard; (3) that 'Before attempting to cross a street that is being used for the traffic of motor vehicles, it is a pedestrian's duty to make reasonable observations to learn the traffic conditions confronting her, to look to that vicinity from which, were a vehicle approaching, it would immediately endanger her passage; and to try to make a sensible decision whether it is reasonably safe to attempt the crossing.'

"It is argued that by these instructions the jury was told as a matter of law that if the minor failed to yield the right of way or failed to observe traffic conditions, she was guilty of contributory negligence; and thus that they invaded the province of the jury, were in conflict with the correctly given instruction on the standard of care required of a minor, and were misleading as guides to the jury in its determination of questions of fact. Also, that the first of such instructions as given incompletely and incorrectly stated the law thereby placing a greater burden on the minor than is required of an adult and gave respondent driver an absolute right where none existed: i. e., the court did not include in the instruction subdivision (b) of section 562, Vehicle Code, which reads: 'The provisions of this section shall not relieve the driver of a vehicle from the duty to exercise due care for the safety of any pedestrian upon a roadway.'

"While the duty to yield the right of way imposed on a pedestrian by section 562, supra, may call for a higher degree of care while crossing between intersections, the real question of fact in such a case is whether the required care has been exercised and not merely whether or not the right of way has been actually yielded. These instructions emphasized the duty of appellant to yield the right of way and failed to inform the jury clearly that such duty was not absolute and that the real question was whether appellant exercised reasonable care under the circumstances then and there existing, to-wit: that degree of care required of a minor under like circumstances. See Shipway v. Monise, 59 Cal.App.2d 565, 571, 139 P.2d 600.

"This is a very close case on its facts, particularly on the issue of negligence of the participants. It should be noted that there is some evidence of contributory negligence on the part of appellant, but it can hardly be said that the record shows contributory negligence as a matter of law; that was an issue of fact for the jury. It cannot be assumed under the circumstances of this case that the jury's verdict for respondents was based on the evidence of contributory negligence alone; it may well have been predicated upon a theory of defense permitted by one or more of the erroneous instructions discussed above. Oettinger v. Stewart, 24 Cal.2d 133, 140, 148 P.2d 19, 23, 156 A.L.R. 1221 citing O'Meara v. Swortfiguer, 191 Cal. 12, 15, 214 P. 975, in which it is stated:

" 'It is true that in determining whether or not a verdict is supported by the evidence, we must assume that the jury accepted the view most favorable to the respondent. However, in determining whether or not the instructions given are correct, we must assume that the jury might have believed the evidence upon which the instruction favorable to the losing party was predicated, and that if the correct instruction had been given upon that subject the jury might have rendered a verdict in favor of the losing party.'

"Likewise in the case here under review. Therefore it was prejudicial error to give the instructions complained of."

In the recent case of Shachunazarian v. Widmer, 159 Cal.App.2d 180, at page 183, 323 P.2d 865, at page 866, it was stated: "Vehicle Code section 562 requires a pedestrian crossing a roadway other than at a crosswalk to yield the right of way to vehicles, but specifically provides that it shall not relieve a driver from the duty to exercise due care. Defendant sought reversal on the ground that the deceased pedestrian was guilty of contributory negligence as a matter of law. But on the facts recited in the opinion, it is clear that there was some evidence to support an implied finding that decedent was not negligent or that his contributory negligence, if any, was not a proximate cause of the collision."

In Garibaldi v. Borchers Bros., 48 Cal.2d 283, at page 293, 309 P.2d 23, at page 28, a case involving an eight and one-half year-old minor, in considering the instruction given, the court stated the following:

" * * * The criticized instruction reads as follows: 'While as to a roadway locality such as that involved in this case, a pedestrian has a right to cross the road at any point, these factors of consideration enter into the question of what conduct is required of him in the exercise of ordinary care. First: If he crosses at a point other than within a marked crosswalk or within an unmarked crosswalk at an intersection, the law requires him to yield the right of way to all vehicles on the roadway so near as to constitute an immediate hazard. Second: The amount of caution required to constitute ordinary care increases as does the danger that a reasonably prudent person, in like position, would apprehend in the situation.

"'This duty to yield the right of way, is *not an absolute one,* and it is for you to determine from the facts, whether the minor plaintiff, Albert Garibaldi, exercised reasonable care under the circumstances, that is, the degree of care ordinarily exercised *by a child of like age, mental capacity and experience.*' (Emphasis added.) This instruction supplied the precise language that was found wanting in the cases to which plaintiffs refer. Cole v. Ridings, 95 Cal.App.2d 136, 141, 212 P.2d 597; Shipway v. Monise, 59 Cal.App.2d 565, 571, 139 P.2d 60. The second paragraph clearly and correctly informed the jury that the boy's duty to yield the right of way was not absolute, and that the basic test was whether he as a minor exercised reasonable care under all the existing circumstances. See Gavin v. Watt, 144 Cal.App.2d 238, [242–243], 300 P.2d 842."

It was the theory of the appellant in the instant case that the boy had been first in the street and had been struck by the car, and then the car had passed over him. It was uncontradicted that when the car did come to a stop and the boy was picked up in the street, he was near the left rear of the tire of the automobile and had grease on his body, giving some indication at least that he had been under the car.

[3] Each party is entitled to have instructions of law given to the jury applicable to his theory of the case and the evidence. Sills v. Los Angeles Transit Lines, 40 Cal.2d 630, 633, 255 P.2d 795; Barnett v. Garrison, 93 Cal.App.2d 553, 557, 209 P.2d 426; Ritchey v. Watson, 204 Cal. 387, 390, 268 P. 345. The appellant in this instance offered some instructions which, in effect, would have avoided the implication given by the language of Vehicle Code section 562, subd. (a), to the effect that the requirement to yield was absolute. Not all of the proposed instructions offered by the plaintiff were proper; however, in the event this case is retried we have no doubt that appropriate instructions with reference to such matters will be presented and given.

The pedestrian has certain rights, and as said in Mitrovitch v. Graves, 25 Cal.App.2d 649, at pages 654–655, 78 P.2d 227, at page 231, after mentioning section 562 of the Vehicle Code:

"The phrase employed in the statute which requires a pedestrian crossing a street or roadway at a point other than the regular marked crosswalk, to 'yield the right of way to all vehicles' does not mean that a pedestrian ventures upon a public highway or street at his peril, or that he must flee at sight of an approaching vehicle. The phrase merely means that when the course of an automobile along a highway meets with that of a person who seeks to walk across the street or roadway at a point other than along a marked crosswalk, under circumstances which render a collision likely, the pedestrian must stop and permit the vehicle to pass ahead of him. Yielding the right of way, within the meaning of the statute, merely means that the pedestrian shall defer to the driver of the vehicle and wait to permit the machine to pass ahead of him. That section is not intended to grant to vehicles a monopoly of streets or highways to the exclusion of pedestrians."

And in Lang v. Barry, 71 Cal.App.2d 121, at page 124, 161 P.2d 949, at page 951, the court stated:

"Defendant * * * urges that the minor plaintiff was contributively negligent as a matter of law in crossing the center line of the highway into the path of the car he had seen approaching, and in failing to yield the right of way as required by section 562 of the Vehicle Code. The contentions are without merit. Section 562 does not prohibit a pedestrian's crossing outside of a crosswalk at any time when a motor vehicle is on the highway. 'While the duty to yield the right of way, imposed on the pedestrian by section 562, may call for a higher degree of care while crossing between intersections, the real question of fact in such a case is whether the required care has been exercised, and not merely whether or not the right of way has been actually yielded.' Shipway v. Monise, 59 Cal.App.2d 565, 571, 139 P.2d 60, 63. 'It cannot be said that as a matter of law a pedestrian who crosses a well lighted business street in the middle of a block is guilty of violating the statute or of negligence proximately contributing to his injury when he proceeds on his way after having observed an automobile approaching from a distance of 200 feet, with nothing to obstruct his view or that of the driver.' Fuentes v. Ling, 21 Cal.2d 59, 62, 130 P.2d 121, 122. * * *"

And in Foti v. Morrissey, 57 Cal.App.2d 328, at page 333, 134 P.2d 51, at page 53, the court said:

"* * * The giving of the instruction is assigned as error, not because it states the law incorrectly but because it states it too bluntly and without explanation of what would have constituted a yielding of the right of way by the decedent if he was found to have been under that duty. Our attention is called to Umemoto v. McDonald, 1936, 6 Cal.2d 587, 58 P.2d 1274; Mitrovitch v. Graves, 1938, 25 Cal.App.2d 649, 78 P.2d 227; and Watkins v. Nutting, 1941, 17 Cal.2d 490, 110 P.2d 384. It is quite true that an instruction upon a rule as vital as the right of way rule should not be stated in language so abstract and laconic as to leave the jury free to believe that a pedestrian struck outside of a pedestrian crossing must have been guilty of failing to yield the right of way and consequently guilty of contributory negligence. It is likewise true that when the right of way rule is stated in such a case it should be with the explanation that the vehicle driver who is entitled to the right of way is not thereby excused from the duty to exercise ordinary care."

And in Francis v. City & County of San Francisco, 44 Cal.2d 335, at pages 339–340, 282 P.2d 496, at page 499, it was said:

"Neither the pedestrian nor the driver of an automobile has a superior right to the use of the street. Burgesser v. Bullock's, 190 Cal. 673, 675, 214 P. 649. Each must exercise the care required of a reasonable and prudent person under the existing circumstances. Even where a right of way is given by statute, if conditions so require it to avoid injury to others, the right of way must be yielded. No general rule may be laid down which will fit all circumstances as to the duty of care required of a pedestrian in crossing a street."

[4] In this case the defendant requested, and the court gave an instruction on unavoidable accident. The instruction as given read as follows:

"In law we recognize what is termed an unavoidable or inevitable accident. These terms do not mean literally that it was not possible for such an accident to be avoided. They simply denote an accident that occurred without having been *proximately* caused by *negligence.*

"Even if such an accident could have been avoided by the exercise of *exceptional* foresight, skill or caution, still, no one may be held liable for injuries resulting from it.

"Bear in mind, however, that if the defendant failed to exercise ordinary care, and if that failure was a proximate cause of the accident in question, then, whether or not such conduct was the sole cause, the accident was not unavoidable, and the defense of unavoidability may not be maintained by that defendant.

"Whether or not the accident in question in this case was unavoidable is, of course, a question of fact for you to determine; and in giving the foregoing instruction I do not imply any opinion or suggestion as to what your finding should be."

As we view it, in this particular case the giving of the last mentioned instruction only added to the confusion of the jury, and they might well have formed the impression that unavoidability was an issue to be decided, and that if true it constituted a separate ground of the defendant's nonliability, thereby emphasizing still further the defendant's case. Butigan v. Yellow Cab Co., 49 Cal.2d 652, 320 P.2d 500.

Under the particular circumstances of this case we believe the giving of the instructions, as heretofore indicated, and the refusal to give clarifying instructions constituted prejudicial error.

The judgment is reversed.

WHITE, P. J., and LILLIE, J., concur.

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169 Cal.App.2d 389

George JACOBSEN, Petitioner and Appellant,

v.

BOARD OF CHIROPRACTIC EXAMINERS of the State of California, Emmett E. Wilent, Thomas J. Earley, Homer York, Edward C. Poulson, Leo Montenegro and John F. Barron, Respondents.

Civ. 9494.

District Court of Appeal, Third District, California.

April 6, 1959.

Proceeding to revoke license of chiropractor for advertising in alleged violation of the Chiropractic Act. The board of chiropractic examiners revoked the license. The chiropractor petitioned for review. The Superior Court, Sacramento County, John Quincy Brown, J., entered judgment upholding the revocation of the license, and the chiropractor appealed. The District Court of Appeal, Van Dyke, P. J., held that chiropractor who advertised that he would treat "female disorders", "sterility" and "lack of vigor" violated the provision of the Chiropractic Act forbidding chiropractors to advertise that they will treat loss of manhood, sexual weakness, sexual disorder and diseases of the sexual organs.

Affirmed.

1. Physicians and Surgeons 🔑10

Chiropractor who advertised that he would treat "female disorders", "sterility" and "lack of vigor" violated the provision of the Chiropractic Act forbidding chiropractors to advertise that they will treat loss of manhood, sexual weakness, sexual disorder and diseases of the sexual organs. West's Ann.Bus. & Prof.Code, § 1000–10 (a).

See publication Words and Phrases, for other judicial constructions and definitions of "Female Disorders", "Lack of Vigor" and "Sterility".

2. Physicians and Surgeons 🔑10

The provision of the Chiropractic Act forbidding chiropractors to advertise that they will treat sexual diseases, lost manhood, sexual weakness or sexual disorder or any disease of the sexual organs was intended to wholly forbid the sort of "bait advertising" so often used to prey upon the weak and credulous by offering "cures" for sexual disorders, diseases or abnormalities. West's Ann.Bus. & Prof.Code, § 1000–10(a).

3. Criminal Law 🔑13

The provision of the Chiropractic Act forbidding chiropractors to advertise that they will treat venereal disease, sexual disease, lost manhood, sexual weakness or sexual disorder or any disease of the sexual organs is not void for vagueness. West's Ann.Bus. & Prof.Code, § 1000–10(a).

4. Constitutional Law 🔑258

A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates due process of law.

5. Criminal Law 🔑13

A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as a standard for the ascertainment of guilt by the courts called upon to apply it.

6. Criminal Law 🔑13

A statute attacked for vagueness will be upheld if its terms may be reasonably certain by reference to its legislative purpose.

7. Constitutional Law 🔑275(1)

Generally, the state may consistently with the requirement of due process regulate the practice of professions affecting public health by prescribing qualifications reasonably necessary and to that end may require licenses and establish supervision by an administrative board.

8. Constitutional Law 🔑275(1)
Physicians and Surgeons 🔑2

The provision of the Chiropractic Act forbidding chiropractors to advertise that they will treat venereal disease, sexual disease, lost manhood, sexual weakness or sexual disorder or any disease of the sexual organs does not unlawfully deprive chiropractor of his right to follow a lawful calling. West's Ann.Bus. & Prof.Code, § 1000–10(a).

9. Physicians and Surgeons 🔑11(3)

In proceeding to revoke license of chiropractor for advertising in violation of the Chiropractic Act, board of chiropractic examiners properly refused to admit evidence of similar advertisements of other chiropractors. West's Ann.Bus. & Prof. Code, § 1000–10(a).

10. Statutes 🔑219

The interpretation of a statute by those to whom has been officially committed the duty of enforcing it is respected by the courts when the statute comes before them for construction; however the conduct of those whose activities are regulated by the statute cannot aid in the construction of the statute.

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Colley & Sakuma, Sacramento, for appellant.

Edmund G. Brown, Atty. Gen., by Willard A. Shank, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Petitioner herein was charged with a violation of Section 10(a) of the Chiropractic Act, an initiative act adopted in 1922, which now appears as Sections 1000–1 through 1001, Business and Professions Code. By the decision of the board petitioner was found guilty of having violated said section 10(a) by the following advertisement in the Sacramento Union:

"Sick?
"Nervous?
"Run Down?

"For many years Dr. Jacobsen has specialized in the treatment of chronic ailments—the diseases that are said to be responsible for 93% of the ill health of the nation. The years of research and experience have enabled us to develop treating methods that are highly skillful and restful. Many patients have been successfully treated here which is your best insurance that we can do the same for you.

Female Disorders
Liver
Colon
Stomach
Gall Bladder
Constipation
Backache
Dizziness
Headaches
Depression
Frustration
Overweight
Rectal Disorders
Skin Disorders
Sterility
Sleeplessness
Prostate
Ulcers
Mental Upsets
Piles
Rheumatism
Nerves
Marital Problems
Lumbago
Fears
Glands
Lack of Vigor

"Laboratory and Physical Examination.

"If you are one of the thousands suffering from poor health you are invited to consult me and discuss your case freely without obligation. If I can help you I will frankly tell you so. Specialized treating methods and experience counts. Over 20 years in practice. * * *"

The charge was that by the said advertisement, petitioner "did advertise directly and indirectly, and in substance, that he, as the holder of a chiropractic license, would treat, cure, or attempt to treat or cure, any person, for loss of manhood, sexual weakness or sexual disorder, or any disease of the sexual organs, namely female disorders and sterility."

Section 10(a) of the Chiropractic Act provides in part as follows:

> "The board shall refuse to grant, or may suspend or revoke, a license to practice chiropractic in this State upon any of the following grounds, to wit:
>
> "* * * the advertising, directly, indirectly or in substance, upon any card, sign, newspaper advertisement, * * * that the holder of such license * * * will treat, cure, or attempt to treat or cure, any venereal disease, or will treat or cure, or attempt to treat or cure, any person afflicted with any sexual disease, for lost manhood, sexual weakness or sexual disorder or any disease of the sexual organs * * *."

[1, 2] The principal issue is whether the words "female disorders", "sterility" and "lack of vigor" as used by the petitioner in his advertisement come under the ban of section 10(a) quoted above.

Petitioner, appellant here, contends that the specified words used do not come within the prohibition of the statute. He challenges the constitutionality of the relevant provisions of the section and, finally, he charges that the hearing officer committed error in refusing to admit certain proffered testimony.

Webster's New International Dictionary defines "chiropractic" as "A system, or the practice, of adjusting the joints, esp. of the spine, by hand for the curing of disease." The term itself is one of art, which makes use of "chiro", a Greek combining form meaning "hand". It is apparent that the electors in approving the initiative measure known as the Chiropractic Act believed that practitioners ought not to advertise concerning treatment of venereal disease, or sexual disease or disorder. The act did not forbid the actual treatment, but it was clearly intended that the licentiates should not be permitted to advertise that they would treat such ailments. The language is general, as is usual—even necessary—in such legislation. The terminology is that of common usage and appears to have been well selected to inform the voters as to just what was being forbidden. A clear intent to eliminate any subterfuge by the use of slightly different verbiage having the same tenor is shown by the language which forbids such advertising, whether done directly, indirectly or in substance. Obviously, it was intended to wholly forbid the sort of "bait advertising" so often used to prey upon the weak and credulous by offering "cures" for sexual disorders, diseases or abnormalities. The advertisement published by appellant appears to us to be a crass attempt to evade the ban of the statute by indirection and subterfuge. The heart of the advertisement is a 27-item list of bodily organs and bodily ailments, with one or two social problems thrown in. Significantly, however, at the beginning, the middle and the end of the list, we find unmistakable references to what in common language may be termed sexual disorders, diseases and ailments. Although it seems to us that expert testimony was not needed to ascertain here the intent to evade the law and to indulge in the very sort of advertising which the law intended to prevent, nevertheless there was expert testimony introduced that the word "sterility" is primarily related to the function or lack of function of the male testes, that the term "loss of vigor" connotes sexual inability of the male, and that "female disorders" embrace various types of malfunction of the female sex organs. We hold that the appellant was properly found guilty of violating the law in that he did advertise that he would treat, and attempt to cure, loss of manhood, sexual weakness, sexual disorder and diseases of the sexual organs.

[3-8] Appellant contends that Section 10(a) of the Chiropractic Act is not a valid constitutional enactment because (1) it is void for vagueness, and, (2) it unlawfully deprives appellant of his right to follow a lawful calling. As to the legislation being void for vagueness, we think little need be said as we have already stated the language used was properly that of common speech and common understanding. So far as the people who adopted the legislation are concerned, there is nothing of vagueness about it. Appellant attempts to create vagueness by reasoning that because any bodily ill-health or mental disturbance can affect sexual organs and functions, the legislation can be used to prevent any and all advertising offering to cure any malady. The legislation is not vulnerable to the attack made upon it. A statute which forbids the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application violates the first essential of due process of law. A statute must be definite enough to provide a standard of conduct for those whose activities are proscribed as well as standard for the ascertainment of guilt by the courts called upon to apply it. But a statute attacked for vagueness will be upheld if its terms may be reasonably certain by reference to its legislative purpose. People v. McCaughan, 49 Cal. 2d 409, 414, 317 P.2d 974. The legislation under review meets the requirements of valid legislation as laid down by the Supreme Court in the McCaughan case. We think people of common intelligence would have no trouble in understanding what was proscribed. Generally on the right of a state to regulate professions affecting public health it has been held that a state may consistently with the requirement of due process regulate the practice of such profession by prescribing qualifications reasonably necessary and to that end may require licenses and establish supervision by an administrative board. Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 55 S.Ct. 570, 79 L.Ed. 1086. In the Semler case, a statute making it grounds for the revocation of a dentist's license to practice if the licentiate advertised professional superiority, prices for professional service, or advertised by means of large display or glaring light signs, or advertised free dental work, or free examination, or any guarantee of any dental service, was upheld by the Supreme Court even against the challenge that such advertising must be permitted if it was in fact truthful. Said the court at pages 611 and 612 of 294 U.S., at page 572 of 55 S.Ct., at pages 1089 and 1090 of 79 L.Ed.:

> "The state court defined the policy of the statute. The court said that while, in itself, there was nothing harmful in merely advertising prices for dental work or in displaying glaring signs illustrating teeth and bridge work, it could not be doubted that practitioners who were not willing to abide by the ethics of their profession often resorted to such advertising methods 'to lure the credulous and ignorant members of the public to their offices for the purpose of fleecing them.' The legislature was aiming at 'bait advertising.' 'Inducing patronage,' said the court, 'by representations of "painless dentistry," "professional superiority," "free examinations," and "guaranteed" dental work' was, as a general rule, 'the practice of the charlatan and the quack to entice the public.'
>
> "We do not doubt the authority of the state to estimate the baleful effects of such methods and to put a stop to them. The legislature was not dealing with traders in commodities, but with the vital interest of public health, and with a profession treating bodily ills and demanding different standards of conduct from those which are traditional in the competition of the market place. The community is concerned with the maintenance of professional standards which will insure not only competency in individual practitioners, but protection

> against those who would prey upon a public peculiarly susceptible to imposition through alluring promises of physical relief. And the community is concerned in providing safeguards not only against deception, but against practices which would tend to demoralize the profession by forcing its members into an unseemly rivalry which would enlarge the opportunities of the least scrupulous. * * *
>
> "It is no answer to say, as regards appellant's claim of right to advertise his 'professional superiority' or his 'performance of professional services in a superior manner,' that he is telling the truth. In framing its policy the legislature was not bound to provide for determinations of the relative proficiency of particular practitioners."

[9, 10] Finally, appellant contends that the trial court erred in rejecting certain proffered evidence. At the hearing before the board, appellant attempted to introduce about 60 advertisements of other chiropractors, which had appeared in newspapers throughout the state, and which used words similar to the words used by him. His purpose was to show the practice in the profession, arguing that thereby he could establish the standard exacted by the law. The offer was rejected. The fact that some 60 chiropractors out of the total number of licentiates in the state may have used advertising similar to that used by appellant does not establish a standard accepted by the law. While the interpretation of a statute by those to whom has been officially committed the duty of enforcing it is respected by the courts when the statute comes before them for construction, we know of no rule which says that the conduct of those whose activities are regulated by the statute can aid in its construction.

The judgment appealed from is affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

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169 Cal.App.2d 331

RICHFIELD OIL CORPORATION, a corporation, Plaintiff and Appellant,

v.

FRANCHISE TAX BOARD of the State of California, Defendant and Respondent.

Civ. 9568.

District Court of Appeal, Third District, California.

April 1, 1959.

Action by taxpayer for a refund of additional assessments of franchise taxes paid under protest. From adverse judgment of the Superior Court, Sacramento County, Albert H. Mundt, J., the taxpayer appealed. The District Court of Appeal, Warne, J. pro tem., held that statute providing that if a taxpayer agrees with United States Commissioner of Internal Revenue for extension of period for proposing and assessing deficiencies in federal income tax the period for mailing of notices of proposed deficiency tax by franchise tax commissioner shall be four years after return was filed or six months after date of expiration of agreed period for assessing deficiencies in federal income tax does not violate equal protection clause of Fourteenth Amendment on ground that it is unreasonable and arbitrary to give benefit of shorter period in which deficiencies can be assessed to a taxpayer who has not agreed to extension with respect to federal taxes, and classification between taxpayers who filed an extension from those who didn't had substantial relation to legitimate and desirable objectives and was not arbitrary and capricious.

Judgment affirmed.

1. Taxation 🔑318

Where taxpayer had filed a written agreement with United States Commissioner of Internal Revenue for extension of period for proposing and assessing deficiencies in federal income tax until December 31, 1944, for income years 1938, 1939 and

1940, deficiency assessments made by franchise tax commissioner less than six months after date of expiration of period agreed upon between taxpayer and Commissioner of Internal Revenue for assessing federal income tax deficiency was timely. West's Ann.Rev. & Tax.Code, §§ 23101 et seq., 25663, 25663a, 26103a.

2. Constitutional Law ⚿229(3)
Taxation ⚿37.6

Statute providing that if a taxpayer agrees with United States Commissioner of Internal Revenue for extension of period for proposing and assessing deficiencies in federal income tax, the period for mailing of notices of proposed deficiency tax by franchise tax commissioner shall be four years after return was filed or six months after date of expiration of agreed period for assessing deficiencies in federal income tax, does not violate equal protection clause of Fourteenth Amendment on ground that it is unreasonable and arbitrary to give benefit of shorter period in which deficiencies can be assessed to a taxpayer who has not agreed to extension with respect to federal taxes, and classification between taxpayers who file an extension from those who do not is reasonable and has substantial relation to legitimate and desirable objectives and is not arbitrary and capricious. West's Ann.Rev. & Tax.Code, §§ 23101 et seq., 25663, 25663a, 26103a; U.S.C.A.Const. Amend. 14; West's Ann.Const. art. 4, § 25.

3. Constitutional Law ⚿211

Relative costs and difficulties of administration alone are proper factors to be considered in determining whether a statute violates the equal protection clause of the federal constitution. U.S.C.A.Const. Amend. 14.

4. Statutes ⚿95(3)

Statute providing that if any taxpayer agrees with United States Commissioner of Internal Revenue for an extension or renewal thereof of the period for proposing and assessing deficiencies in federal income tax for any year, the period for mailing notices of proposed deficiency tax for such year shall be four years after the return was filed or six months after date of expiration of agreed period for assessing deficiencies in federal income tax, whichever period expires later, is not a special law extending time for payment of taxes. West's Ann.Const. art. 4, § 25; West's Ann.Rev. & Tax.Code, § 25663a.

5. Appeal and Error ⚿169

Contentions that have not been made before the trial court are not properly before the reviewing court.

◆

David Guntert, Robert A. Gaston, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., by James E. Sabine and Irving H. Perluss, Assts. Atty. Gen., Edward P. Hollingshead, Deputy Atty. Gen., for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment denying recovery of additional assessments of franchise taxes paid under protest.

The stipulated statement of facts shows that the Franchise Tax Commissioner (hereinafter referred to as the commissioner), on June 27, 1945, mailed to plaintiff, Richfield Oil Corporation (hereinafter referred to as Richfield), a notice of proposed additional assessment, by which Richfield was assessed tax and interest under the Bank and Corporation Franchise Tax Act (Chapter 13, Statutes 1929, as amended) in the total amount of $84,756.14 for the income years 1938, 1939, and 1940. Richfield paid the assessment under protest and filed claims for refund which were denied by the commissioner. An appeal was then taken by Richfield to the State Board of Equalization, which affirmed the commissioner's action in denying Richfield's claim for refund. Thereafter, in accordance with the provisions of Section 30, subdivision (b), of the Bank and Corporation Franchise Tax Act, Revenue and Taxation Code, § 26103a, Richfield brought this refund recovery action against defendant, Franchise Tax Board of the State of California, successor to the commissioner. Judgment was for defendant and plaintiff Richfield appealed.

There is no issue as to the correctness of the amounts of tax and interest, or that the assessments were not timely under the provisions of Section 25, subdivision (f), of the Bank and Corporation Franchise Tax Act as amended by Statutes of 1943, Chapter 37, section 14, page 203, now section 25663a of the Revenue and Taxation Code (Bank and Corporation Tax Law).

[1] It appears that Richfield filed a written agreement with the United States Commissioner of Internal Revenue for extension of the period for proposing and assessing deficiencies in federal income tax until December 31, 1944, for income years 1938, 1939 and 1940. However, Richfield had no agreement with the commissioner concerning extension of time for notices of additional assessments, nor did it consent to any such extension. Richfield contends that the deficiency assessments were barred under section 25 of the Bank and Corporation Franchise Tax Act, now section 25663 of the Revenue and Taxation Code, which provides as follows: "Except in the case of a fraudulent return, and except as otherwise provided in Sections 25663a and 25663b every notice of additional tax proposed to be assessed shall be mailed to the taxpayer within four years after the return was filed. No deficiency shall be assessed or collected with respect to the year for which such return was filed unless the notice is mailed within the four-year period or as otherwise provided. * * *"

On the other hand, defendant claims that said section 25663 is not controlling as Richfield entered into an agreement with the United States Commissioner of Internal Revenue for an extension of the period for proposing and assessing deficiencies in federal income for the income years 1938, 1939 and 1940, and therefore the case falls within the exception provided in section 25663a referred to in section 25663.

Section 25663a provides: "If any taxpayer agrees with the United States Commissioner of Internal Revenue for an extension, or renewals thereof, of the period for proposing and assessing deficiencies in Federal income tax for any year, the period for mailing notices of proposed deficiency tax for such year shall be four years after the return was filed or six months after the date of the expiration of the agreed period for assessing deficiencies in federal income tax, whichever period expires the later."

Although the tax and interest here involved were assessed more than four years after Richfield's returns were filed, they were assessed less than six months after the date of the expiration of the period agreed upon between Richfield and the Commissioner of Internal Revenue for assessing deficiencies in federal income tax and thus were timely under section 25663a.

[2] Richfield complains of the distinction made by the Legislature as between taxpayers which have executed agreements with the Commissioner of Internal Revenue to extend the limitation period for making assessments and those which have not executed such agreements. In the former case, the period for making assessments and filing claims for refund under the Bank and Corporation Franchise Tax Act is extended—in the latter case, it is not. Richfield, while conceding the Legislature has broad discretion in classifying for legislative purposes, contends that section 25663a violates the equal protection clause of the Fourteenth Amendment of the Constitution of the United States, in that it is unreasonable and arbitrary to give the benefit of a shorter period in which deficiencies may be assessed to a taxpayer who does not agree to an extension in respect to his federal taxes than to one who does. Richfield's position is that the distinction transcends reasonable classification. Richfield also contends that the section is violative of Section 25 of Article IV of the Constitution of California, which prohibits any special law, "Extending the time for the collection of taxes." In Dribin v. Superior Court, 37 Cal.2d 345,

351–352, 231 P.2d 809, 813, 24 A.L.R.2d 864, the court said:

> "The following pertinent principles are well established: 'Wide discretion is vested in the Legislature in making the classification and every presumption is in favor of the validity of the statute; the decision of the Legislature as to what is a sufficient distinction to warrant the classification will not be overthrown by the courts unless it is palpably arbitrary and beyond rational doubt erroneous. [Citations] A distinction in legislation is not arbitrary if any set of facts reasonably can be conceived that would sustain it.' (Sacramento Municipal Utility Dist. v. Pacific Gas & Electric Co. (1942), 20 Cal.2d 684, 693, 128 P.2d 529; see also In re Herrera (1943), 23 Cal.2d 206, 212, 143 P.2d 345; Reclamation District No. 1500 v. Riley (1923), 192 Cal. 147, 156, 218 P. 762.) 'The existence of facts supporting the legislative judgment is to be presumed and the burden of overcoming the presumption of constitutionality is cast upon the assailant.' (Takahashi v. Fish and Game Comm. (1947), supra, 30 Cal.2d 719, 728, 185 P.2d 805; Id., 334 U.S. 410, 68 S.Ct. 1138, 92 L.Ed. 1478; People v. Western Fruit Growers (1943), 22 Cal. 2d 494, 507, 140 P.2d 13; see also In re Fuller (1940), 15 Cal.2d 425, 437, 102 P.2d 321; California Physicians' Service v. Garrison (1946), 28 Cal.2d 790, 803, 172 P.2d 4, 167 A.L.R. 306.) The classification should be reasonable; i. e., 'have a substantial relation to a legitimate object to be accomplished. * * * [I]t is not our concern whether the Legislature has adopted what we might think to be the wisest and most suitable means of accomplishing its objects. [Citations.]' (Lelande v. Lowery (1945), 26 Cal.2d 224, 232, 234, 157 P.2d 639, 175 A.L.R. 1109.)"

And in Madden v. Commonwealth of Kentucky, 1940, 309 U.S. 83, 88, 60 S.Ct. 406, 408, 84 L.Ed. 590, the court said:

> "The burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it."

Applying the above principles to the legislation herein involved we feel that the classification made in section 25663a is reasonable and has substantial relation to legitimate and desirable objectives and is not "arbitrary and capricious."

A comparison of the Bank and Corporation Franchise Tax Act with the Federal Income Tax Law shows that in a large part it is based upon and taken from the federal law, and apparently it was anticipated in the early days of the Act that federal audits would be utilized in making state audits. Thus, in the report of the California Tax Research Bureau (January 23, 1933), which was submitted to the 1933 session of the Legislature, it was said with reference to the Bank and Corporation Franchise Tax Act on page 88:

> "The one year limitation on additional assessments is entirely too short. It renders practically impossible the making of adjustments on the audit of the Federal return and thus enables the taxpayer to escape the payment of taxes rightfully due the State which the Commissioner would not reasonably be expected to assess within one year. The limitation is two years in the Federal act, but should be somewhat longer in the state act to permit adjustments on the audit of the Federal return."

In this regard Congress has recognized the desirability of co-ordinating the federal law with the state law by providing that information respecting the federal income tax liability of federal taxpayers shall be available to state tax administrators. Section 55, subd. (b), Internal Revenue Code of 1939, 26 U.S.C.A. § 55(b); section 6103, subd. (b), Internal Revenue Code of 1954, 26 U.S.C.A. § 6103(b).

[3] Obviously information concerning audits and assessments made under the Federal Income Tax Law would serve no purpose for state tax administrators if, be-

cause of the granting by the taxpayer of extensions to the Commissioner of Internal Revenue for the completion of examinations or audits and the assessing of deficiencies, the period for assessment of the state tax expired before the federal information was available to the state. Unquestionably, the use of the federal audits results in great savings to the State of California and the taxpayers of the state. It is a fair inference that not only does the use of the federal audits bring about fewer detailed audits by California, but taxpayers are spared the inconvenience and expense of having two detailed audits of their books at their place of business. Further, the period of time for paying deficiency assessments by virtue of section 25663a is not alone for the benefit of the state, because the federal audit may reveal that the taxpayer has made an overpayment on his state income tax and is entitled to a refund. Thus, the taxpayer still could file a timely claim therefor, even though the usual state period of limitation had expired under section 25663a of the Revenue and Taxation Code (Bank and Corporation Franchise Tax Act, sec. 25, subd. (f)). These facts establish that the section is reasonable and proper. Relative costs and difficulties of administration alone are proper factors to be considered in determining whether a statute violates the equal protection clause of the Federal Constitution. Citizens' Telephone Co. v. Fuller, 229 U.S. 322, 33 S.Ct. 833, 57 L.Ed. 1206; Carmichael v. Southern Coal & Coke Co., 301 U.S. 495, 57 S.Ct. 868, 81 L.Ed. 1245.

Further the exception mentioned in section 25663a applies equally to all persons within the class to which it is addressed. There is nothing in the statute that prevents any taxpayer from agreeing with the United States Commissioner of Internal Revenue for an extension or renewal of the period for proposing and assessing deficiencies. It is uniform in its operation as to all taxpayers within the general classification who elect to come within its provisions. Hence, we fail to see where there can be any imposition of "peculiar disabilities of burdensome conditions in the exercise of a common right," nor is it "arbitrary or capricious." In the case of Madden v. Commonwealth of Kentucky, supra, 309 U.S. at page 88, 60 S.Ct. at page 408, the court said: "[T]he presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." This Richfield has failed to do, hence we hold that the statute is not violative of either the equal protection clause of the Fourteenth Amendment of the Constitution of the United States or the comparable provisions of the Constitution of California, i. e., Article I, Section 11; Article I, Section 21; and Article IV, Section 25.

[4] Richfield also contends that the case falls within the provisions of Article IV, Section 25, of the California Constitution which prohibits special laws extending the time for the payment of taxes. The 1943 amendment to Section 25, subd. (f) (Section 25663a, Revenue and Taxation Code), is not such a special law. The same contention was made and rejected in Elbert, Ltd. v. Nolan, 87 Cal.App.2d 24, 196 P.2d 88, 91, where a statute extending the time for making a sale to the State in 1933 for delinquent property taxes was extended 61 days from and after July 1, 1933. The court said:

> "* * * It is to be noted that said provision of the Constitution does not prohibit the extension of time for the collection of taxes, but it does recite that no special law shall be passed extending the time for the collection of taxes. That provision of the Constitution is as follows: 'The Legislature shall not pass local or special laws in any of the following enumerated cases. * * * Thirteenth-Extending the time for the collection of taxes.' Appellants also assert that said 1933 statute was special legislation for the benefit of a particular class, and was in effect a deferment of taxes more favorable to

> those who had not paid their taxes on July 1st than it was to other persons who had paid their taxes prior to enactment of the statute. These contentions are not sustained. The said statute of 1933 was not a special law. It applies equally to all persons within the class to which it is addressed. It is a general law having a uniform operation upon a class of persons differentiated from another class of persons by reason of the necessities peculiar to the subject matter of the legislation."

Richfield further contends that if section 25663a is constitutional it must be construed to permit assessments of additional tax more than four years after the return was filed only upon the basis of Federal net income tax changes; that if construed as permitting additional tax on any basis in addition to Federal changes, it becomes unconstitutional on various grounds. In support of these contentions Richfield asserts factually that part of the additional tax assessment was based on matters not reflected in Federal changes. But these factual assertions find no support in the agreed statement of facts, nor does it appear that these contentions were made in the trial court. Richfield makes no claim to the contrary in its closing brief.

[5] The stipulation of facts states: "The issue involved herein is the validity of the 1943 amendment (Statutes 1943, Chapters 37 and 352) to section 25 (now section 25(f) of the Bank and Corporation Franchise Tax Act, * * *" (Now Section 25663a of the Revenue and Taxation Code which is hereinbefore set out verbatim). We find nothing in the record to even indicate that these contentions, legal and factual, were made before the trial court. Hence they are not properly before this court. It is a general rule of appellate review, early established and long adhered to, that questions not raised in the trial court will not be considered on appeal. 3 Cal.Jur.2d sec. 140, p. 604; Wood v. Moulton, 146 Cal. 317, 322, 80 P. 92; Sommer v. Martin, 55 Cal.App. 603, 610, 204 P. 33; Marra v. Aetna Construction Co., 15 Cal.2d 375, 379, 101 P.2d 490; Grimes v. Nicholson, 71 Cal.App.2d 538, 542–543, 162 P.2d 934.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

In the Matter of the ESTATE of Harry C. STAUFFER, Deceased.

Anthony J. KENNEDY and Devlin Diepenbrock & Wulff, Petitioners and Respondents,

v.

Gladys WOLLENBERG, Residuary Legatee and Appellant.*

Civ. 9505.

District Court of Appeal, Third District, California.

April 6, 1959.

Rehearing Denied April 30, 1959.

Hearing Granted June 3, 1959.

Will contest. The Superior Court, Sacramento County, Jay L. Henry, J., entered order proportionately charging extraordinary attorney fees to each of heirs, legatees and beneficiaries of will and estate of decedent, and appeal was taken. The District Court of Appeal, Warne, J. pro tem., held that under statute to effect that intestate portion of decedent's estate, in absence of testamentary intent to contrary, is chargeable with payment of expenses of administration, before testate portion, residuary legacy which lapsed as to one-third thereof because of fraud on part of one legatee would be resorted to first for payment of all of attorney's fees even though there would have been no property in estate of decedent without legal services and legal services were performed in connection with litigation for benefit of each of heirs, legatees and beneficiaries of estate of decedent, and only if intestate portion were insufficient would balance of expenses of estate be charged proportionately to portions of estate received by residuary beneficiaries.

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* Opinion vacated 346 P.2d 748.

Reversed and remanded with directions.

Peek, Acting P. J., dissented.

Wills ⚿827

Under statute to effect that intestate portion of decedent's estate, in absence of testamentary intent to contrary, is chargeable with payment of expenses of administration before testate portion, residuary legacy which lapsed as to one-third thereof because of fraud on part of one legatee would be resorted to first for payment of all of extraordinary attorney's fees even though there would have been no property in estate of decedent without legal services and legal services were performed in connection with litigation for benefit of each of heirs, legatees and beneficiaries of estate, and only if intestate portion were insufficient would balance of expenses be charged to portions of estate received by residuary beneficiaries. West's Ann.Prob. Code, § 750.

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A. M. Mull, Jr., Clarence Pease, and Wilke & Sapunor, Sacramento, for appellant.

Anthony J. Kennedy and Devlin, Diepenbrock & Wulff, Sacramento, for respondents.

WARNE, Justice pro tem.

This is an appeal from an order fixing and directing payment of extraordinary attorney fees and costs and proportionately charging such fees to each of the heirs, legatees and beneficiaries of the will and estate of decedent.

The trial court, in conformity with the decision of this court (In re Estate of Stauffer, 142 Cal.App.2d 35, 297 P.2d 1029), entered judgment to the effect that under Item 4 of decedent's will, one Michael David Littlefield would receive a bequest of $5,000, and under Item 7 thereof appellant Gladys Wollenberg and one Jessie Snyder would take one-third of the residue of decedent's estate remaining for distribution, and as to the remainder of the residue testator died intestate.

The attorney fees allowed to respondents were for extraordinary services performed in representing the special administrator to recover property for the estate, much of which is reflected in the decision of this court in Anglo Cal. Nat. Bank of San Francisco v. Philpot, 148 Cal.App.2d 469, 306 P.2d 970. As the result of respondents' efforts, property valued at over $173,000 was recovered and became assets of said estate. The trial court found "that without said legal services there would be no property, real or personal, in the estate of decedent; that said services created and preserved for the estate of decedent all of the real and personal property that has come into the possession of said Special Administrator"; and "that said extraordinary legal services were performed in connection with litigation taken for the common benefit of each of the heirs, legatees and beneficiaries of the estate of decedent." The trial court further found that $32,500 was a reasonable fee; and that the fee plus costs of $1,311.51 should be paid proportionately by the heirs, legatees and beneficiaries, and so ordered.

Appellant Wollenberg contends that any fee allowance should be preferentially a charge against the intestate portion of said estate rather than ratably charged against all the beneficiaries.

Under Item 7 of decedent's will, R. N. Philpot, Jessie Snyder and Gladys Wollenberg were the residuary legatees, share and share alike (142 Cal.App.2d 35, 40, 297 P.2d 1029), and because of fraud upon the part of Philpot, his share lapsed, the result being that a residuary legacy lapsed as to one-third thereof. Under such circumstances we feel that the rule that where a residuary legacy lapses due to the death of the legatee prior to the death of the testator, such a legacy is not residue but is estate not disposed of by the will and should be first resorted to for the payment of all demands against the estate, is likewise applicable here. As stated in Re Estate of Hall, 183 Cal. 61, 190 P. 364: "The general rule is that property not disposed of by the will should be first resorted to for the payment of all demands against the estate. This is so for the reason that the law endeavors to carry out the intent of the testator as far as possible and, therefore, property not disposed of by the will should be so applied as to render it certain that the dispositions actually made by the testator will be effective." See also In re Estate of Kelleher, 205 Cal. 757, 272 P. 1060; In re Estate of Traver, 145 Cal. 508, 78 P. 1058.

Appellant points out that there is no will before this court directing payment of debts, and that if there were such an express direction, section 750 of the Probate Code would apply in any event, and the intestate share would be first chargeable. We agree with appellant. The section reads: "If the testator makes provision by his will, or designates the estate to be appropriated, for the payment of his debts, the expenses of administration, or family allowance, they must be paid according to such provision or out of the estate thus appropriated, so far as the same is sufficient. *If insufficient, that portion of the estate not disposed of by the will, if any, must be appropriated for that purpose;* and if that is not sufficient, the property given to residuary legatees and devisees, and thereafter all other property devised and bequeathed is liable for the same, in proportion to the value or amount of the several devises and legacies, but specific devises and legacies are exempt from such liability if it appears to the court necessary to carry into effect the intention of the testator, and there is other sufficient estate." (Emphasis added.)

Respondents, on the other hand, contend that since their services and the costs advanced by them redounded to the benefit of the estate and to all persons interested therein, the entire estate by the application of equitable principles is the fund to be surcharged for the costs and expenses in creating it, and therefore the order appealed from should stand. We do not agree.

None of the cases cited by respondents in support of their position are in point, factually or otherwise, with the instant case. For instance, in Re Estate of Reade, 31 Cal.2d 669, 191 P.2d 745, the decedent died intestate, hence section 750 of the Probate Code was not even mentioned for the obvious reason that it is not applicable to a totally intestate estate.

Likewise, In re Estate of McDonald, 128 Cal.App.2d 719, 275 P.2d 917, is not in point since the entire estate passed by will. No mention of section 750 was made, nor was it in issue.

As for In re Estate of Keller, 134 Cal. App.2d 232, 286 P.2d 889, 890, that case is not in point either.

There the dispute concerned the difference in the construction placed by the parties upon the following provisions of the will: " 'First: I direct my Executor hereinafter named to pay my just debts as soon as it has funds of my estate and in hand sufficient for the purpose, and I also direct my said Executor to pay all taxes levied and assessed against my property and all inheritance taxes and estate taxes.' "

Under paragraph "Fourth" he bequeathed and devised to his brothers and sisters residing in Switzerland, 20 per cent of the properties of his estate and under paragraph "Fifth" he bequeathed and devised all the "rest, residue and remainder" of his estate to a cousin and his wife, and their daughter residing in Modoc County, California. The appellant took the position that the paragraph numbered "Fourth" should be interpreted to mean that the legatees and devisees thereunder were entitled to distribution of 20 per cent of the gross estate and that all the debts, costs of administration and taxes should be paid from that portion willed to the so-called residuary legatees under Paragraph "Fifth." The probate court disagreed with that interpretation and in the decree of distribution adopted respondents' view, which was that all debts, costs and taxes should be deducted from the gross estate and the net only should be distributed, 20 per cent to appellants and 80 per cent to respondents. This court said at pages 236 and 237 of 134 Cal.App.2d, at page 891 of 286 P.2d: "In the will before us the draftsman specified the order in which the mandates thereof were to be carried out and first on the list, and so specified by use of the word 'First' at the beginning of the paragraph, is that the executor is to pay the testator's 'just debts' and 'all taxes levied and assessed against my property and all inheritance taxes and estate taxes.' It is not provided that these payments are to be made from any specific fund or the residue of the estate. In this connection appellant cites section 750 of the Probate Code, which, of course, is controlling if no contrary testamentary intent appears from the language of the will and if those mentioned in paragraph 'Fifth' of the will are to be considered 'residuary legatees and devisees.'"

This court then pointed out that "the only direction in paragraph numbered 'First' is that the items therein mentioned are to be paid," and that if the testator had any impelling desire to have these obligations paid from the residue or any fund other than the general corpus of his estate that could have been accomplished by the inclusion of not more than three words, such as "from the residue." The provision was interpreted to be "that the items therein mentioned should be paid before there is a division of the assets." Hence the case involved an interpretation of those provisions of testator's will. However, it held that section 750 was controlling if no contrary testamentary intent appears from the language of the will. Further the case holds in substance that a general direction to pay debts is not a specific direction to pay from specific property within the meaning of the first sentence of section 750. To do so would be in violation of the rule and reasoning in Re Estate of Hall, supra, holding that the law endeavors to carry out the intent of the testator by first charging the intestate portion.

Nor is there anything in Re Estate of Resler, 43 Cal.2d 726, 278 P.2d 1, that supports respondents' contention. This case cites In re Estate of King, 19 Cal.2d 354, 121 P.2d 716, which involved a will of decedent husband but where the surviving wife renounced her right to "inherit" property from the estate of her husband according to the terms of said will, and on the contrary elected to take her share of the property pursuant to the rules of succession. One of the issues was as to whether the family allowance should be charged against the devisees and legatees in proportion that they respectively share in the properties, both community and separate, upon distribution. It was asserted that the entire community amount of family allowance granted to the widow is required to be paid from the community interests of the deceased and his widow. The Supreme Court did not agree with appellant. It held that property "not disposed of by the will" by virtue of Probate Code, section 750, does not include community property to which the widow succeeded solely by virtue of her statutory one-half interest by operation of law. On the death of her husband such property belongs to her as the surviving wife. Probate Code, § 201. "Such property never belonged to the husband and the failure of his testamentary disposition thereof could not operate to place it in the category of property 'not disposed of by the will.' [Citing cases.]" In re Estate of King, supra, 19 Cal.2d at page 363, 121 P.2d at page 722. Obviously the case has no bearing on the instant case.

In conclusion we do not feel that equitable principles can be applied here in the face of a statute which provides that the intestate portion of a decedent's estate, in the absence of testamentary intent to the contrary, is first chargeable with the payment of debts, expenses of administration, or family allowance, before the testate portion, for the same reason as stated in Lass v. Eliassen, 94 Cal.App. 175, 179, 270 P. 745, 747: "Rules of equity cannot be intruded in matters that are plain and fully covered by positive statute. * * * Nor will a court of equity ever lend its aid to accomplish by indirection what the law or its clearly defined policy forbids to be done directly."

The order appealed from is reversed and the cause is remanded to the probate court to enter judgment that the special administrator pay the extraordinary attorney fees, together with the costs and all other expenses, first from the intestate portion of the estate in accordance with section 750 of the Probate Code, and only if said intestate portion is insufficient shall the balance of expenses of this estate be charged proportionally to the portions of the estate to be received by the residuary beneficiaries, Snyder and appellant Wollenberg.

SCHOTTKY, J., concurs.

PEEK, Acting Presiding Justice.

I dissent. It appears to me that the sole question in this appeal comes squarely within the rule enunciated in Re Estate of Reade, 31 Cal.2d 669, 191 P.2d 745, and In re Estate of Lundell, 107 Cal.App.2d 463, 237 P.2d 62. See also In re Estate of Hendrix, 77 Cal.App.2d 647, 176 P.2d 398.

In Re Estate of Reade one of the heirs successfully contested the first and final account of the administratrix, thereby making an additional fund available for distribution. The probate court awarded to the contestant her attorney fees and costs and ordered the payment thereof from the estate. On appeal the Supreme Court, in affirming the award, said, 31 Cal.2d at pages 671 and 672, 191 P.2d at page 746:

> "* * * [A] plaintiff who has succeeded in protecting, preserving or increasing a fund for the benefit of himself and others may be awarded compensation from the fund for the services of his attorney. This is to compel those for whose benefit the action or proceeding was taken to bear their share of the expenses of the litigation; and this rule is equitable and just. [Citations.]
>
> "While the probate court has no general equity jurisdiction and its jurisdiction generally is confined to the settlement of the estates of deceased persons, it does have the power to apply equitable principles in aid of its functions as a probate court. [Citation.] Here the successful contest by Mrs. Queirolo resulted in charging the administratrix in her first and final account with the additional sum of $2,654 which then became available for distribution. A fund was thus created or preserved for the benefit of all the heirs. Mrs. Queirolo has only a one-seventh interest in the estate. The application of equitable principles would seem to require that the other heirs bear their proportionate share of the expense of the litigation. We therefore conclude that the allowance of a fee for the legal services which thus redounded to the benefit of the estate and all persons interested therein was within the lawful exercise of power by the trial court (see 79 A.L.R. 523, 533), and that the order appealed from should stand * * *."

In Re Estate of Lundell the guardian of a minor, who was a beneficiary under the will of the decedent, was successful in her objection to the award of extraordinary legal fees. Thereafter she sought to recover her costs and the fees of her attorneys in contesting the award, to which the executors objected. The probate court disallowed the objection of the executors and the fees were awarded as requested. The District Court, in sustaining the award, based its conclusion solely upon the Reade case, holding that "* * * fees for legal services rendered in preserving a common fund for the benefit of all heirs or persons interested in an estate are proper charge against such fund. Each beneficiary should bear his proportionate share of expenses of litigation as a result of which he derives a benefit." [107 Cal. App.2d 463, 237 P.2d 63.] Thereafter a petition for hearing in the Supreme Court was denied unanimously.

In each of the cited cases the action taken, for which the extraordinary fees were awarded and charged to the estate, was for the benefit of all the heirs and persons interested in the estate. A like condition prevails in the instant case; that is, but for the efforts of respondents, real property valued at more than $170,000 would have been lost to the estate. Hence it must follow that the fees for legal services rendered in recovering such a substantial amount of property for the benefit of all heirs and persons interested in the estate should, as in the cited cases, be paid proportionately by those who derived the benefits therefrom.

It further should be noted that section 750 of the Probate Code, which the majority says is controlling in the instant case, is not mentioned in either the Reade or Lundell cases. Each of those cases, like the one before us, involved the question of extraordinary legal services. The majority says the reason for the omission of any reference to said section, at least insofar as In re Estate of Reade is concerned, is that there the decedent died intestate. However such was not the case in Re Estate of Lundell (which is not cited in the majority opinion), since there the decedent did leave a will. Necessarily, therefore, I repeat—the question raised in this appeal is controlled by the rule expressed in the Reade and Lundell cases.

I would affirm the order of the trial court.

Rehearing denied; PEEK, Acting P. J., dissenting.

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168 Cal.App.2d Supp. 788

PEOPLE of the State of California, Plaintiff and Appellant,
v.
August Lee DANIEL, Defendant and Respondent.
Cr. 65379.

Appellate Department, Superior Court, Stanislaus County, California.
Feb. 16, 1959.

Defendant was charged with being a "common drunkard" in violation of the vagrancy statute. The trial court dismissed the action and the People appealed. The Appellate Department of the Superior Court, Chamberlain, J., held inter alia that the statute declaring that every "common drunkard" is a vagrant is not so uncertain, indefinite or ambiguous as to violate the due process provisions of state and federal constitutions since quoted words have been in common use and generally understood to describe a person who is commonly or habitually so intoxicated that his faculties have been impaired, and the words are generally so understood to extent that they have been practically unquestioned.

Reversed and remanded with instructions.

1. Criminal Law 🔑1189

Where trial court dismissed prosecution for being a "common drunkard" in violation of vagrancy statute on ground that statute was unconstitutional, if appellate department of Superior Court should find trial court had been in error, proper proceeding would be to reverse and remand the case to the trial court for further proceedings. West's Ann.Pen. Code, §§ 647, subd. 11, 1466, subd. 1(a).

2. Criminal Law 🔑13

The basic or fundamental requirement of a statute is that it should be sufficiently definite to (1) guide the individual in planning his own future conduct, and (2) guide the court and counsel in adjudication of rights and duties.

3. Constitutional Law 🔑48

A statute should not be held invalid unless after using every possible means the court should find it impossible to give it an intelligent meaning or properly enforce it.

4. Criminal Law 🔑13

A statute is not necessarily invalid even though in its definition some matter of degree may be involved, and it will not generally be held invalid if language is sufficient to enable the attorney to explain to his client and advise what questions may be left to determination of jury, so that he will be able to govern himself accordingly.

5. Criminal Law 🔑13

To sustain the validity of statute, it is not necessary that words have a universally recognized meaning, and charging words will ordinarily be held sufficient if their meaning can be fairly ascertained by references to similar statute or other judicial determinations, or by reference to the common law, or to the dictionary, or if words themselves had a common and generally accepted meaning.

6. Constitutional Law 🔑48

The long continued use of words in a statute without question as to their sufficiency creates a presumption that they have come to be well understood by those to whom they apply.

7. Constitutional Law 🔑48

The courts will consider underlying purpose of law and although it might desire a little more certainty, generally court will uphold validity of statute and interpret it to the best of its ability, particularly when any attempt to make it more specific and certain, would tend to nullify its fundamental purpose.

8. Statutes 🔑223.1

In construing a statute, reference may be had to similar well known statutes defining the words and phrases, and to prior decisions, if any.

9. Constitutional Law 🔑47

Occasional misuse is not by itself sufficient cause to invalidate a statute, and although statutory clarification might be desirable, the possibility of thereby nullifying fundamental purpose of statute will be considered.

10. Constitutional Law 🔑47

The possibility of a reasonable construction will prevail over mere theoretical grounds of objection to validity of statute.

11. Constitutional Law 🔑38

Where statute involves some matters of degree as to which individuals and even jurors might reasonably disagree in their judgment, the statute will not for that reason alone be invalidated, particularly where statute prohibits an act or condition which is "malum per se" rather than merely "malum prohibitum".

12. Constitutional Law 🔑258

Vagrancy 🔑1

The statute declaring that every "common drunkard" is a vagrant is not so uncertain, indefinite or ambiguous as to violate the due process provisions of state and federal constitutions since quoted words have been in common use and generally understood to describe a person who is commonly or habitually so intoxicated that his faculties have been impaired, and the words are generally so understood to extent that they have been practically unquestioned. West's Ann.Pen.Code, § 647, subd. 11; West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

See publication Words and Phrases, for other judicial constructions and definitions of "Common Drunkard".

13. Criminal Law 🔑13

Where statutory words and phrases are susceptible to a reasonable interpretation to comply with stated requirements, they will not be declared insufficient because of some element of uncertainty as to degree or definition but such statutes will be approved and courts will resolve the uncertainties by judicial interpretation.

Frank S. Pierson, Dist. Atty., and Deputy Dist. Atty., Gerald R. Douglas, Modesto, for appellants and People.

George Mellis (of Mellis & Stockton), Modesto, for respondent and defendant.

CHAMBERLAIN, Judge.

The defendant August Lee Daniel hereafter called the defendant, was charged with being a "common drunkard" in violation of Subdivision 11 of Section 647 of the California Penal Code, known as the vagrancy Statute.

[1] He has never been arraigned. His counsel moved the court to dismiss the action upon the grounds that the court did not have jurisdiction of the matter, and that the statute under which he was charged is unconstitutional. The court dismissed the action, and filed a written opinion stating that he found the statute in question unconstitutional and in violation of due process of law. From that decision the People have appealed to this court pursuant to the authority of Subdivision 1(a) of Section 1466 of the Penal Code. If we should find the trial court to have been in error, the proper proceeding is to reverse and remand the case to the trial court for further proceedings. People v. Ring, 26 Cal.App.2d Supp. 768, 70 P.2d 281; People v. Smith, 133 Cal.App.2d Supp. 777, 284 P.2d 203; People v. Sevel, 120 Cal.App.2d Supp. 907, 261 P.2d 359; People v. Garner, 120 Cal.App.2d Supp. 923, 264 P.2d 672.

The question presented for our determination is whether or not Subd. 11 of Sec. 647 Penal Code, defining Vagrancy, is so uncertain, indefinite, or ambiguous as to violate the due process provisions of the United States Constitution as set forth in the 14th amendment, or of course, similar provisions in the Constitution of the State of California, Art. 1, § 13. Subd. 11 of said section declares that every "common drunkard" is a vagrant.

The matter has been exhaustively briefed by both parties, and so many authorities have been cited that the task of even co-ordinating them has been Herculean. They range in time from the delivery of the Commandments and Laws to his people by Moses as related in Deuteronomy, wherein he advises his people to take the stubborn and rebellious son without the walls of the city and stone him to death as a glutton and a *drunkard* (emphasis added) so that they shall purge the evil from their midst, and all Israel should hear and fear. They cover the entire English speaking world from the ancient common law to the present date. It would be tedious, and in our opinion, unnecessary to here attempt any detailed discussion of these authorities, but from them we have selected a number which should be sufficient for the determination of this question. These we will shortly cite. But we desire first to state that we realize our Appellate jurisdiction has limitations, both in territory and in authority, and that we offer our opinion and conclusion largely for whatever assistance it may be to other or higher jurisdictions in which the same or a similar question may be presented and because we consider the question to be of general and widespread interest.

First, we will refer to the learned discussion of the broad aspects of this problem in 62 Harvard Law Review page 76 published in 1949. The authorities cited there are almost exclusively decisions of the United States Supreme Court. The guiding principles stated are sound and have been followed by practically all of the cases cited from American jurisdictions, including those from California which we will hereafter mention. For brevity we will not attempt to analyze the article here, but it is recommended as basic reading. The phrase "common drunkard" is not mentioned therein.

We will next refer to an article entitled "Who is a Vagrant in California?" in 23 California Law Review page 506, published in 1935, which we also recommend to the reader. This article, as its title indicates, deals with the vagrancy statute of the State of California, particularly with reference to the element of uncertainty and ambiguity of the provisions of subdivisions 1, 3, 5, and 6 of Sec. 647, but offers no criticism of Subd. 11 relating to "common drunkards", which is the subject of the present inquiry.

That article was answered by Judge Alden Ames of the San Francisco Municipal Court in an article at page 616 of the same Volume 23 California Law Review. He calls attention to the useful function which the vagrancy statute has performed in this State, even though it may have been at times subject to some abuse, and states at the end of his article, that he would personally recommend and support any proposals or suggestions which would meet the difficulties mentioned in the article which he answers, provided that the fundamental purposes and objects of the statute, which he endeavored to point out, would still remain. Again there is no mention of Subd. 11.

We will next refer to an article on vagrancy in Volume 39 California Law Review page 579 published in 1951. The author deals partly with the single offense theory, and also to some extent with some evidentiary problems, but does not mention Subdivision 11 of that Section. He concludes with the following suggestion or recommendation, to wit: "The courts, while continuing to clarify the statute should strive to follow a philosophy and interpretation that will keep the use of this statute in the penumbra between abusive disregard of personal rights and the practical needs of police agencies in protecting society."

We will now cite a number of California cases which set forth rules to be followed in the determination of the question before us. These cases and some others we will later discuss in a little more detail. The cases are: Lorenson v. Superior Court, 35 Cal.2d 49, 216 P.2d 859; People v. Deibert, 117 Cal.App.2d 410, 256 P.2d 355. People v. Ring, 26 Cal.App.2d Supp. 768, 70 P.2d 281; People v. Smith, 36 Cal.App.2d Supp. 748, 92 P.2d 1039; People v. De Leon, 35 Cal.App. 467, 170 P. 173; People v. Nunn, 46 Cal.2d 460, 296 P.2d 813. By examination and correlation of these articles and cases we believe that the rules to be applied can be quite fully and correctly stated.

[2] The basic or fundamental requirement of a statute is that it should be sufficiently definite to: 1. Guide the individual in planning his own future conduct: 2. And guide (the court and counsel) in the adjudication of rights and duties. 62 Harv.Law Rev. p. 77; Lorenson v. Superior Court, 35 Cal.2d 49, 216 P.2d 859.

To show the matters which should be considered in determining the sufficiency in a particular case, we will cite and quote from the California decisions mentioned above and some others. In quoting, we will, for brevity, omit citations.

In Lorenson v. Superior Court, 35 Cal.2d 49, 216 P.2d 859, 865, (a leading case) defendant and others were charged with and convicted of conspiracy to commit certain named crimes and "to pervert or obstruct justice, or the due administration of the laws." Defendant claimed the quoted part of the charge was void for uncertainty and ambiguity. In denying the claim, the Court said, "To comply with the constitutional requirement of due process of law, the crime for which a defendant is being prosecuted must be clearly defined, but it is only necessary that the words used in the statute be well enough known to enable those persons within its reach to understand and correctly apply them. 'To make a statute sufficiently certain to comply with constitutional requirements, it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited.' * * * Although higher standards of certainty will be required of penal than of civil statutes, * * * a statute is sufficiently certain if it employs words of long usage or with a common law meaning, 'notwithstanding an element of degree in the definition as to which estimates might differ.' * * * For example, the courts have upheld statutes employing such terms as: 'to make diligent effort to find the owner', * * * 'unreasonable speed', * * * 'unjustifiable physical pain or mental suffering' * * * 'practice law,' * * and 'to the annoyance of any other person'. Considering the well-settled meaning at common law of the words 'to pervert or obstruct justice, or the due administration of the laws', the other and more specific provisions in the Penal Code concerning 'Crimes Against Public Justice', and the relative certainty of words employed in statutes which have been held valid, it cannot be said that subsection 5 of section 182 of the Penal Code is unconstitutional. For substantially the same reasons the indictment against Lorenson is not vague, indefinite, or uncertain and it complies with the statutory requirement for such an accusation. Section 952 of the Penal Code allows an indictment to be stated 'in the words of the enactment describing the offense or declaring the matter to be a public offense, or in any words sufficient to give the accused notice of the offense of which he is accused.' Lorenson was indicted in the terms of the 'enactment describing the offense', and the grand jury has fairly informed him of the acts of which he is accused to the extent which will enable him to defend himself."

There was a dissenting opinion solely on ground of insufficiency of the evidence.

People v. Deibert, 117 Cal.App.2d 410, 256 P.2d 355, 359, cites and follows the Lorenson case. The charge was contributing. The Court said: "Defendants attack the constitutionality of section 702 of the Welfare and Institutions Code as applied in the instant case, asserting that it is too vague, indefinite and uncertain to form the basis of a criminal charge and hence invalid under the due process clause of the Fourteenth Amendment to the Constitution of the United States. They contend that the words 'dissolute' and 'immoral' contained in the language of the statute and incorporated in the charging clause of the information are not sufficiently definite to inform those subject to its sanctions what type of conduct is thereby denounced. This challenge is not well taken. Where a statute contains a reasonably adequate disclosure of the legislative intent regarding an evil to be combated in language giving fair notice of the practices to be avoided, the court will be slow to say that such a statute is too indefinite to be enforced. The complexities of the social problems dealt with by the Legislature require that a practical construction be given to the language employed by the draftsmen of legislation less their purposes be too easily nullified by over-refined inquiries into the meanings of words. 'Reasonable certainty, in view of the conditions, is all that is required, and liberal effect is always to be given to the legislative intent when possible.' * * * The use of words of general meaning is the essence of our code system. Thus, in a sphere so vital to the community as the welfare of its youth, the words used in a statute designed to enable the legislature to come to grips effectively with the problem of juvenile delinquency should be upheld where their frequent use in penal statutes gives assurance that they are understood by men of ordinary intelligence. To comply with the constitutional requirement of due process of law, a crime for which a defendant is being prosecuted must be clearly defined, but it is only necessary that the words used in the statute be well enough known to enable those persons within its reach to understand and correctly apply them. "To make a statute sufficiently certain to comply with constitutional requirements it is not necessary that it furnish detailed plans and specifications of the acts or conduct prohibited." Although higher standards of certainty will be required of penal than of civil statutes, a statute is sufficiently certain if it employs words of long usage or with a common law meaning, 'notwithstanding an element of degree in the definition as to which estimates might differ (citations).'" (Hearing denied by Supreme Court.) Lorenson v. Superior Court, 35 Cal.2d 49, 216 P.2d 859.

In People v. Ring, 26 Cal.App.2d Supp. 768, 70 P.2d 281, 283, the charge was the "unlawful practice of law." The court held those words sufficiently plain and clear to meet the constitutional requirement. In so holding, the court stated: "The phrase 'practicing law,' or its equivalent, 'the practice of law,' has long had a sufficiently definite meaning throughout this country to be given a place in both constitutional and statutory law without further definition. * * * Words used in creating a statutory crime do not fail of such certainty merely because the offense, when viewed through them, may not have all the precision in outline of a geometrical figure; if the main and central part of the field of view is clear, some slight lack of definition around its outer edges is not fatal. General terms may be used in a statute to describe things according to the common understanding of such terms."

People v. De Leon, 35 Cal.App. 467, 170 P. 173, 175 was another charge of contributing to the delinquency of a minor and there too objection was made to the sufficiency of the words "idle," "dissolute," "lewd," or "immoral". The court overruled their claim and held the words to be sufficiently definite and certain, and said: "We do not deem it necessary or proper to give to the foregoing clause of the information or the foregoing provisions of the juvenile court law, the narrow and restricted construction for which the appellant herein contends. The evident object and main purpose of the juvenile court law was not so much punitive as it was preventive. Its intent was to put a barrier across the threshold of those entrances to downward ways which are open before the feet of youth." Then after stating its views, and in answer to some of the defendants' arguments, the court made this significant statement: "These views are directly applicable to the case and question before us in the light of the suggestions of appellant's counsel as to its possible application to supposititious cases wherein acts innocent in themselves might be held criminal according to the whim or prejudice of some judge or jury. It is not by such extreme or fanciful standards that the validity of the statute is to be determined, but rather by the reasonableness of its application to cases like the instant one, wherein the act or omission of the defendant amounts to the breach of a definite legal duty, and is of such a nature and tendency as to affect directly the welfare of the minor." (Hearing denied by Supreme Court).

In People v. Nunn, 46 Cal.2d 460, 296 P.2d 813, 816, the defendant, a physician, was convicted of four charges of unlawfully prescribing narcotics (Sec. 11163, Health and Safety Code.) and one of prescribing narcotics to an addict (Sec. 11164.). Defendant questioned the sufficiency of such words and phrases used in the act, as "except in the regular practice of his profession", "good faith", and "addict". The Court held the words to be sufficient, citing cases, including the Lorenson case, and made the following significant statement: "A liberal construction should be given constitutional provisions in order to sustain legislative enactments, and all doubts and uncertainties arising from the Constitution, as well as the statute, should be resolved in favor of the validity of the statute." (Dissenting opinion on ground of entrapment. Rehearing denied. One dissent.)

Relating to the matter of uncertainty where the question of degree might be important we will quote from People v. Smith, 36 Cal.App.2d Supp. 748, 92 P.2d 1039, 1042 as follows: "The law is full of instances where a man's fate depends on his estimating rightly, that is, at the jury subsequently estimates it, some matter of degree." That case then cites a number of cases where laws containing some uncertainty of degree were upheld.

[3] Defendant relies on the case of Connally v. General Construction Co., 269 U.S. 385, 46 S.Ct. 126, 128, 70 L.Ed. 322 which is cited as a leading case, and on People v. McCaughan, 49 Cal.2d 409, 317 P.2d 974, 977. Examining those cases we find that they conform to the California cases which we have cited. The complaint in the Connally case was that the defendant paid wages "less than the current rate of per diem wages in the locality where the work is performed." The U. S. Supreme Court held that the determination of the current rate per diem was so involved and so dependent upon so many circumstances, conditions, and factors from time to time that it was a practical impossi-

bility for any person to ascertain what was in fact the current wage. The court did, however, state in the Connally case that a statute should not be held invalid unless after using every possible means the court should find it impossible to give it an intelligent meaning or properly enforce it.

In the McCaughan case the court approved the words "cruel treatment" and "neglect of duty", but disapproved the words "harsh" and "unkind" treatment, stating as to those words that "It is apparent from the mere recitations of the (dictionary) meanings ascribed to 'harsh' and 'unkind', most of them indefinite themselves, that men of common intelligence must necessarily guess at the meaning of these words as used in the statute and that they will differ as to their application in a specific situation. The words in question have no established common law meaning. Nor have they any adjudicated meaning."

We will mention a few cases disapproving some words and phrases in order to show the classification into which many of them fall. The word "picketing" without any further definition or qualification; In re Harder, 9 Cal.App.2d 153, 49 P.2d 304; the phrase "frosted to the extent of endangering the reputation of the citrus industry if shipped"; In re Peppers, 189 Cal. 682, 209 P. 896; provision of the State Housing Act, Health & Safety Code, § 16900, that "every gas burning appliance shall be approved by a nationally recognized testing agency", People v. Neff, 117 Cal. App.2d 772, 257 P.2d 47; the phrase "practices inimical to the public interest"; People v. Saad, 105 Cal.App.2d Supp. 851, 234 P.2d 785, 787. It will be noted that the words and phrases used in these cases are associated with the complications of modern business, and in general have not acquired any definite popular meaning, nor been adjudicated, and, of course, are entirely foreign to the common law, and in general are practically wholly unintelligible and impossible to apply.

[4-11] From the Law Review articles and cases cited, the rules to be applied in determining the present question may be summarized as follows:—A statute is not necessarily invalid even though in its definition some matter of degree may be involved; it will not generally be held invalid if the language is sufficient to enable the attorney to explain to his client and advise what questions may be left to the determination of the jury, so that he will be able to govern himself accordingly; neither is it necessary that the words have a universally recognized meaning; that the charging words will ordinarily be held sufficient if their meaning can be fairly ascertained by references to similar statutes or other judicial determinations, or by reference to the common law, or to the dictionary, or if the words themselves had a common and generally accepted meaning; that the long continued use of words in a statute without question as to their sufficiency creates a presumption that they have come to be well understood by those to whom they apply. (This reasoning is particularly applicable here because defendant's counsel states that he has been unable to find any case of appellate jurisdiction construing the words "common drunkard" as used in vagrancy statutes.) That the courts will consider the underlying purpose of the law and although it might desire a little more certainty, as a general rule the court will uphold the validity of the statute and interpret it to the best of its ability, particularly when any attempt to make it more specific and certain, would tend to nullify its fundamental purpose. (It may be noted that the vagrancy statute here involved tends to fill what would be a gap in the absence of City or County ordinances on the subject.) Also that reference may be had to similar well known statutes defining the words and phrases, and to prior decisions, if any; that occasional misuse is not by itself sufficient cause to invalidate the law; that although statutory clarification might be desirable, the possibility of thereby nullifying the fundamental purpose of the stat-

ute will be considered; that the possibility of a reasonable construction will prevail over mere theoretical grounds of objection; that where the statute involves some matters of degree as to which individuals and even jurors might reasonably disagree in their judgment, the statute will not for that reason alone be invalidated, and this is particularly true where, as here, the statute prohibits an act or condition which is "malum per se" rather than merely "malum prohibitum". In the former, the citizen is bound to anticipate that his continued wrongful acts might, in the individual judgment of the jurors, be deemed unlawful, a result which he can readily avoid by righteous living.

[12] Applying the foregoing criteria to the words "common drunkard" as used in the vagrancy statute, it is our opinion that they are sufficiently certain and definite to meet the constitutional requirements.

The words, both singly and conjunctively, have been in common use and generally understood since Moses delivered the Commandments and the Law to his people, and up to the present time when the words are frequently used derisively to describe a person who is commonly or habitually so intoxicated that his faculties have been impaired, and the words are generally so understood to the extent that they have been practically unquestioned.

The dictionaries are in substantial accord on the definitions, although some accord to the word "drunk" or "drunkard" alone, a meaning which would make the word "common" superfluous. Ballantine's Law Dictionary 2d Edition (1948) defines drunkenness as "that state or condition which inevitably follows from taking excessive quantities of an intoxicant. It is synonymous with inebriety and inebriation." The same authority defines a "common drunkard" as "a person who drinks intoxicating liquor to excess with habitual frequency." 13 Words and Phrases defines a "drunk" as "a person" who is "under the influence of liquor [to the extent] that his passions are visibly excited or his judgment impaired by the liquor." Webster's New International Dictionary, unabridged, 2d Edition, defines a "drunkard" as "one who habitually drinks strong liquors immoderately, for example, a toper or a sot." The same dictionary defines the word "drunk" as "under the influence of an intoxicant, especially an alcoholic liquor, so that the use of the faculties is materially impaired. Synonym—inebriate." The same dictionary defines the word "common" as "habitual or notorious, as a common scold or a common thief"; also "of frequent or ordinary occurrence." The American College Dictionary defines the word "common" as "generally or publicly known,—notorious as a common scold; familiar, usual, as a common event." It defines "drunk" as "a drunken person intoxicated with or as with strong drink." It defines a "drunkard" as "a person who is habitually or frequently drunk." It states that the use of the word "drunkard" connotes wilful indulgence to excess. The Oxford Universal Dictionary defines the word "common" as "generally known", as for example, "a common prostitute"; also as "ordinary, prevalent, frequent, or commonly." It also defines the word "drunkard" as "one addicted to drinking, especially to excess, as an inebriate, a sot." That dictionary also states that these words have been in common use since the sixteenth century. It defines the word "drunken" as "intoxicated, or habitually intemperate", and the word "drunkenness" as "the habit of drinking to excess." We do not see how any person who can read and has access to a dictionary could possibly fail to understand the meaning of the words "common drunkard." Their common use and the availability of the dictionary definitions furnish everybody with the means of knowing exactly what they mean. They are certainly sufficient to warn every person of the danger which he may incur if he persistently and habitually gets drunk.

In support of our conclusion but at the risk of redundance, we will cite some California cases (in addition to those hereinbefore mentioned), and the statutory words and phrases which they held sufficient: "make diligent effort to find the owner" (Pacific Coast Dairy v. Police Court, 214 Cal. 668, 8 P.2d 140, 141, 80 A.L.R. 1217); "unreasonable speed" (Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172); "unjustifiable physical pain or mental suffering" (People v. Curtiss, 116 Cal.App. Supp. 771, 300 P. 801, 802); "to the annoyance of any other person" (People v. Beifuss, 22 Cal.App.2d Supp. 755, 67 P.2d 411); the phrase "neglect of duty" and "cruel" (People v. McCaughan, 49 Cal.2d 409, 317 P.2d 974); "criminal syndicalism" (People v. Whitney, 57 Cal.App. 449, 207 P. 698), approved by the United States Supreme Court in Whitney v. California, 274 U.S. 357, 47 S.Ct. 641, 71 L.Ed. 1095; "idle or lewd or dissolute person" as used in Subd. 5 of the vagrancy statute (In re McCue, 7 Cal.App. 765, 96 P. 110); "infamous crime against nature" (People v. Williams, 59 Cal. 397); the words "banking game" and "poker" (People v. Carroll, 80 Cal. 153, 22 P. 129); the word "loiter" (Phillips v. Municipal Court, 24 Cal.App.2d 453, 75 P. 2d 548); "tending to deceive or mislead the public" (Smulson v. Dental Examiners, 47 Cal.App.2d 584, 118 P.2d 483, 484); the word "mingle" or "mingling" as in a crowd (People v. King, 115 Cal.App.2d Supp. 875, 252 P.2d 78); provision of the Health and Safety Code, § 24242 limiting the discharge of smoke to that "as dark or darker in shade than that designated as No. 2 on the Ringlemann Chart, as published by the United States Bureau of Mines" (People v. International Steel Corp., 102 Cal.App.2d Supp. 935, 226 P.2d 587, 588); "driving drunk" under Section 501, Vehicle Code (People v. Haeussler, 41 Cal.2d 252, 260 P.2d 8; People v. Dingle, 56 Cal.App. 445, 205 P. 705); "reckless driving" under Section 505, Vehicle Code (People v. Smith, 36 Cal.App.2d Supp. 748, 92 P.2d 1039); "driving" automobile while "under the influence, of narcotic drugs" under Section 506, Vehicle Code (People v. Berner, 28 Cal.App.2d 392, 82 P.2d 617); the words "as to 'indicate' either willful or wanton disregard" as used in Vehicle Code, § 505 prior to its amendment (People v. Steel, 35 Cal.App.2d Supp. 748, 92 P.2d 815); the same words under the new statute (People v. Young, 20 Cal.2d 832, 129 P.2d 353); "speed greater than is reasonable or prudent", under Vehicle Code Section 510 (Ex parte Daniels, 183 Cal. 636, 192 P. 442, 21 A.L.R. 1172); stating also the general principle involved (People v. Banat, 39 Cal.App.2d Supp. 765, 100 P.2d 374), with citations (People v. Smith, 36 Cal.App. 2d Supp. 748, 92 P.2d 1039), citing many cases; the words "trade dispute" and "labor disturbance" (People v. Smith, 133 Cal.App.2d Supp. 777, 284 P.2d 203); "driving at a speed greater than is reasonable and proper", or "at such rate of speed as to endanger the life or limb of any person or the safety of any property" (Ex parte Daniels, 183 Cal. 636, 192 P. 442, 450, 21 A.L.R. 1172); "unreasonable waste of natural gas" (People v. Associated Oil Co., 211 Cal. 93, 294 P. 717, 719); "due caution and circumspection" as used in Penal Code, § 192 relating to manslaughter (People v. Crossan, 87 Cal.App. 5, 261 P. 531). We believe that research would discover many more but further citations would, in our opinion, be superfluous.

The difficulties suggested by counsel for fendant are, in our opinion, more imaginary than real. The statute sufficiently advises both the defendant and the court and the counsel of the nature of the charge; it would appear that the condition should exist at the time of the arrest to avoid the defense of reformation; the number of occasions of drunkenness is in the nature of degree which may be reasonably defined by the court and on which an individual juror could exercise a proper and sound judgment. Lord Hardwicke's rule, discussed in 1 Wigmore, Evidence, 3rd Ed., 1939, Sec. 203, p. 691 et seq.; State v. Flynn, 16 R.I. 10, 11 A. 170, 171; State v. Kelly, 12 R.I. 535; Tatum v. State, 32 Ala.App. 128, 22 So.2d 350; see citations in Pollon v. State, 218 Wis. 466, 261 N.W. 224. The offense most likely applies to public places but there are some cases holding that a person may be a "common drunk" in his own home;

since the accusation relates to a condition rather than a specific act, there would not seem to be any reasonable objection to proving as many acts as are necessary to cause the condition charged; he should be able to properly prepare his defense by preparing to defend against all accusations of intoxication, concerning which he should have personal knowledge; problems of evidence and instructions exist in every case, and do not seem particularly difficult since the jury need only decide whether or not at the time of the defendant's arrest he was an habitual or frequent user of intoxicating liquor to excess. The dictionary should furnish a reasonable guide for the instructions.

Counsel for defendant stated that he had no case upholding the conviction of a man as a "common drunkard" under a vagrancy statute. But we will refer to Pollon v. State, 218 Wis. 466, 261 N.W. 224. The syllabus states: "Defendant could be convicted of vagrancy as a 'common drunkard', though he was intoxicated only in his own home, and not in a public place." It briefly traces the use of the words "drunk", "drunkard" and common "drunkard" from the year 1606 to date of the decision (1935). It distinguishes the case (State ex rel. Larkin v. Ryan, 70 Wis. 676, 36 N.W. 823), upon which the lower court largely based its decision and shows that it had no application to the question before them and now before us. We think the trial court misconstrued State ex rel. Larkin v. Ryan. That case considered the words "common drunkard" but did not hold them insufficient. The ground for reversal, as stated 36 N.W. on page 828, was that the statute provided for arrest, conviction, and punishment without a trial. Insofar as it might be construed to hold the words "common drunkard" to be insufficient, it was overruled in the Pollon case.

[13] The procedure followed in California in upholding the sufficiency of the many words and phrases in statutes of common everyday use as heretofore cited, furnishes us with a proper guide in interpreting the statute here in question. Where the words and phrases are susceptible to a reasonable interpretation to comply with the requirements stated, they have not declared them insufficient because of some element of uncertainty as to degree or definition, but have approved them and have resolved the uncertainties by judicial interpretation, although it has not always been easy. Many of these judicial interpretations are found in the Criminal Instruction book known as C.A.L.J.I.C. which is widely used. In so doing they have added flesh and given life to many of the naked skeletons found in the statutes and enabled them to fulfill the beneficial purposes for which they were enacted.

It is therefore our conclusion, that the statute in question here is not void for uncertainty or ambiguity, and that the trial court committed error in dismissing the complaint and charge. It is therefore ordered that the dismissal be reversed and set aside and the cause remanded to the trial court with instructions to vacate its order dismissing the case, and restore the same to the calendar for further appropriate proceedings.

We regret the length of this opinion. In spite of diligent effort, we have been unable to shorten it, and still give the difficult problem proper consideration.

BUSH, P. J., concurring.

DAMRELL, J., deeming himself disqualified, did not participate in the hearing and does not join in this decision.

169 Cal.App.2d Supp. 883

J. Bruce ISMAY, doing business as Collection and Credit Adjustment Service, Plaintiff and Respondent,

v.

Theodore R. TYLER, Defendant and Appellant.

Appeal No. 67.

Appellate Department, Superior Court,
Fresno County, California.
March 18, 1959.

Judgment creditor's proceeding respecting issuance of writ of execution in which judgment debtor moved to quash and stay further proceedings until termination of bankruptcy proceedings could be filed in Muncipal Court. From an order denying defendant's motion to quash writ of execution, defendant appealed. The Appellate Department of the Superior Court in and for Fresno County, Popovich, J., held that where collection agency had claim assigned to them by original creditor and procured a judgment against debtor and collection agency was known to be judgment creditor for approximately two years before debtor's institution of bankruptcy proceedings, mailing of notice of bankruptcy proceedings to assignor of claim rather than agency, did not constitute notice to agency of existence of bankruptcy proceedings and debt was not discharged in bankruptcy.

Affirmed.

1. Assignments ⚿57

After notice to debtor of an assignment of claim, debtor deals with assignor at his peril and upon service of summons upon assigned claim, notice of assignment to debtor is conclusively established. Bankr.Act, § 17, sub. a as amended 11 U.S.C.A. § 35, sub. a; West's Ann.Civ.Code, § 2332.

2. Bankruptcy ⚿425

Where original creditor assigned claim to collection agency which procured a judgment against debtor more than two years before debtor subsequently instituted bankruptcy proceedings in which collection agency was not scheduled as a creditor, sending of notice to assignor of claim did not constitute notice of bankruptcy proceedings to collection agency which had no actual knowledge thereof, and discharge in bankruptcy did not discharge agency's judgment against debtor. Bankr.Act, § 17, sub. a as amended 11 U.S.C.A. § 35, sub. a; West's Ann.Civ.Code, § 2332.

Dubsick & Helon, Fresno, for appellant.

Nathan Guthertz, Fresno, for respondent.

POPOVICH, Judge.

In April, 1955, plaintiff, a collection agency, procured a judgment of $444.59 against defendant upon a claim assigned to them for collection by Kyle and Company. Certain executions were issued upon this judgment and were returned unsatisfied.

In November, 1957, defendant was adjudicated a bankrupt. Defendant failed to list plaintiff as a creditor in his bankruptcy schedule and no notice was mailed plaintiff of the bankruptcy proceedings. However, defendant did list Kyle and Company as a creditor in the bankruptcy schedule and a creditor's notice was mailed to Kyle and Company.

On October 3, 1958, plaintiff caused a writ of execution to be levied on a commercial account of the defendant in Solano County, in the sum of $216.09, whereupon defendant moved to quash the writ and to stay further proceedings until termination of the bankruptcy proceedings could be filed in the Municipal Court, upon the grounds that plaintiff's judgment was discharged in bankruptcy.

Appellant contends that Section 17 of the Bankruptcy Act of 1898, as amended (U.S.Code Ann., Title 11, Sec. 35, Subdivision A, 11 U.S.C.A. § 35, sub. a) provides: "A discharge in bankruptcy shall release a bankrupt from all of his approvable debts, whether allowable in full or in part, except such as * * * [3] have not been duly scheduled in time for proof and allowance, with the name of the creditor, if known to the bankrupt, *unless such creditor had notice or actual knowledge of the proceedings in bankruptcy.*" (Italics ours.)

He asserts that under the assignment from Kyle and Company to plaintiff, there is the relationship of principal and agent and that the creditor's notice received by Kyle and Company as principal constituted notice to plaintiff, its agent, under the provisions of Section 2332 of the Civil Code, which provides: "As against a principal, both principal and agent are deemed to have notice of whatever either has notice of and ought in good faith and the exercise of ordinary care and diligence, to communicate to the other."

It was conceded that plaintiff had no actual knowledge of the bankruptcy proceedings, and therefore the only question on this appeal is whether or not notice mailed to Kyle and Company can be construed as notice to the plaintiff.

[1] Under California law, after notice to a debtor of the assignment of a claim for collection, the debtor deals with the assignor at his peril and upon the service of summons upon the assigned claim, notice of the assignment to the debtor is conclusively established (In re Kling, 44 Cal.App. 267, at page 270, 186 P. 152, at page 153). Further, as between plaintiff and defendant, the status of plaintiff is more than a mere assignee. He had become defendant's judgment creditor for approximately two years and after Kyle and Company had gone out of business.

In Santa Rosa Bank v. White, 139 Cal. 703, 73 P. 577, it was held that the provision to the exception contained in Section 17 of the Bankruptcy Act, "unless such creditor had notice or actual knowledge of the proceedings in bankruptcy," does not contemplate constructive notice to the creditor; but the term "actual knowledge" is used as explanatory of the word "notice," and actual knowledge is required in order to exclude the creditor from the exception. It follows, therefore, that Section 2332 of the Civil Code should not be applied to meet the requirement of actual knowledge. The case of Ray v. Schubach, 10 Cal.App.2d 122, 50 P.2d 1073, cited in the decision of the Los Angeles Appellate Superior Court, relied upon by appellant, is distinguished because the assignor there had actual knowledge of the debtor's bankruptcy (being told in the debtor's lawyer's office) long prior to the filing of the suit on the assigned claim.

It has been further held in reference to Sec. 17 of the Bankruptcy Act in Brown v. Tropp, 106 Cal.App. 605, at page 608, 289 P. 648, at page 649 as follows: "The provisions of the law relied upon by plaintiff in error are for the benefit of creditors, not of the debtor. That the law should give a creditor remedies against the estate of a bankrupt, notwithstanding the neglect or default of the bankrupt, is natural. The law would be, indeed, defective without them. It would also be defective if it permitted the bankrupt to experiment with it,—to so manage and use its provisions as to conceal his estate, deceive or keep his creditors in ignorance of his proceeding, without penalty to him. It is easy to see what results such looseness would permit,—what preference could be accomplished and covered by it."

[2] Since the plaintiff herein was a judgment creditor of defendant well known to him for approximately two years before bankruptcy proceedings, it would appear that the just application of the provisions of Section 17 of the Bankruptcy Act above quoted if there be any doubt as to its applicability, should be resolved in favor of the creditor under the facts and circumstances of this case.

The judgment should therefore be and it is affirmed.

CONLEY, P. J., and DE WOLF, J., concur.

Nola Perry CALLUM, etc., et al., Plaintiffs and Respondents,

v.

HARTFORD ACCIDENT & INDEMNITY CO., etc., Defendant and Appellant.

Civ. A. 9688.

Appellate Department, Superior Court, Los Angeles County, California.

March 17, 1959.

Action by an innocent bystander, hit by bullet of a licensed private patrolman, against surety on patrolman's bond, following entry of a judgment in favor of plaintiff entered in a suit plaintiff brought against patrolman. The Municipal Court of the Los Angeles Judicial District, Vernon W. Hunt, J., entered judgment in favor of plaintiff for the amount of the bond, and surety appealed. The Superior Court, Appellate Department, David, J., held that where condition of bond was that if the principal did not injure any person by his "wilful, malicious, or wrongful act", obligation was null and void, the term "wrongful act" as so used, included negligence, and therefore surety was liable under such bond for injuries caused by detective principal's negligence in discharging his gun.

Judgment affirmed.

1. Bonds ⚿58

Conditions of a bond establish the scope of liability under it, since breach of a condition is what is actionable.

2. Principal and Surety ⚿74

Where faithful conduct is required by the terms of a surety bond, everything is unfaithful that the law does not permit or excuse.

3. Detectives ⚿3

Where condition of a private detective's bond was that if the principal did not injure any person by his "wilful, malicious, or wrongful act", obligation was null and void, the term "wrongful act" as so used included negligence, and therefore surety was liable under such bond for injuries caused by detective principal's negligence in discharging his gun.

See publication Words and Phrases, for other judicial constructions and definitions of "Wrongful Act".

Colby & Magad, North Hollywood, for appellant.

Jack Dunaway, Hollywood, for respondent.

DAVID, Judge.

Plaintiff is an "innocent bystander" hit by the bullet of a licensed private patrolman, who had fired into the air and over the head of a fleeing suspect who had emerged on the run at 2 a. m. from a closed cafe protected by the detective agency. Perry sued Devenney, the patrolman, in the Superior Court. A judgment was entered by stipulation for Perry in the sum of $3,540. The complaint had sought compensatory and punitive damages. The present defendant was not a party to the lawsuit or the stipulated judgment. The present action is brought upon Devenney's $2,000 bond, which was written by defendant, under Business and Professional Code, secs. 7545, 7546.

Under these code sections, the bond is to be "conditioned for the faithful and honest conduct of the business of private detective by such applicant" (Business & Professions Code, sec. 7545) and "every person injured by the wilful, malicious or wrongful act of the principal may bring an action on the bond in his own name to recover damages suffered by reason of such wilful, malicious or wrongful act." Business & Professions Code, sec. 7546.

[1] These conditions of the bond establish the scope of liability under it, since breach of a condition is what is actionable. One condition here is that there shall be "faithful and honest conduct of the business" but we cannot agree that Business & Professions Code, sec. 7546 is modified by Business & Professions Code, sec. 7545 to

relate only to wilful, malicious or wrongful acts which result from the unfaithful or dishonest conduct of the business. Myles v. Meineke, 1948, 82 Ohio App. 126, 78 N.E. 2d 917, 918.

[2] Where "faithful conduct" is required by the terms of a surety bond, everything is "unfaithful" that the law does not permit or excuse. Thurston County to Use of Vesely v. Chmelka, 1940, 138 Neb. 696, 294 N.W. 857, 863, 132 A.L.R. 1077; National Surety Co. v. State ex rel. Rathburn, 1928, 90 Ind.App. 524, 161 N.E. 832, 834. Negligent performance is not faithful performance, according to authorities which deal with liability on bonds where various types of neglect have been involved. See: People v. Smith, 1898, 123 Cal. 70, 74, 55 P. 765, failure or neglect to collect a personal property tax; Howard v. United States, 7 Cir., 1937, 87 F.2d 243, 247, n. 1., listing authorities; 46 C.J. p. 1068, sec. 398; 67 C.J.S. Officers § 161 par. C., p. 459.

"While it is true that a surety cannot be held beyond the express terms of his contract, yet, in interpreting the terms of a contract of suretyship, the same rules are to be observed as in the case of other contracts." Sather Banking Co. v. Arthur R. Briggs Co., 1903, 138 Cal. 724, 730, 72 P. 352, 354; City of Los Angeles v. Hoppenyan's, Inc., 1935, 8 Cal.App.2d 138, 141, 47 P.2d 293. "While, under the law of suretyship, a bond is, as a general rule, recognized to be purely a contract which, in its nature, when privately given without any qualifying laws, is to be strictly construed and not extended beyond the scope of the obligation according to its express terms, still a statutory bond to the public, given for the observance of a law authorizing a business only permitted under specified conditions and regulated under the police power of the state, is not in the same sense strictly contractual in its nature. Its characteristics are also, and perhaps to a greater degree, statutory. It is to be read and construed and enforced in connection with and according to the statute pursuant to which it is given, and should be interpreted according to the purpose, intent, and meaning of the legislative enactment." Hauth v. Sambo, 1916, 100 Neb. 160, 158 N.W. 1036, 1039, quoting with approval from Squires v. Michigan Bonding & Surety Co., 1912, 173 Mich. 304, 312, 138 N.W. 1062, 1065, 42 L. R.A.,N.S., 1142.

The bond as written is conditioned "if the above bounden principal * * * does not injure any person by his wilful, malicious or wrongful act, then this obligation shall be null and void * * *." Taking this at face value, does "wilful, malicious or wrongful act" include negligence within the term *wrongful?* Or does *wrongful* under the doctrine of *ejusdem generis* refer only to a trespass, a non-negligent injury?

[3] The term "wrongful act" in a statute giving an injured party a right to sue thereon in his own name means simply a "tortious act". Camp v. Superman, 1955, 119 Vt. 62, 118 A.2d 353, 355. It is any act which in ordinary course would infringe upon the rights of another to his damage, except when done in the exercise of an equal or superior right. Judson v. Peoples Bank & Trust Co., 1954, 17 N.J. 67, 110 A. 2d 24, 35. The phrase is broad enough to include a wrongful act or neglect. Cf. Rubino v. Utah Canning Co., 1954, 123 Cal. App.2d 18, 22–23; 266 P.2d 163. It is urged that a "wrongful *act*" is the antithesis of negligence, which relates to an omission and not an act. In this situation, the distinction is unavailing. It was the act of Devenney in shooting which allegedly injured plaintiff. His act may be wrongful because the *act* should not have occurred, or because the *act* was not accomplished with due care under the circumstances. Early American cases, dealing with injuries from wrongful shooting, procedurally were brought in trespass (assault and battery) for the act itself; while in later decisions the fashion changed toward emphasis of the omission to use due care, i. e. action on the case. Either is proper. Hawksley v.

Peace, 1916, 38 R.I. 544, 96 A. 856, 858, L.R.A.1916D, 1179; McLaughlin v. Marlatt, 1922, 296 Mo. 656, 246 S.W. 548, 552.

Since liability of Devenney for the negligent discharge of his gun is amply supported in the law, (Warner v. Santa Catalina Island Co., 1955, 44 Cal.2d 310, 317, 282 P.2d 12; Glueck v. Scheld, 1899, 125 Cal. 288, 57 P. 1003; Rudd v. Byrnes, 1909, 156 Cal. 636, 105 P. 957, 26 L.R.A.,N.S., 134), such negligence as a "wrongful act" was covered by the bond written by defendant.

The judgment is affirmed.

BISHOP, P. J., and SWAIN, J., concur.

51 Cal.2d 805

Jim ALLEN, Appellant,

v.

LOS ANGELES COUNTY DISTRICT COUNCIL OF CARPENTERS (an Unincorporated Association), et al., Respondents.

L. A. 24678.

Supreme Court of California,
In Bank.
March 27, 1959.

Proceeding for a writ of mandate to compel the restoration of plaintiff to membership in a local union and for judgment for damages against the union and officials and members thereof for alleged wrongful expulsion. From an adverse judgment in the Superior Court, Los Angeles County, Bayard Rhone, J., the plaintiff appeals. The Supreme Court, Spence, J., held that plaintiff's showing was not such as to lead to the conclusion that he had come into court with "clean hands" and that he failed to sustain the burden of proof in the action for damages for wrongful expulsion.

Judgment affirmed.

Gibson, C. J., and Traynor, J., dissented.

Opinion, 327 P.2d 938, vacated.

1. Labor Relations 🔑94

A labor union could properly provide in its constitution and laws for excluding from membership persons who are members of the Communist Party or related organizations. Communist Control Act of 1954, § 1 et seq., 50 U.S.C.A. § 841 et seq.; West's Ann.Gov.Code, § 1027.5.

2. Labor Relations 🔑117

Mandamus 🔑141

In mandamus proceeding to compel restoration of plaintiff to membership in its local union and for damages against the union for alleged wrongful expulsion, trial court properly assumed jurisdiction to determine the cause on the merits as against the union defendants.

3. Trial 🔑105(2)

In the absence of objection, the fact that evidence may have fallen within the category of hearsay does not render it incompetent.

4. Labor Relations 🔑112

A labor union in its disciplinary action against a member was not governed by legal rules of evidence but by the terms of its constitutions and by-laws.

5. Equity 🔑65(1)

Mandamus 🔑1, 7

Proceeding before the trial court for a writ of mandate to compel plaintiff's restoration to his membership in his local union was an equitable proceeding in which the trial court was vested with a wide discretion and the doctrine of "clean hands" was applicable.

6. Mandamus 🔑187(9)

In mandamus proceeding to compel plaintiff's restoration to membership in a local union, even though there was some irregularity in the proceedings before the union committee leading to the plaintiff's expulsion, the plaintiff could not contend on appeal that the trial court abused its discretion in denying the writ in the absence of a showing that the plaintiff came into court with "clean hands" and that he was entitled to the relief demanded, which was reinstatement to membership in the union.

7. Equity 🔑65(2)

Where plaintiff instituted proceeding seeking affirmative relief by mandate to compel his reinstatement to membership in the union and question concerning his membership in the Communist Party was highly relevant, plaintiff's refusal to answer question with respect to membership therein, together with apparent lack of candor throughout his testimony and failure to offer any evidence of his eligibility for membership when such eligibility was questioned, justified the refusal of a writ of mandate directing his reinstatement to membership on the ground that the plaintiff did not come into court with "clean hands". Communist Control Act of 1954, § 1 et seq., 50 U.S.C.A. § 841 et seq.; West's Ann. Gov.Code, § 1027.5.

See publication Words and Phrases, for other judicial constructions and definitions of "Clean Hands".

8. Labor Relations ⚿119

In action for damages against union and members thereof for alleged wrongful expulsion of plaintiff, burden was on the plaintiff to establish his alleged wrongful expulsion and the evidence failed to sustain such burden.

Herbert W. Simmons, Jr., Abraham Gorenfeld and A. L. Wirin, Los Angeles, for appellant.

Arthur Garrett, Los Angeles, for respondents.

SPENCE, Justice.

Plaintiff sought a writ of mandate to compel his restoration to membership in his local union, and also a judgment for damages against the union and certain officials and members thereof for alleged wrongful expulsion. While he also sought herein a writ of mandate and a judgment for damages against his former employers, the defendant employers did not appear and the action was dismissed as to them. Plaintiff had previously filed a complaint with the National Labor Relations Board.

Following the trial of the present action, the court found and concluded that plaintiff's expulsion was "lawful and justified"; that he had been "fairly charged, tried and convicted, upon substantial evidence, of a substantial offense under the constitution and laws" of the union "in accordance with the requirements of due process of law"; that none of "plaintiff's rights of person or property have been violated"; that neither the union "nor any defendant herein is required to restore plaintiff to membership"; that plaintiff sustained "no damage or injury"; and that "insofar as his loss of employment by the corporate defendants herein is concerned and any reinstatement to employment by them and any wages lost since plaintiff was severed from such employment the exclusive jurisdiction thereof is in the National Labor Relations Board and this Court is without jurisdiction further to consider the same." From the judgment thereupon entered denying the relief demanded, plaintiff appeals.

[1] This litigation apparently arises out of the attempt of the union to exclude from membership persons who are members of the Communist Party or related organizations. That the union could properly provide in its constitution and laws for excluding such persons is made clear by federal legislation (U.S. Stats. at Large, Vol. 68, Public Law 637, Chap. 886, p. 775, 50 U.S.C.A. § 841 et seq.) and by state legislation (Gov.Code, § 1027.5). The cited federal act, relating to "Communist organizations," including the "Communist Party" and "Communist-infiltrated organizations," declares in part: "The Congress hereby finds and declares that the Communist Party of the United States, although purportedly a political party, is in fact an instrumentality of a conspiracy to overthrow the Government of the United States. * * * It is the means whereby individuals are seduced into the service of the world Communist movement, trained to do its bidding, and directed and controlled in the conspiratorial performance of their revolutionary services." The cited state act, relating to "World Communism," declares in part: "There exists a world-wide revolutionary movement to establish a totalitarian dictatorship based upon force and violence rather than upon law."

The union's constitution, by-laws, and ritual required each member to take an oath and required the president to advise the new member, before taking that oath, that the union did not recognize the Communist Party as a political organization. Plaintiff became a member of this union, known as Local 1976 of the United Brotherhood of Carpenters and Joiners of America. The above-mentioned oath which he took when becoming a member read as follows: "I further affirm and declare that I am not now affiliated with and never will join or give aid, comfort or support to any Revolutionary Organization or to any organization that tries to disrupt or cause dissension in any Local Union, District Council, * * * of the United Brotherhood of Carpenters and Joiners of America."

Certain members of the union later filed charges against plaintiff, in the manner provided in the by-laws, for having "over a period of years given aid, comfort and support to Communistic-Front organizations." Timely notice of the charges was served on plaintiff, and a hearing was had before a duly appointed committee, with plaintiff and his counsel present. The evidence introduced consisted largely of newspaper articles and other documentary items.

Several articles were from the Daily People's World. One listed plaintiff as a union leader and signer of a statement released by the Civil Rights Congress, asking an end to contempt proceedings against persons who had refused to turn over membership lists to the courts. The statement declared: "We demand the rights of Communists, along with those of all Americans, be fully respected." Another, entitled "Lead the Fight, Communists Urge NAACP," stated that certain reactionary elements in the National Association for the Advancment of Colored People had demanded removal of Communists and other progressives from the nominating committee of the NAACP and from nomination in recent elections; and that plaintiff was one of those barred from office. Another described plaintiff as a leader in the labor movement and as one of the founders of the Negro Labor Council. An item from another newspaper stated that the Attorney General of the United States had declared that this Council was to be named on the list of organizations designated by the Justice Department as subversive. Other newspaper items were introduced setting forth that an officer of the Civil Rights Congress, who had been cited for contempt of Congress for refusing to divulge the names of members of his group or contributors to it, would speak at a reception for him and at a mass meeting, and that plaintiff was one of the sponsors of the reception. It was further stated that the scheduled speaker had admitted that his organization was once listed among Communist-front groups by the United States Attorney General. There was also introduced at the hearing a copy of the Fourth Report of Un-American Activities in California, in which the Civil Rights Congress is declared to be a subversive organization and under Communist control; and a document used by the Housing Authority of the City of Los Angeles likewise listing the Civil Rights Congress among subversive organizations. In addition, there were introduced such documents as a postcard printed by plaintiff urging union members to attend his trial; letters from a state senator addressed to a union officer setting forth for evaluation various instances of plaintiff's activities; and a number of letters and postcards, some anonymous, sent to the union in protest of plaintiff's oncoming trial. Plaintiff made no denial before the committee of his membership in the organizations named or of his activities as recited in the newspaper articles.

In the present action, plaintiff did testify but again made no such denial. He merely challenged the regularity of the proceedings before the committee, and the competency and sufficiency of the evidence presented there. In connection with the issue of damages, his testimony was extremely evasive, equivocal and uncertain in fixing his actual earnings for the years in question. When questioned regarding the current year, he professed not to have computed his earnings with any exactitude although he knew that he was "coming to testify" at the trial. With respect to prior years, he was able to furnish only partial reports and could not remember whether the accountant had given him copies of his income tax returns. A union delegate testified as to the employment and dispatching policies of the union. He stated that the union kept an open and nondiscriminatory hiring list; that the local would permit members or nonmembers to sign the list so as to be available for calls to work; and that if plaintiff had applied, he could have been sent on jobs on the same basis as union members.

The evidence in court established that plaintiff had been a business agent and an officer of his local union, and as such agent he would have had to file certain affidavits, including the non-Communist affidavit required by the Labor Management Relations Act of 1947, 29 U.S.C.A. § 141 et seq. Plaintiff testified that he could not remember whether he had ever signed such an affidavit. He insisted, however, that since his expulsion from the union, he had been shunned by his fellow-workers, but it appears that the same reaction could have resulted from his activities in support of the causes of the organizations named in the evidence presented at the committee hearing. Plaintiff was then asked in court: "Have you ever been a member of the Communist Party?" He first responded that he "wouldn't like to answer that question." Later, he stated that he would like to stand on his constitutional rights and would refuse to answer the question because it might tend to incriminate him. Finally, in attempting an explanation, plaintiff testified: "The reason that I give is, that if I answer this question 'no,' then I understand that later on somebody could come along and accuse me of lying here, which legally is considered perjury." This line of questioning was material on the theory of plaintiff's alleged damages as well as on his plea for reinstatement in the union when Communist Party membership would make him ineligible therefor.

On this appeal, plaintiff's main attack is directed at the proceedings before the union committee and the trial court's findings sustaining his expulsion as a result of such proceedings. He challenges the sufficiency of the charges made against him and the sufficiency of the evidence before the committee to justify his expulsion. He further challenges the finding of the trial court that he had suffered no damage by reason of his expulsion, the ruling of the trial court admitting and considering his refusal to testify concerning membership in the Communist Party, and the trial court's conclusion regarding the exclusive jurisdiction of the National Labor Relations Board.

[2] Considering first the jurisdictional question, it is apparent that the trial court's conclusion concerning the exclusive jurisdiction of the National Labor Relations Board related only to the claims in plaintiff's complaint against his former employers, as to whom this action was not tried since it had been previously dismissed. We need not discuss the propriety of that conclusion, as it is wholly immaterial here. The trial court properly assumed jurisdiction to determine the cause on the merits as against the union defendants (International Association of Machinists v. Gonzales, 356 U.S. 617, 621, 78 S.Ct. 923, 2 L.Ed.2d 1018), and we therefore turn to a consideration of plaintiff's remaining claims on this appeal.

[3, 4] With respect to plaintiff's attack upon the regularity of the proceedings leading to his expulsion, it must be conceded that such proceedings were conducted in a very informal manner. The evidence introduced by both sides before the union committee consisted largely of newspaper articles and other documents, but there was practically no objection made upon any ground to the introduction of any part thereof. In the absence of objection, the fact that such evidence may have fallen within the category of hearsay does not render it incompetent. 19 Cal.Jur.2d, Evidence, § 389, p. 123; Powers v. Board of Public Works, 216 Cal. 546, 552, 15 P.2d 156; see also Merchant Shippers Ass'n v. Kellogg E. & D. Co., 28 Cal.2d 594, 599, 170 P.2d 923; People v. Murray, 135 Cal.App.2d 600, 603, 287 P.2d 775; McVey v. McVey, 132 Cal.App.2d 120, 123, 281 P.2d 898. Furthermore, the union in its disciplinary hearing was not governed by the legal rules of evidence but by the terms of its own constitution and by-laws. Bush v. International Alliance, 55 Cal.App.2d 357, 364, 130 P.2d 788. The "refined and technical practices which have developed in the courts cannot be imposed upon the deliberations of workingmen, and

the form of procedure is ordinarily immaterial if the accused is accorded a fair trial." Cason v. Glass Bottle Blowers Ass'n, 37 Cal.2d 134, 143, 231 P.2d 6, 11, 21 A.L.R.2d 1387. In any event, and for the reasons hereinafter stated, we deem it unnecessary on this appeal from the judgment of the trial court denying the writ of mandate, to consider in detail plaintiff's objections to the pleading and proof before the union committee.

[5, 6] The proceeding before the trial court for a writ of mandate was an equitable proceeding, in which the trial court was vested with a wide discretion. Parker v. Bowron, 40 Cal.2d 344, 254 P.2d 6; Bartholomae Oil Corp. v. Superior Court, 18 Cal.2d 726, 117 P.2d 674; Rogers v. Board of Directors of Pasadena, 218 Cal. 221, 22 P.2d 509; El Camino Land Corp. v. Board of Supervisors, 43 Cal.App.2d 351, 110 P.2d 1076; Neto v. Conselho Amor Etc., 18 Cal.App. 234, 122 P. 973. The doctrine of "clean hands" was therefore applicable. 32 Cal.Jur.2d, Mandamus, § 8, pp. 125–126. Thus, even assuming some showing of irregularity in the proceedings before the union committee, plaintiff may not successfully contend on this appeal that the trial court abused its discretion in denying the writ in the absence of a showing in the trial court that he came into court with "clean hands," and that he was entitled to the relief demanded, which was reinstatement to membership in the union. See Neto v. Conselho Amor Etc., supra, 18 Cal.App. 234, 122 P. 973; Note 36 A.L.R. 508. Plaintiff made no such showing but, on the contrary, refused to answer the question relating to his eligibility to attain or retain such membership.

[7] The trial court made its position clear during the discussion of counsel's objection to the question concerning plaintiff's membership in the Communist Party. The trial court stated: "Supposing now, you are asking for the equity—this is really an extraordinary legal remedy, and you are asking the Court to order him reinstated if it is shown in this trial that the trial proceedings were irregular, but it is shown that because of some impediment at the time he could not be a member of the union, then the Court would be unable to order, by writ of mandate, his reinstatement, even though expulsion had been improper." Despite this statement by the court, plaintiff persisted in his refusal to answer any questions concerning membership in the Communist Party, electing to stand upon his "constitutional rights."

This is not the ordinary situation where the constitutional privilege is invoked by one who is merely a witness. Here plaintiff was the party who instituted the proceeding seeking affirmative relief by way of a writ of mandate to compel his reinstatement to membership in the union. The question concerning his membership in the Communist Party was therefore highly relevant. We need not determine whether his refusal to answer the question under these circumstances made adverse inferences permissible. See Fross v. Wotton, 3 Cal.2d 384, 393–395, 44 P.2d 350. We do hold, however, that his refusal to answer the question, together with his apparent lack of candor throughout his testimony and his failure to offer any evidence of his eligibility for membership when such eligibility had been questioned, justified the trial court in refusing in its discretion to issue a writ of mandate directing his reinstatement to membership. In other words, plaintiff's showing was not such as to lead to the conclusion that he had come into court with "clean hands" or that he was entitled to the relief demanded.

[8] Turning to the adverse finding on the damage issue, it is apparent from the record that the trial court did not believe plaintiff's evasive, equivocal and incomplete testimony concerning his alleged loss of earnings. Here again the burden was upon plaintiff, and the trial court was entirely justified in concluding that plaintiff had failed to sustain that burden.

The judgment is affirmed.

SHENK, SCHAUER and McCOMB, JJ., concur.

GIBSON, Chief Justice.

I dissent.

There is nothing in this case to justify a conclusion that plaintiff can be denied reinstatement on the theory that he did not show clean hands in the trial court, and, since the record of the proceeding before the union discloses that plaintiff's expulsion was wrongful, the judgment should be reversed.

The theory that plaintiff lacked clean hands is not argued by the parties, and neither the findings nor the conclusions of the trial court support it.[1] Findings are required in mandamus proceedings in the superior court when there are questions of fact. Code Civ.Proc. §§ 1109, 632; Treu v. Kirkwood, 42 Cal.2d 602, 611–613, 268 P.2d 482; Lassen v. City of Alameda, 150 Cal.App.2d 44, 48, 309 P.2d 520; Delany v. Toomey, 111 Cal.App.2d 570, 571-572, 245 P.2d 26; Beloin v. Blankenhorn, 97 Cal.App.2d 662, 664, 218 P.2d 552; see 2 Witkin, California Procedure (1954) 1833–1834. Not only is there an absence of a finding upon this question but also, as we shall see, the evidence is insufficient to show that plaintiff lacked clean hands.

The only factors suggested by the majority opinion as indicating lack of clean hands are plaintiff's refusal in the superior court to answer the question whether he was "ever" a member of the Communist Party, his failure to offer in that court any evidence of his eligibility for union membership, and his "apparent lack of candor throughout his testimony." While plaintiff's failure and refusal to testify in the trial court on these matters may be relevant on the issue of damages, this conduct has no bearing upon whether he is entitled to an order setting aside a wrongful expulsion. Insofar as concerns plaintiff's right to reinstatement, the subject matter as to which plaintiff refused or failed to testify involved questions of fact which were to be determined solely by the union, and, if the evidence before the union is insufficient to support the expulsion, the trial court cannot properly uphold the union's decision by relying on evidence not considered by the union.

The function of a superior court in reviewing the expulsion of a union member is to ascertain whether the member had a fair trial by the union's fact-finding body, including consideration of whether there was evidence before that body to support the charges made against the member and whether the charges constituted legally recognizable grounds for expulsion; the trial court may not reweigh the evidence before the union or receive additional evidence or pass upon the truth of the charges made, and, if it appears that the plaintiff did not have a fair trial before the union, the expulsion must be set aside, and further proceedings, if any, to determine the facts must be conducted by the union, not by the court. See Cason v. Glass Bottle Blowers Ass'n, 37 Cal.2d 134, 143–144, 147, 231 P.2d 6, 2 A.L.R.2d 1387; Miller v. International Union etc. Engineers, 118 Cal.App.2d 66, 70, 257 P.2d 85; Taylor v. Marine Cooks & Stewards Ass'n, 117 Cal.App.2d 556, 565, 256 P.2d 595; Bush v. International Alliance, 55 Cal.App.2d 357, 363, 130 P.2d 788; Ellis v. American Federation of Labor, 48 Cal.

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[1] It is true, as pointed out by the majority, that the trial judge made a statement to the effect that if "it is shown that because of some impediment at the time [plaintiff] could not be a member of the union, then the court would be unable to order * * * his reinstatement, even though expulsion had been improper." However, this statement was made in the course of trial during a discussion between court and counsel as to whether plaintiff was required to answer if he had ever been a member of the Communist Party, and it was immediately followed by the judge's query, "Is that true?" and, after further discussion, by his remark, "I think it goes to the credibility of the witness, to the matter of damages also." Under these circumstances, particularly in the absence of any finding or conclusion indicating that the court's refusal to issue mandate was based on a lack of clean hands, the statement in question cannot properly be construed as showing that the court relied on such a theory.

App.2d 440, 445, 120 P.2d 79; McConville v. Milk W.D. Union, 106 Cal.App. 696, 697–698, 289 P. 852; cf. Smith v. Kern County Medical Ass'n, 19 Cal.2d 263, 265, 120 P.2d 874; Bernstein v. Alameda etc. Med. Ass'n, 139 Cal.App.2d 241, 253, 293 P.2d 862. Plaintiff, of course, must make out a case for mandate, but he does so if he shows that he did not have a fair hearing before the union because the evidence presented there did not support the charges made or the charges were insufficient to justify expulsion.

These principles will be defeated if a trial court. under the guise of passing upon the plaintiff's "clean hands," is permitted to receive evidence upon and make determinations of fact as to charges against a union member which are within the exclusive province of the union's fact-finding body. Plaintiff's refusal at trial to answer the question whether he was ever a Communist and his asserted failure to produce evidence there that he had eligibility for union membership fall within this category. The same is true of plaintiff's asserted lack of candor insofar as it concerns his right to reinstatement.[2] Since these are matters to be determined by the union, not by the court, it is difficult to see how plaintiff's conduct at trial shows that he lacked clean hands; he merely refused to go into factual matters which were inappropriate to a judicial review of his expulsion.

It is important to note, in connection with the above discussion, that an affirmative answer to the question whether plaintiff was "ever" a member of the Communist Party would not, without more, show a ground for expulsion under the union's oath provision which he is charged with having violated. Under any reasonable interpretation of the oath plaintiff was not subject to discipline on the ground that he was "ever" a member of, or aided, a "Revolutionary Organization" or one which tried to disrupt the union, but he could be expelled only if he was a member of or supported such a group at the time he took the oath or thereafter. Although the union's fact-finding body might be entitled to require an answer to a question of this nature under an extension of the principles which permit such a question as a means of investigating charges against school teachers and other public employees (see Board of Education, etc. v. Mass, 47 Cal.2d 494, 304 P.2d 1015; Steinmetz v. Cal. State Board of Education, 44 Cal.2d 816, 285 P.2d 617), the right to make such an investigation lies exclusively in the union and not with the courts. Any other conclusion would permit the trial court to weigh evidence and make findings that would be binding on the union when such functions should be performed only by that organization.

The union obviously had the burden of showing at its hearing that plaintiff had lost his eligibility to remain a member, whereas the view that in the trial court a plaintiff must affirmatively show his eligibility has the unfortunate and improper effect of shifting the burden on this issue to the plaintiff even if he shows that insufficient evidence was produced at the union hearing. Under such a rule a union could gain an unfair advantage by making a weak showing at the expulsion hearing, possibly deliberately, thus forcing the plaintiff not only to establish in the superior court that the union's trial was unfair but also to show by a preponderance of the evidence that he had not lost his eligibility.

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[2] Plaintiff's asserted lack of candor, including his equivocal testimony as to his loss of earnings, may have been properly considered by the trial court insofar as it related to the issue of damages, but this could not affect his right to reinstatement. Misconduct claimed to result in lack of clean hands will not bar relief unless it is closely connected with the matter in which the plaintiff seeks equitable assistance and is of such a prejudicial nature to the rights of another that it would be inequitable to grant him that assistance. Bradley Co. v. Bradley, 165 Cal. 237, 242, 131 P. 750; see Dominguez v. Dominguez, 136 Cal.App.2d 17, 20–21, 288 P.2d 195.

The view that plaintiff does not have the burden of proof is supported in principle by the recent decision of Speiser v. Randall, 357 U.S. 513, 520 et seq., 78 S.Ct. 1332, 2 L.Ed.2d 1460, where the United States Supreme Court, after assuming without deciding that California may deny tax exemptions to persons who engage in advocating overthrow of the government by force, held that the allocation to the taxpayer of the burden of proof upon such an issue concerning free speech constituted a denial of due process. The court pointed out that where the burden of proof lies may be decisive of the outcome.[3] 357 U.S. at page 525, 78 S.Ct. at page 1341. Plaintiff, of course, may be expelled only for cause after a fair hearing, and, by analogy to the Speiser case, the hearing would not be fair if the accused member were required to sustain the burden of showing that he had not lost his eligibility.

It follows from the foregoing that plaintiff's asserted lack of clean hands cannot properly be relied upon as a reason for not passing upon his contentions that the charges and the evidence presented to the union are insufficient to justify his expulsion.

In considering whether the proceedings before the union justified the ouster, it must be kept in mind that, regardless of what disciplinary rules a union might legally adopt, a court, when reviewing the charges and evidence against an expelled member, is limited to a consideration of the rules and regulations actually made by the union. Here the charges against plaintiff are confined to a violation of the oath provision.[4] It is necessary first to ascertain the meaning of the oath, being careful not to extend the requirement beyond what it purports to be.

The oath in substance proscribes membership in, or the giving of support to, either of two types of organizations: (1) any "Revolutionary Organization" and (2) any organization which tries to "disrupt or cause dissension" in the carpenters' union. The charges of which plaintiff was found to be guilty appear to relate solely to his asserted connection with organizations coming within the first of these two classes. The words "Revolutionary Organization" should be interpreted to mean any organization which advocates overthrow of the government by force and violence, and, in the absence of a specific definition of the term by the union, it would be unreasonable to give these words a more extensive meaning when applying them as a basis for expulsion in a case such as this. In addition, by analogy to the decisions of the United States Supreme Court and of this court relating to statutory oaths exacted of governmental employees, the oath should be interpreted to require *knowledge* by the union member of the character of the proscribed organization before his conduct in aiding the organization can be used as a basis for expulsion from the union. Cf. Wieman v. Updegraff, 344 U.S. 183, 73 S.Ct. 215, 97 L.Ed. 216; Adler v. Board of Education, 342 U.S. 485, 494, 72 S.Ct. 380, 96 L.Ed. 517; see distinction noted in Steinmetz v. California State Board of Education, 44 Cal.2d 816, 823–824, 285 P.2d 617. It must also be kept in mind that the oath does not refer to a union member's activities prior to the time he took it.

In my view the evidence before the union as set forth in the majority opinion, even if the hearsay character of that evidence could be disregarded, is not sufficient to establish that plaintiff violated the oath, properly construed. The showing made does not reasonably warrant the conclusion that plaintiff supported any organization which, to his knowledge, advocated the overthrow of the government by force and violence. Nor was it shown at the union hearing that the conduct in question occurred at a time coming within the prohibition of the oath, since there was no evidence as to when, if ever, plaintiff took the oath.

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[3] The United States Supreme Court also declared that since only considerations of the greatest urgency can justify restrictions on speech, and since the validity of a restraint on speech in each case depends on careful analysis of the particular circumstances, the procedures by which the facts of the case are adjudicated are of special importance, and the validity of the restraint may turn on the safeguards which they afford. 357 U.S. at page 521, 78 S.Ct. 1339.

[4] The advising of each new member that the union "did not recognize the Communist Party as a political organization" is of little help in this connection as it does not purport to prohibit any activity by the members.

Moreover, all the evidence offered against plaintiff at the union hearing was hearsay not falling within any applicable exception to the hearsay rule, and a person cannot properly be expelled *solely* on the basis of such evidence. Cf. Steen v. Board of Civil Service Com'rs, 26 Cal.2d 716, 726–727, 160 P.2d 816; Walker v. City of San Gabriel, 20 Cal.2d 879, 881–882, 885, 129 P.2d 349, 142 A.L.R. 1383; Armistead v. City of Los Angeles, 152 Cal. App.2d 319, 324, 313 P.2d 127. This difficulty is not obviated by the fact that plaintiff did not object when the evidence was received. The refined and technical practices which have developed in the courts are not imposed upon deliberations of workingmen (Cason v. Glass Bottle Blowers Ass'n, 37 Cal.2d 134, 143, 231 P.2d 6, 21 A.L.R.2d 1387), and it is obvious that under this rule hearsay was admissible and that objections to its admissibility would have been unavailable. Furthermore, after the case against him had been presented, plaintiff moved for a dismissal of the charges and relied on the hearsay character of the evidence as a ground for his motion. Even if the motion were not regarded as a sufficient objection to the taking of action on the basis of hearsay alone, a failure to object in an informal proceeding where technical rules are inapplicable should not be given the same effect as where a court trial is involved. Accordingly, plaintiff cannot be held to have waived his right to complain that the expulsion was based entirely on hearsay evidence.

The lack of proof warranting the expulsion cannot be ignored on the theory that plaintiff failed to make adequate denials and thus admitted the charges and the activities sought to be proved. The transcript of the hearing discloses that he pleaded not guilty to the charges and that he introduced evidence in an effort to show that some of the evidence relied upon by his accusers was untruthful. Further, in a statement made at the close of the proceeding, plaintiff said, "Now, I could go down the line and answer or refute these things, I think I could, but I don't feel that it is right for me to. I don't think I should, because they haven't proven anything." Under these circumstances it would be unreasonable to treat plaintiff's conduct at the hearing as amounting to admissions which cured the defects in the case against him.

I would reverse the judgment.

TRAYNOR, J., concurs.

51 Cal.2d 843

CITY OF LOS ANGELES et al.,
Appellants,
v.
COUNTY OF MONO, Respondent.
Sac. 6886.

Supreme Court of California,
In Bank.
April 8, 1959.
As Modified on Denial of Rehearing
May 6, 1959.

Action to recover taxes paid under protest to county. The Superior Court, Mono County, Samuel F. Finley, J., rendered judgment for defendant, and plaintiffs appealed. The Supreme Court held that mere fact that old plant remained in existence did not compel conclusion that new municipally-owned hydroelectric plant was a new improvement rather than merely a "replacement" subject to taxation, where old plant had little or no value even as standby facility and physical removal of old plant was impracticable.

Affirmed.

Opinion, 331 P.2d 421, vacated.

1. Trial 🔑9(1)

Pretrial order controlled subsequent course of case, and issues raised by pleadings were superseded. Superior Court Rules, rule 8.8.

2. Taxation 🔑217

Permission to tax municipally-owned property includes not only improvements subject to taxation when acquired but also replacement and substitutes for those improvements; and, in event replacement is made, it is taxed at its own fair market value and not at that of improvement which was replaced. West's Ann.Const. art. 13, § 1.

3. Taxation 🔑217

In determining whether municipally-owned hydroelectric plant was a replacement, subject to taxation, or a nontaxable new improvement, it was immaterial that plans to retire existing hydroelectric plant had been revoked (particularly if revocation was accomplished for tax avoidance purposes), and it was likewise immaterial that new facilities were much larger and more efficient and provided 10 times as much power as old plant. West's Ann. Const. art. 13, § 1.

4. Taxation 🔑217

That old plant remained in existence did not compel conclusion that new, municipally-owned, hydroelectric plant was a new improvement rather than merely a "replacement" subject to taxation, where old plant had little or no value even as standby facility and physical removal of old plant was impracticable. West's Ann. Const. art. 13, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Replacement".

5. Taxation 🔑217

For municipally-owned property to constitute a taxable "replacement", rather than a nontaxable new improvement, identity is not required. West's Ann.Const. art. 13, § 1.

6. Taxation 🔑493(8)

Findings of state board when it sits as board of equalization pursuant to constitution have same effect as findings of county board of supervisors sitting as board of equalization, and judicial review of decisions of state board of equalization is a limited one.

7. Taxation 🔑543(7)

In city's action to recover from county taxes paid under protest, it was incumbent on city to show that state board of equalization had acted fraudulently or maliciously or had used its powers arbitrarily in denying relief from alleged excessive assessments placed on land; and, on record presented, such burden was not sustained.

8. Taxation 🔑348

Prior sales may be used as starting point in appraising property for taxation.

◆

Roger Arnebergh, City Atty., Gilmore Tillman, Chief Asst. City Atty. for Dept. of Water and Power, A. H. Driscoll, Asst. City Atty., and O. M. Lloyd, Deputy City Atty., Los Angeles, for appellant.

N. Edward Denton, Dist. Atty., Bridgeport, Morris M. Doyle, John N. Hauser, McCutchen, Thomas, Matthew, Griffiths & Greene, McCutchen, Doyle, Brown & Enersen, San Francisco, and Verne Summers, Bishop, for respondent.

PER CURIAM.

Plaintiffs (hereinafter referred to as the "city") brought two actions to recover taxes paid under protest to defendant (hereinafter referred to as the "county"). Before paying the taxes, the city made appropriate application to the State Board of Equalization for relief from the assessments, but the board denied any relief. One of the actions was to recover taxes paid on two hydroelectric generating plants and appurtenant works on the Owens River, a transmission line, and a dam on Rush Creek; the other to recover alleged excessive and discriminatory taxes on approximately 20,000 acres of land in Mono County. The actions were consolidated for trial, and a trial de novo was ordered as to several issues set out in pre-trial orders. Judgment was rendered denying the city any relief. This appeal is from said judgment.

Appeal Relating To Hydroelectric Plants, Transmission Line and Dam

In 1933 the city purchased two power plants located in the Owens River Gorge in Mono County. They were known as Adams Main and Adams Auxiliary and had a combined generating capacity of 7,400 kilowatts. The plants were "run of the stream" units and until the completion of the Long Valley Dam in 1940 could operate only during the part of the year when the natural flow of the Owens River provided sufficient water.

The Adams plants were located in the east half of section 16 and were taxable when acquired. The city owns all the land in the gorge, but all except the east half of section 16 was purchased from the federal government and was not taxable at the time of acquisition.

At the upstream end of the gorge the city constructed Long Valley Dam, which created a reservoir of some 183,465 acre-feet known as Crowley Lake. The reservoir provides regulation for the flow of the Owens River. The reservoir impounds not only the waters of the Owens River but also waters of a foreign watershed, Mono Basin, which are diverted from the natural watershed and conducted to Crowley Lake by a system of aqueducts and tunnels. The right to divert these waters had been acquired by the city prior to 1941. Through the addition of this foreign water supply, the average flow available into Crowley Lake was increased from 230 second-feet, the natural flow of the Owens River, to 405 second-feet.

In 1948 the city commenced construction of a three-plant hydroelectric generating system in the gorge. Two of these plants are located in Mono County, and the third is in Inyo County at the foot of the gorge. Each unit can generate 37,500 kilowatts of power. The trial court in its findings refers to these three plants and appurtenant works as the Gorge System.

After completion of the three new plants in the gorge, it was possible to operate the Adams plants only by diverting water from the new facilities, which were designed to utilize the entire flow of water available in the gorge. There were various methods whereby water could be diverted from the Gorge System to one or the other of the Adams plants, and vice versa. However, all these possibilities involved loss of water from the Gorge System and a consequent reduction of its efficiency. There was testimony to the effect that any loss of water from the Gorge System resulted in a substantial economic loss to the city.

The city had planned to abandon the Adams plants upon the completion of the new facilities. Steps were taken to put them out of service and retire them permanently. However, prior to the completion of this plan the city decided to return them to use. The trial court found that the rescission of the retirement of the Adams plants was carried out by the city in an attempt to avoid taxation of the new facilities by the county, and not because the Adams plants had any actual or potential utility. The Adams plants were not operated after the completion of the new plants until the time of the commencement of this litigation, and were operated then only intermittently. Extensive repairs were required at that time to place them in operating condition. Expert witnesses testified that after the construction of the new facilities the Adams plants were without value as standby plants or for any other purpose. The county began to tax the new plants when they were completed.

The city purchased a dam on Grant Lake in 1934. The dam was subject to taxation at the time of acquisition. It impounded the waters of Rush Creek and created a reservoir with a capacity of 10,000 acre-feet. The reservoir had previously supplied water for irrigation. In 1941 the city constructed a new dam (New Grant Lake Dam) a short distance downstream from the old dam. The reservoir created by the new dam has a capacity of 47,500 acre-feet. When the new dam was completed, the old dam was breached and became submerged. The old dam was assessed and taxed until the 1954–1955 tax year. Thereafter the county taxed the new dam. The trial court found that the new dam replaced the old dam.

At the time the new plants were constructed the city also constructed a transmission line which connected the new plants to the Los Angeles system. The taxability of this line was not raised before the State Board of Equalization. In the trial court the city's complaint alleged that the line was tax exempt and that it was erroneously assessed and taxed. These allegations were denied by the county.

[1] The pre-trial orders limited the issues to be tried. Although the pre-trial orders are somewhat generally stated, it is evident from discussions had during the trial that they were designed to limit the issues to whether the Gorge plants in Mono County and the New Grant Lake Dam were replacements or new improvements. The new transmission line was not to be in issue.

[2] The taxation of municipally-owned property is governed by article XIII, section 1, of the California Constitution, which provides in part: "* * * property * * such as may belong * * * to any * * * municipal corporation within this State shall be exempt from taxation, except such lands and the improvements thereon located outside of the * * * municipal corporation owning the same as were subject to taxation at the time of the acquisition of the same by said * * * municipal corporation; provided, that no improvements of any character whatever constructed by any * * * municipal corporation shall be subject to taxation."

Article XIII, section 1, formerly granted a blanket exemption to all municipal property, wherever located and whenever acquired. By 1914 Los Angeles and San Francisco had acquired extensive property holdings in the mountain counties of Mono, Inyo and Tuolumne. It became apparent that those counties faced an ever-increasing diminution of their tax base as the holdings of foreign municipalities increased. Therefore, in 1914, the constitutional provision was amended to read as quoted above. Protection of the tax position of those counties in which municipalities acquire property for the operation of various municipal projects has long been judicially recognized as the purpose of the amendment. City of Long Beach v. Bd. of Supervisors, 50 Cal. 2d 674, 677 [3], 328 P.2d 964; City of Pasadena v. County of Los Angeles, 37 Cal.2d 129, 132 [2], 230 P.2d 801; City and County of San Francisco v. County of San Mateo, 36 Cal.2d 196, 199, 222 P.2d 860; Rock Creek Water Dist. v. County of Calaveras, 29 Cal.2d 7, 9 [2], 172 P.2d 863; City and County of San Francisco v. San Mateo County, 17 Cal.2d 814, 818 [2], 112 P.2d 595; City and County of San Francisco v. County of Alameda, 5 Cal.2d 243, 245 [2], 54 P.2d 462; City of Pasadena v. County of Los Angeles, 182 Cal. 171, 174, 187 P. 418.

The permission to tax granted by article XIII, section 1, has been construed to include not only improvements subject to taxation when acquired but also replacements and substitutes for these improvements. City and County of San Francisco v. San Mateo County, supra, 17 Cal.2d at page 819, 112 P.2d at page 597. In the event a replacement is made, it is taxed at its fair market value, and not that of the improvement that was replaced. City of Pasadena v. County of Los Angeles, supra

37 Cal.2d at page 134, 230 P.2d at page 803. On the other hand, it is specifically stated in article XIII, section 1, that new improvements constructed after acquisition are not taxable.

The issue in this case, then, is clearly drawn: Are the Gorge System plants and the New Grant Lake Dam replacements for improvements subject to taxation when acquired by the city, or are they new improvements? We believe they are replacements and thus taxable by the county.

[3] Looking first at the hydroelectric plants, it is readily apparent that the Gorge System replaced the Adams plants. The Gorge System was designed to utilize the entire flow of available water. Testimony of expert witnesses demonstrated that any use of the Adams plants concurrently with the Gorge plants would substantially reduce the efficiency of the latter. There was also testimony to the effect that the Gorge System was designed to assume the functions of the Adams plants, and that the Gorge System plans called for the removal of the Adams plants from service. It is immaterial that the plans to retire the Adams plants were revoked, particularly in view of the trial court's finding that the revocation was accomplished for tax avoidance purposes.

Nor is it significant that the new facilities are much larger and more efficient and provide ten times as much power as the old plants. In City and County of San Francisco v. San Mateo County, supra, 17 Cal.2d 814, 112 P.2d 595, the question was presented whether a concrete canal which replaced a wooden flume was taxable under article XIII, section 1. The concrete canal and a capacity four times as great as the flume. The court said at page 819, of 17 Cal.2d at page 598 of 112 P.2d: "While the concrete canal in this case is of larger dimensions and has a greater capacity than the wooden flume, it is substantially the same improvement. It is used for the same purpose and is a part of the same water works system. Both are used as conduits for transporting water. It cannot fairly be said that the concrete canal is different in character from the wooden flume." And in City of Pasadena v. County of Los Angeles, supra, the water mains held taxable as replacements were "larger and more substantially constructed, and of greater value than the improvements they replaced; and * * * were constructed to serve a different purpose in that they were larger and would serve more parts of the water system." 37 Cal.2d at page 131, 230 P.2d at pages 801, 802.

In this case the new facilities are substantially the same improvement as the Adams plants. The greater capacity, more elaborate and efficient operation, and greater value of the Gorge System do not serve to differentiate it in character from the Adams plants. Electric power is still generated, but on a much broader and more efficient scale.

[4] The city places great reliance on the fact that the Adams plants are still in existence. It reasons that since they are still present in the gorge, they cannot have been replaced. The city defines "replacement" too narrowly.

"Replacement" must be construed in such a way as to achieve a result consonant with e purposes of the amendment of article XIII, section 1. The definition of "replacement" urged by the city would enable a foreign municipality to obtain the tax exemption that existed prior to the amendment of article XIII, section 1, by merely leaving a replaced improvement in existence after the construction of its successor. The replaced improvement would often be without value, and its successor, not being a "replacement," would be tax exempt. Thus no revenue would be produced by either, and the purposes of the amendment would be defeated.

In the case before us there can be little question that the Gorge System made the Adams plants valueless. Under normal conditions, the former utilizes the entire flow of water, making the latter inoperable. It was shown that the Adams plants had little or no value as standby facilities. It took too long to place them in operating condition, and even when operative, the 7,400 kilowatts that could be generated would not be a worthwhile standby supply of power for the 112,500 kilowatts that the Gorge System could generate or even the 37,500 kilowatts generated by a single unit.

Moreover, the impracticability of requiring physical removal is obvious. In many situations, as in the present case, salvaging the property would cost more than abandonment. We do not wish to encourage such waste.

[5] It appears that the New Grant Lake Dam is also a replacement. After the new dam was completed, the old dam was breached and is now submerged. The new dam has assumed the functions of the old dam,—impounding the waters of Grant Lake and its tributaries. The new dam is higher and impounds considerably more water, but, as indicated by the San Mateo canal case and the Pasadena water main case, identity is not required.

That the purpose of the amendment would be defeated if we adopted the city's contention that physical removal of the old improvement is required before its successor can be a "replacement" is clearly demonstrated here. The old dam has absolutely no value. However, since it is still in existence, although submerged, the new dam, under the city's definition, could not be a "replacement." The loss of revenue is apparent.

City and County of San Francisco v. County of San Mateo, supra, 36 Cal.2d 196, 222 P.2d 860, lends no support to the city's claim that the Gorge plants and the New Grant Lake Dam are tax exempt. That case was not a replacement case, although it recognized the rule subjecting replacements to taxation. Since we have decided that the Gorge plants and the New Grant Lake Dam are replacements, that case is inapplicable.

Appeal Relating To Assessment Of Certain Lands Owned By The City

The city owns approximately 62,000 acres of land in Mono County. This acreage was taxable when acquired and is taxable now. The city contends that the county placed excessive assessments on some 20,000 acres referred to as grazing land, and also over-assessed the east half of section 16, which is the site of the Adams plants and the Middle Gorge Plant. This phase of the case, therefore, deals solely with a question of the valuation of admittedly taxable property.

[6] Judicial review of the decisions of the State Board of Equalization is a limited one. The findings of the state board when it sits as a board of equalization pursuant to the Constitution have the same effect as findings of county boards of supervisors sitting as boards of equalization. Covert v. State Board of Equalization, 29 Cal.2d 125, 131, 173 P.2d 545; Alpaugh Irrigation District v. County of Kern, 113 Cal.App.2d 286, 290, 248 P.2d 117.

The effect to be given the decision of a county board of equalization has been stated to be as follows: "The duty of determining the value of the property and the fairness of the assessment is confided to the appropriate county board of equalization. Furthermore, in discharging this duty, the board's determination upon the merits of the controversy is conclusive; the taxpayer has no right to a trial de novo in the superior court to resolve conflicting issues of fact as to the taxable value of his property. (Citations.) The question presented to the superior court in such an action is whether there was evidence of sufficient substantiality before the board to justify the finding (citation), and in the absence of fraud or malicious or arbitrary use of its powers the board is the sole judge of questions of fact and of the values of property. (Citation.)" Bank of America Nat. Trust & Savings Ass'n v. Mundo, 37 Cal.2d 1, 5, 229 P.2d 345, 347.

[7] It is therefore incumbent on the city in this proceeding to show that the State Board of Equalization acted fraudulently or maliciously or used its powers arbitrarily. For the reasons stated herein, we feel that the city has not sustained its burden.

The city introduced evidence tending to show that its land was assessed at a higher rate than other allegedly comparable land in the county. This evidence consisted of a comparison of value determined by the number of cattle that could be grazed on the city's land and on comparable land. On the other hand, the county's witness, Mr. Ralph Goodall, testified that he had appraised the city's land and was of the opinion that the value placed thereon by the assessor represented the fair market value of the land as grazing land.

It appears that there was merely a conflict in the evidence, which was resolved by the board in the county's favor. The record amply supports the trial court's finding that the board's decisions as to the assessment on the city's land were supported by substantial evidence and did not constitute an abuse of discretion. The board's decisions as to the assessment on the east half of section 16 is equally well supported. It is sufficient to cite only the evidence that the parcel has a unique value as a power site due to the great drop of water in a relatively short distance.

[8] The city has endeavored to discredit the county's witness, Mr. Brothers, because he considered prior sales of the property. However, it is clear from his testimony that these sales were among several factors considered by him. Moreover, it is well established that prior sales may be used as a starting point in appraising property. Rancho Santa Margarita v. San Diego County, 135 Cal.App. 134, 141, 26 P.2d 716.

The judgment is affirmed.

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169 Cal.App.2d 544

Fred W. HINRICHS, Plaintiff and Appellant,

v.

Earl MALONEY, Defendant and Respondent.

Civ. 6016.

District Court of Appeal, Fourth District, California.

April 10, 1959.

Action for false arrest and imprisonment. The jury returned a verdict for the plaintiff. The Superior Court of Fresno County, Milo Popovich, J., entered orders granting defendant's motion for new trial and denying plaintiff's subsequent motion to set such order aside, and the plaintiff appealed. The District Court of Appeal, Griffin, P. J., held that where other vacating minute order denying new trial was made more than 60 days after notice of entry of judgment was served and more than 60 days after defendant's notice of intention to move for new trial was filed, such order of vacation was in excess of trial court's jurisdiction and was void under the statute.

Orders reversed.

1. New Trial ⚿165

Where order vacating minute order denying new trial was made more than 60 days after notice of entry of judgment was served and more than 60 days after defendant's notice of intention to move for new trial was filed, such order of vacation was in excess of trial court's jurisdiction and was void under the statute. West's Ann. Code Civ.Proc. §§ 12a, 660.

2. New Trial ⚿165

Order vacating minute order denying new trial was not an attempt to correct, nunc pro tunc, such minute order where the clerk had not erred in making his entry in the minutes of the order denying new trial and the trial court had not intended that its order of vacation was to be treated as being effective as of the earlier date.

3. New Trial ⚷163(1)

The defendant's filing of notice of intention to move for new trial after a lapse of the jurisdictional 10-day period after defendant received notice of entry of judgment disclosed that minute order denying defendant's motion for new trial was final and was not entered through clerical error, so that it could not be corrected nunc pro tunc. West's Ann.Code Civ.Proc. §§ 659, 1013.

4. New Trial ⚷163(2)

When a motion for a new trial has been properly made and noticed and the court has ruled on the motion, the order regularly made is conclusive so far as the court making it is concerned unless the order, as entered by the clerk, is not the order made by the court.

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J. E. Hahesy, Fresno, for appellant.

Nathan Guthertz, and Allan S. Mason, Fresno, for respondent.

GRIFFIN, Presiding Justice.

On December 17, 1957, the jury, in this action for false arrest and imprisonment, returned a verdict for the plaintiff-appellant and against the defendant-respondent in the sum of $3,000. This verdict was filed and entered in the judgment book on December 18, 1957. The subsequent series of events in chronological order were these: The plaintiff filed a notice of entry of judgment and a copy was mailed to the attorneys for the defendant, at Fresno, on December 18, 1957. Defendant filed notice of intention to move for a new trial on January 3, 1958. It was heard and denied by minute order on February 14, 1958. Apparently, without a motion, on March 7, 1958, an order was made and entered in the clerk's minutes vacating the minute order of February 14, 1958, denying a new trial. It also granted defendant's motion for a new trial. A written order was filed specifying that the new trial was granted on the ground of the insufficiency of the evidence to sustain the verdict. On March 20, 1958, plaintiff filed a notice of motion to set aside the order granting a new trial on the ground that it was void. Defendant's attorney filed affidavits in which he stated that he could not say with any certainty on what date he received notice of entry of judgment but that he believed he had filed his motion for new trial in time; that mails are sometimes delayed for as much as a week during the holiday season and that he was convinced that the notice of entry of judgment could not have been received before December 23 or 24, 1957. An order based on said affidavits was, on August 28, 1958, made and entered upon the clerk's minutes denying defendant's motion for a new trial. On September 10, 1958, a minute order was made vacating and setting aside the minute order of August 28, 1958, and denying plaintiff's motion to vacate the order granting a new trial. None of the orders made subsequent to the minute order of February 14, 1958, purport to correct that order *nunc pro tunc,* as being incorrectly entered due to clerical error.

Except as otherwise provided in section 12a of the Code of Civil Procedure, under section 660 thereof, the power of the court to pass upon a motion for new trial expires 60 days from and after service upon the moving party of written notice of entry of the judgment, or if such notice has not theretofore been served, then 60 days after the filing of the notice of intention to move for a new trial. If such motion is not determined within said period of 60 days or within said period as thus extended, the effect shall be a denial of the motion without further order of the court.

[1] It is apparent that the order of March 7, 1958, was made more than 60 days after notice of the entry of judgment was served and more than 60 days after defendant's notice of intention to move for a new trial was filed. This order was in excess of the court's jurisdiction and void. Caldwell v. Geldreich, 137 Cal.App.2d 78, 289 P.2d 832; Smith v. Big Horn Mining Co., 165 Cal.App.2d 502, 332 P.2d 191.

[2] Recognizing this inevitable result in the present state of the record, defendant contends that the March 7, 1958, order was an attempt to correct, *nunc pro tunc,* the minute entry of an order given February 14, 1958. The record does not support this contention. Nowhere is there an indication that the clerk erred in making his entry in the minutes on February 14, 1958, or that the court intended its order of March 7, 1958, to be treated as being effective as of the earlier date.

[3] Plaintiff also contends that the notice of intention to move for a new trial was filed after a lapse of the jurisdictional 10-day period after defendant received notice of the entry of the judgment, citing sections 659 and 1013 of the Code of Civil Procedure and Department of Social Welfare of State of California v. Gandy, 56 Cal.App.2d 209, 132 P.2d 241. These contentions have merit and furnish additional grounds for holding that the minute order of February 14, 1958, denying a new trial was final and was not entered through clerical error.

[4] The last point to be considered is the propriety of the trial court's attempted reversal of its decision of February 14, 1958. When a motion for a new trial has been properly made and noticed and the court has ruled on the motion, the order regularly made is conclusive so far as the court making it is concerned unless the order, as entered by the clerk, is not the order made by the court. Drinkhouse v. Van Ness, 202 Cal. 359, 260 P. 869; Stevens v. Superior Court, 7 Cal.2d 110, 59 P.2d 988; Vol. 2 Stanbury, California Trial and Appellate Practice, Sec. 832, pp. 77 and 78; Vol. 3, Witkin, California Procedure, Attack on Judgment in Trial Court, Sec. 44 (a), p. 2095.

The purported order of March 7, 1958, attempting to grant a new trial was ineffective. Orders granting a new trial and denying plaintiff's subsequent motion to set it aside reversed.

MUSSELL and SHEPARD, JJ., concur.

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169 Cal.App.2d 455

William MANN, doing business as Home Owners Investment Co., Plaintiff and Appellant,

v.

Mary Ellen ANDRUS, Defendant and Respondent.

Civ. 23280.

District Court of Appeal, Second District, Division 1, California.

April 9, 1959.

Action by holder on an installment note executed by maker in consideration for certain repairs which were to have been made by payee upon the premises of maker. The Superior Court, Los Angeles County, Burnett Wolfson, J., entered judgment for maker and holder appealed. The District Court of Appeal, Fourt, J., held that evidence was insufficient to sustain finding that holder took title to the note with knowledge of nonperformance by payee of its agreement.

Judgment reversed.

1. Appeal and Error 🔑770(1)

Where respondent does not file any brief, the District Court of Appeal is under no duty to look up the law, nor is it required to make any search for evidence.

2. Appeal and Error 🔑770(1)

Where a respondent does not file a brief, District Court of Appeal has no course open to it except to accept as true the statement of facts in appellant's opening brief, and further, District Court of Appeal may assume that respondent has abandoned any attempt to support the judgment, and may also assume that points made by appellant are meritorious.

3. Bills and Notes 🔑497(2)

Burden is on maker to prove that holder took note in question with notice of maker's equities.

4. Bills and Notes 🔑334

Acquisition by a holder of information concerning infirmities, if any, in a note after time of purchase, did not affect holder's status as a holder in due course.

5. Bills and Notes ⚷370, 503

Defenses between the original parties, such as lack of consideration, are usually not available as defenses against a holder in due course, and evidence of want of consideration to the maker is irrelevant as against a holder in due course. West's Ann.Civ.Code, § 3105.

6. Bills and Notes ⚷525

In action by holder on an installment note executed by maker in consideration for certain repairs which were to have been made by payee upon the premises of maker, evidence was insufficient to sustain finding that holder took title to the note with knowledge of nonperformance by payee of its agreement.

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Nathan M. Dicker, Beverly Hills, for appellant.

No appearance for respondent.

FOURT, Justice.

This is an appeal from a judgment in favor of the defendant in an action based upon a promissory note.

An action was brought by the plaintiff against the defendant on a promissory note, dated December 14, 1955, providing in substance that the defendant would pay to the Central Home Improvement Company, or order, the sum of $486.36, in thirty-six consecutive monthly installments of $13.51; the first installment to be payable January 25, 1956, the balance of the installments to be paid on the same date of each month thereafter. It was also provided that attorney's fees would be payable if the note was placed in the hands of an attorney for collection after maturity, and it was further provided that if an installment was not paid when the same became due, the entire balance could become due and payable at the option of the holder of the note.

On December 2, 1955, the defendant entered into a written contract with Central Home Improvement Company, which contract provided for certain repairs to be made by that company upon the premises of the defendant. The contract provided that the labor and materials were to cost $350 and to be financed for thirty-six months (monthly installments of $13.51 each—the first payment to be made January 25, 1956). It was set forth that the above monthly payment included carrying charges and time-price differential for the term of the contract. The contract also set forth that the contractor was granted a lien on the real property as security for the faithful performance of the obligations of the owner under the contract. The contract contained an acknowledgment that appellant subscribed to the same and acknowledged that she had executed it on December 2, 1955. A promissory note (the note in controversy in this case), bearing date of December 14, 1955, was delivered by the defendant to Central Home Improvement Company, and by the latter Company sold and transferred to the plaintiff herein on the same day it was made, namely December 14, 1955, for a valuable consideration. The note set forth on its face that on December 14, 1955, Mary Ellen Andrus appeared before a named notary public and acknowledged that she executed the same. The defendant signed a certificate of completion, dated December 14, 1955, which was presented to the plaintiff before the purchase of the promissory note. This certificate, among other things, referred to the credit application of the appellant dated December 2, 1955, and it was set forth "that all articles and materials have been furnished and installed and the work satisfactorily completed on premises indicated," and that "any holder of the promissory note given therefor does not guarantee the material or workmanship nor inspect the work performed." It was also noted in bold black print opposite the space provided for a signature, "Notice to Maker—Do Not Sign this certificate until you are satisfied that the dealer has carried out his obligations to you and that the work or the materials have been satisfactorily completed or delivered."

The certificate also contained, in part, an acknowledgment which set forth that on December 14, 1955, Mary Ellen Andrus, known to the named notary public, appeared before him and acknowledged that she executed the same.

The court, over the objection of the plaintiff, permitted the defendant to introduce evidence to the effect that the work contracted to be done upon her premises under the contract had not been completed.

The trial court made findings that on or about December 2, 1955, the defendant entered into the contract in question with Central Home Improvement Company, according to the terms of which the Company agreed to furnish to the defendant certain labor and materials in improvements to the real property of the defendant, and that said improvements were not made by the plaintiff's assignor. The court also found that it was true that on or about December 2, 1955, the Central Home Improvement Company sold and endorsed and delivered the note to the plaintiff; that it was true that the plaintiff knew the note was the consideration for the performance of the terms of the contract between plaintiff's assignor and the defendant, and knew that at the time he acquired the note that the work called for had not been done; that the plaintiff did not go upon the premises and inspect the same; that it was true that the plaintiff was not a bona fide purchaser for value, nor was he a holder in due course. The court then concluded that the plaintiff should take nothing by reason of his action.

The plaintiff-appellant contends, (1) that he was a holder in due course of the promissory note in question; (2) that want or failure of consideration does not constitute a defense to the plaintiff's action; (3) that the evidence does not support the findings of the court to the effect that the plaintiff was the purchaser of the note with notice of defendant's equities.

The appellant has filed a brief in this case and has complied with the rules on appeal.

After due and proper notice, the defendant-respondent has neglected or refused to file a brief, and pursuant to Rule 17(b) of the Rules on Appeal, the matter now stands submitted for decision on the record, and on the appellant's opening brief. Under the last mentioned rule this Court may "accept as true the statement of facts in the appellant's opening brief."

[1, 2] Where the respondent does not file any brief we are under no duty to look up the law, nor are we required to make any search for evidence. Crofts & Anderson v. H. L. Petersen Construction Co., 130 Cal.App.2d 790, 279 P.2d 828. We feel that we have no course open to us except to accept as true the statement of facts in the appellant's opening brief. MacGregor v. Kawaoka, 132 Cal.App.2d 407, 282 P.2d 130. Further, we may assume, as is apparently correct in this case, that the respondent has abandoned any attempt to support the judgment, and we may also assume that the points made by the appellant are meritorious. Cravens v. Coghlan, 154 Cal.App.2d 215, 315 P.2d 910; Postin v. Griggs, 66 Cal.App.2d 147, 151 P.2d 887; 4 Cal.Jur.2d 334, § 496.

The promissory note in this case was complete and regular on its face, the plaintiff purchased the note before it was overdue, in good faith and for value. The appellant makes the point that there was no evidence to sustain the finding of the court that at the time the note was negotiated to the plaintiff he had notice of any infirmity. A reading of the record convinces us that the appellant is correct in his contention. There was no evidence that the note had previously been dishonored, if such be the fact.

Section 3138, Civil Code, provides as follows:

"A holder in due course holds the instrument free from any defect of title of prior parties, and free from defenses available to prior parties among themselves, and may enforce payment of the instrument for the full amount thereof against all parties liable thereon."

Civil Code sections 3140 and 3126 are also pertinent and are quoted here:

§ 3140—"Every holder is deemed prima facie to be a holder in due course; but when it is shown that the title of any person who has negotiated the instrument was defective, the burden is on the holder to prove that he or some person under whom he claims acquired the title as holder in due course. But the last-mentioned rule does not apply in favor of a party who became bound on the instrument prior to the acquisition of such defective title."

§ 3126—"Except where an indorsement bears date after the maturity of the instrument, every negotiation is deemed prima facie to have been effected before the instrument was overdue."

[3] The burden is on the defendant to prove that the plaintiff took the note with notice of the defendant's equities. Goodale v. Thorn, 199 Cal. 307, 249 P. 11; Tilden Lumber & Mill Co. v. Bacon Land Co., 116 Cal.App. 689, 3 P.2d 350.

[4] The acquisition by the plaintiff of the information concerning the infirmities, if any, in the instrument after the time of purchase does not affect his status as a holder in due course. Goodale v. Thorn, supra.

There was no testimony in this case to show that the transaction was other than honestly conceived and concluded without collusion, fraud or knowledge of fraud, and without any intent to assist in a design which was fraudulent or unlawful.

No one has referred us to any testimony in the record to the effect that the plaintiff had any actual knowledge of any defect or defects. Mere suspicion is not ordinarily enough, but in this case not even a suspicious circumstance was shown. No inquiry was invited from the face of the documents.

"Notice to a holder that a note was given in consideration of an executory agreement of the payee which has not yet been performed does not deprive the indorsee of the character of a holder in due course, unless he also has notice of a breach of the agreement. Where a note or bill is disposed of for a valuable consideration the holder is not bound to inquire whether the indorser has performed or will be able to perform the agreement into which he has entered, so long as there is nothing suspicious or out of the usual course of business in the circumstances attending its issue." 8 Cal.Jur.2d, § 85, pp. 409–410; see also, Splivallo v. Patten, 38 Cal. 138; Flood v. Petry, 165 Cal. 309, 132 P. 256, 46 L.R.A.,N.S., 861.

It is true that "The rule appears to be settled that a mere want of consideration does not operate to throw upon the holder the burden of proving that he or one under whom he claims acquired the title as a holder in due course, as Section 3136, Civil Code, defining defective title, does not include want or failure of consideration." Tilden Lumber & Mill Co. v. Bacon Land Co., supra, 116 Cal.App. 689, 693, 3 P.2d 350, 352.

Civil Code section 3105 provides as follows:

"Every negotiable instrument is deemed prima facie to have been issued for a valuable consideration; and every person whose signature appears thereon to have become a party thereto for value."

[5] Defenses between the original parties, such as lack of consideration, are usually not available as defenses against a holder in due course. Ingold v. Daly Bank & Trust Co., 101 Cal.App. 579, 281 P. 1075, and evidence of want of consideration to the maker is irrelevant as against a holder in due course. Jones v. Evans, 6 Cal.App. 88, 92, 91 P. 532.

[6] The finding of the trial court to the effect that the plaintiff knew at the time he got the note that the work called for under the contract had not been done, was not supported by the evidence and was, in reality, but a conclusion. See, Ingold

v. Daly Bank & Trust Co., supra, 101 Cal.App. 579, 585, 281 P. 1075.

It may well be true that the time-differential cost in this matter is close to being outrageous, but that is a matter which should, under the circumstances, attract the attention of the legislature to the end that laws be adopted to stop such practices. This court can do nothing about it.

The judgment is reversed.

WHITE, P. J., and LILLIE, J., concur.

169 Cal.App.2d 587

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Raymond ADAME, also known as Ray Adame, Defendant and Appellant.

Cr. 2919.

District Court of Appeal, Third District, California.

April 13, 1959.

Rehearing Denied May 4, 1959.

Prosecution for possession and sale of marijuana after prior conviction and sentence for possession of marijuana. The Superior Court, Madera County, Gregory P. Maushart, J., entered judgment, and defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that where attorney who was experienced member of the bar and who had once been a district attorney was appointed to represent defendant, and the case was not hurried to trial and three months elapsed between the appointment and the time when, a few days before the trial, the attorney was informed by defendant that defendant did not want the attorney to try the case, and defendant did not request continuance and stated to court that he was ready to go ahead and try the case himself and court carefully warned defendant of the dangerous course he was taking in trying his own case, defendant was not deprived of his constitutional right to representation by counsel.

Affirmed.

1. Criminal Law 🔑641(1)

Where attorney who was experienced member of the bar and who had once been a district attorney was appointed to represent defendant, and the case was not hurried to trial and three months elapsed between the appointment and the time when, a few days before the trial, the attorney was informed by defendant that defendant did not want the attorney to try the case, and defendant did not request continuance and stated to court that he was ready to go ahead and try the case himself and court carefully warned defendant of the dangerous course he was taking in trying his own case, defendant was not deprived of his constitutional right to representation by counsel.

2. Criminal Law 🔑1166½(12)

Where defendant stated that he wished to try the case himself and that he did not want his court appointed attorney to try the case for him, defendant was not prejudiced by trial court's statement in presence of jury that there was an old saying "he who acts as his own attorney has a fool for a client".

3. Poisons 🔑9

In prosecution for possession and sale of marijuana, evidence was sufficient to show that defendant sold the marijuana cigarettes to intermediary who in turn sold the cigarettes to an agent of the state bureau of narcotic enforcement. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law 🔑1144(13)

On defendant's appeal from judgment of conviction, the evidence must be stated favorably to the prosecution in so far as conflicts therein and conflicting inferences that may be drawn therefrom are concerned.

5. Arrest 🔑63(4), 71

In prosecution for possession and sale of heroin, record disclosed that arrest of defendant by officers without warrant and incidental search and seizure were lawful, in that officers had reasonable cause to believe in guilt of defendant. West's Ann. Health & Safety Code, § 11500; West's Ann.Pen.Code, § 836.

6. Arrest 🔑63(4)

A peace officer may make an arrest without a warrant when he has reasonable cause to believe that the person to be arrested has committed a felony whether or not a felony has in fact been committed. West's Ann.Pen.Code, § 836.

7. Arrest 🔑63(4)

In statute authorizing peace officer to arrest without warrant when felony has in fact been committed and officer has reasonable cause for believing that person to be arrested has committed it, "reasonable cause" means such a state of facts as would lead a man of ordinary care and prudence to believe or entertain an honest suspicion that the person in question is guilty of a crime. West's Ann.Pen.Code, § 836.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause".

8. Arrest 🔑71

If an arrest without a warrant is based on reasonable cause and is, therefore, lawful, a search and seizure incident thereto would also be legal because based on reasonable cause. West's Ann.Pen.Code, § 836.

9. Criminal Law 🔑394.4(9)

In prosecution for possession and sale of marijuana, where officers had reasonable cause to believe in guilt of defendant when they arrested him without warrant and the officers made a lawful search and seizure as incident thereto, the marijuana cigarettes taken from the person of defendant when he was arrested, a partly smoked marijuana cigarette found in his watch pocket and a small coin purse taken from defendant at the time of his arrest, which had in it a dollar bill with orange fluorescent powder on it, were properly admitted in evidence. West's Ann.Pen.Code, § 836.

10. Arrest 🔑63(4)

Whether or not reasonable cause exists in a particular case for believing the person arrested without warrant to have committed a felony must be decided on the facts and circumstances of that case. West's Ann.Pen.Code, § 836.

11. Criminal Law 🔑1043(1)

One party cannot take advantage on appeal for the first time of objections to testimony raised only by a codefendant or his counsel, where the record does not show any stipulation or understanding that one defendant should have the benefit of objections made by the other.

12. Criminal Law 🔑1043(1)

In prosecution for possession and sale of marijuana, defendant who made no objection to admission of testimony of police officer that he had knowledge that defendant was a known peddler or user of marijuana could not assert on appeal that he was prejudiced by the admission of such testimony, notwithstanding that objection had been taken by codefendant.

13. Criminal Law 🔑788

An instruction that prosecution is not required to call all persons shown to be present or to have knowledge of matters on trial is a proper one to be given in criminal cases.

14. Criminal Law 🔑788

Instruction that pursuant to the Code of Civil Procedure evidence is to be estimated not only by its intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, therefore, that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust, may be given by the court to the jury on all proper occasions, but in criminal cases the proper occasions are so few and the improper occasions are so many that it is better if the instruction is given rarely, if at all. West's Ann.Code Civ.Proc. § 2061, subds. 6, 7.

15. Criminal Law ⚷788

In prosecution for possession and sale of marijuana, where the defendant did not take the stand although he certainly must have had knowledge of matters in issue, failure to instruct the jury pursuant to Code of Civil Procedure that evidence is to be estimated not only by its intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, therefore, that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust, was not error. West's Ann.Code Civ.Proc. § 2061, subds. 6, 7.

16. Criminal Law ⚷1037(1, 2)

Defendant could not complain on appeal that argument was improper where no objection was made to the argument and no request was made that the trial court should admonish the jury to disregard the argument.

17. Criminal Law ⚷603(1)

Defendant could not complain on appeal that he was not granted a continuance to enable him to seek other counsel when trial court granted defendant's request that defendant be relieved of court appointed counsel, where defendant had not requested a continuance.

18. Criminal Law ⚷641(3)

Trial court was not required to appoint advisory counsel for defendant when trial court granted defendant's request that defendant be relieved of court appointed counsel.

19. Arrest ⚷68

Under statute, police officer making arrest must state the reason for the arrest. West's Ann.Pen.Code, § 841.

20. Criminal Law ⚷1165(1)

In prosecution for possession and sale of marijuana, defendant was not prejudiced by police officer's failure to state reason for arrest, where at the moment the defendant was arrested the sale had been made and intermediary from whom the agent of the state bureau of narcotic enforcement had made the purchase had departed with the marijuana and defendant and another were seated in the intermediary's automobile with the money received from the sale. West's Ann.Pen.Code, § 841.

◆

A. Richard Backus, Sacramento, for appellant.

The Atty. Gen., Doris H. Maier and Robert K. Puglia, Deputy Attys. Gen., for respondent.

VAN DYKE, Presiding Justice.

In an information filed on February 25, 1958, the appellant, Raymond Adame, was accused of the crime of possessing marijuana (2 counts), in violation of Section 11500 of the Health and Safety Code, alleged to have been committed on the 22d day of January, 1958. Count Three of the information charged sale of marijuana on the same date. Appellant was also charged with a prior conviction of possession of marijuana and with having served a term in a California state prison therefor. On February 23, 1958, counsel was appointed for him by the court. His case was consolidated for trial with the cases of the defendants, Armando Garcia, Richard Lee Ingle, and Ingle's wife, Sondra. Appellant was arraigned on March 7, 1958. His counsel moved for a continuance of one week, requesting that other counsel be appointed. The motion was denied. Appellant entered a plea of not guilty to all three counts and denied his prior conviction. The cause came to trial on May 22d, at which time it was ordered that counsel be relieved of his appointment, as appellant desired to proceed in propria persona.

[1] Since one of the contentions of appellant is that the judgment should be re-

versed because of a violation of his constitutional rights to representation by counsel, we will first consider this assignment. On February 23d, two days before the filing of the information, Mr. Barcroft, an experienced member of the bar, who had once been a district attorney, was appointed to represent appellant and his codefendant Ingle. It appears that there had been some dissatisfaction on the part of appellant and Ingle with Mr. Barcroft's representation, and 5 days before the trial was to begin they had told him that they did not want him to try their case. This impelled him, at the opening of the trial, to bring the matter before the court and the following occurred:

> "Mr. Barcroft: If the Court please, there is a preliminary matter that should be taken up at this time. Last Saturday I visited with the Defendants Raymond Adame and Richard Lee Ingle with a view to discussing trial preparation, and they then and there informed me definitely that they no longer wanted me connected with their defense and that, alternatively, rather than have my continued representation, they would defend themselves. At this time, in order that they may take over their own defense, as they have indicated to be their desire, I ask the Court to relieve me from any responsibility which I may have incurred by virtue of having been assigned to their defense.
>
> * * * * * *
>
> "The Court: All right, gentlemen, you have heard the statement of Mr. Barcroft. What have you to say?
>
> "Defendant Adame: Your Honor, the reason we are going to act as our own attorneys is because of being held in the County Jail for a period of four months. We have attempted to have another attorney prior to this time—we tried—we told the court we wanted another attorney, because Mr. Barcroft felt he couldn't handle our case and it would prejudice him by asking us to go on with the Court and asking us to plead guilty to the charge. So, at this time, I would like to go ahead with the trial if you would appoint us an advisor.
>
> "The Court: I am in no position to provide you with an advisor at this late date. This Court has previously appointed Mr. Barcroft to represent you. I have known Mr. Barcroft for twenty-five years. I know him as an able, conscientious, well-informed attorney, possessed of more than average, or more than ordinary ability. I know of no man who could defend you any better than Mr. Barcroft. This is not a case where the Court has appointed an inexperienced young lawyer just out of school. Rather, the Court, I think, has used excellent judgment to protect the rights of a Defendant in appointing Mr. Barcroft to represent you. Now, you have the right to represent yourselves if you desire. You have a right to counsel at all stages of the proceedings if you haven't sufficient funds with which to employ counsel. You have made that statement, apparently, at the time of your arraignment, that you hadn't sufficient money, and the Court then, in compliance with your request and in accordance with the rules, to afford you all the rights granted you under the Constitution, appointed Mr. Barcroft. Now, if you are dissatisfied with Mr. Barcroft and this case is ready for trial and you want to try this case yourselves, that is perfectly all right with me. But, if that situation should develop, I am not going to act as your attorney. If you elect to represent yourselves, you will be bound by the same rules of conduct we expect and demand from every attorney. You must be familiar with the rules of evidence, and if the questions you ask are improper or improperly asked, they will not be permitted to be answered. Now, whatever you want to do is entirely up to yourselves. There is an old, old saying that 'he who acts as his

own attorney has a fool for a client,' and while it is an old saying, I think it it a true saying. Now, if you fellows, both of you, feel that this is a simple matter and that you are well equipped to try your own cases without any legal background, that is a decision you are going to have to make.

"Defendant Richard Ingle: Your Honor, we knew Mr. Barcroft was not going to handle the case and we requested the District Attorney's office if they would possibly let us look at some of the law books and become familiar with some of the things we should know in this type of trial. We know it's a very serious charge, and with Mr. Barcroft handling the case we did not feel our story would come out the true way.

"The Court: Mr. Barcroft, the statement has been made by these Defendants that you desire to withdraw from this case. Did you make application to withdraw from this case prior to your statement to the Court here?

"Mr. Barcroft: No, Your Honor, I have never made any application to withdraw following my assignment. At the time I was assigned, I suggested that the Defendants would probably feel better satisfied if other counsel were assigned, but Judge Sischo at that time said it was up to me to accept this appointment, which I have done.

"The Court: I appreciate you have.

"Mr. Barcroft: I have never endeavored to withdraw since, and I was ready to represent the Defendants to the best of my ability up to last Saturday. Since that time, of course, it is evident that any further relationship between us is going to be distasteful to all of us.

"The Court: I appreciate the position you are in, but by the same token, in a Courtroom full of prospective Jurors,—I am down here on an assignment myself—I am not going to continue this matter. At the time I set this case for trial when I was here, I believe it was in April, possibly it was in March—we set the date in your presence and in the presence of Mr. Chandler. [Mr. Chandler was counsel for Mrs. Ingle.] No objection was made at that time, either to counsel or to the selection of the date. You were ready to proceed. Now, you can either have Mr. Barcroft, or you can represent yourselves. You make the decision, and you make it in the light of what I told you as to the conduct of this case. Now, make up your mind what you want to do. Do you want Mr. Barcroft to represent you? If so, I will still keep him in the case. If you don't want him, I want it in the record that you have refused counsel in the case and desire to handle the matter yourselves.

"Defendant Richard Ingle: Your Honor, we feel we will go ahead and act as our own attorneys.

"The Court: Have you considered what I stated to you about the conduct of this trial and the manner in which it is going to proceed?

"Defendant Richard Ingle: Yes, sir.

"The Court: You fully understand and know what you are doing?

"Defendant Richard Ingle: Yes, sir.

"The Court: How about you, sir?

"Defendant Adame: Yes.

"The Court: You desire to proceed by yourself, and represent yourself?

"Defendant Adame: Yes.

"The Court: You fully understood what I stated as to how this trial was going to be conducted?

"Defendant Adame: Yes, sir.

"The Court: Knowing that, you feel competent to represent yourself?

"Defendant Adame: Not competent, but we will go ahead.

"The Court: You don't want Mr. Barcroft to represent you?

"Defendant Adame: I did not say Mr. Barcroft—as I said before, he previously wanted to get out of the trial.

"The Court: Mr. Barcroft has denied that statement that he wanted to get out of the trial. The question I am going to ask you is plain and very simple. Do you want Mr. Barcroft to represent you in the trial? Answer that 'Yes' or 'No.'

"Defendant Adame: No.

"The Court: All right, Mr. Barcroft, you are relieved of further duty in the representation of these Defendants."

[2] There is no merit in the charge that appellant was denied the aid of counsel. This action was not hurried to trial. Three months elapsed between the appointment of Mr. Barcroft and the time when a few days before the trial he was informed by appellant and his codefendant, Ingle, that they did not want him to try the case for them. It is evident from what occurred that the decision to discharge Mr. Barcroft was a decision jointly arrived at by appellant and Ingle and while they made a half-hearted attempt to lay some blame upon the district attorney because he did not accede to a request of theirs to use a law library it clearly appears that, foolish though it may have been and probably was, the decision to discharge Mr. Barcroft was their own. Appellant did not ask for a continuance, although this may have been in part because the court had stated that it would not grant one. Under the circumstances, the court was justified in stating it would not continue the case. The fact remains that no continuance was asked and we cannot assume that appellants desired one. Both he and Ingle stated to the court that they were ready to go ahead. It appears the trial court was meticulously careful to warn them as to the danger of the course they were taking, even stating to them the old familiar saying that an accused acting as his own attorney has a fool for a client. The net result of this attempt of the court to clearly point out to appellant that the course he was taking was a dangerous one produced nothing more than an argument on this appeal that the court was guilty of misconduct for having called appellant a fool, thus prejudicing him in the minds of the jury, a charge which borders upon the ridiculous. There is no merit in the contention now under discussion. Appellant literally kicked competent counsel out of his case and if he suffered for that the fault is entirely his own.

[3, 4] Appellant challenges the sufficiency of the evidence to sustain the verdict on the count charging him with sale. To discuss this assignment and others made we will now state the testimony, adhering to the rule that it must be stated favorably to the prosecution in so far as conflicts therein and conflicting inferences that may be drawn therefrom are concerned.

On January 2 and January 15, 1958, Richard Gary Nicholson, an agent of the State Bureau of Narcotic Enforcement, made purchases of marijuana cigarettes from one Garcia. On each occasion Nicholson met Garcia at the latter's house in Madera, California, and gave him money for marijuana cigarettes. Garcia, on each occasion, left his house by himself, returning in 15 to 20 minutes with the cigarettes which he then gave to Nicholson. On at least one of these occasions when Garcia was gone for 15 to 20 minutes he departed in his automobile, a 1948 dark maroon Chevrolet club coupe. On January 17, 1958, Nicholson again met Garcia at the latter's house and gave him $20. Garcia left the house and returned about 15 minutes later with 10 marijuana cigarettes, 9 of which he gave to Nicholson. Several minutes later he again left, returning about 20 minutes later with 10 more cigarettes, 9 of which he gave to Nicholson. On that same evening, Gary Shoemaker, an inspector for the State Bureau of Narcotic Enforcement was parked near the appellant's home in Madera. At about 7:30 p. m. he observed a 1948 maroon Chevrolet pull into appellant's driveway. The driver honked twice and some one came out of the house, approached the driver's side of the car and apparently engaged the driver in conversation. Shoemaker saw the Chevrolet leave and go back to Madera. A short time later that evening, Shoemaker again observed the same maroon Chevrolet pull into appellant's driveway. On January 22, 1958, Nicholson saw Garcia at the latter's house and gave him $20. The bills were in denominations of two $5 bills and ten $1 bills. The money had been given to Nicholson by Shoemaker, who had made a list of the serial numbers on the bills and had marked each bill with green fluorescent crayon and orange fluorescent powder. Garcia received the money from Nicholson at about 7 p. m., and departed. He was gone until approximately 8:10 p. m. At about 7:15 p. m. Shoemaker, who was again parked near appellant's house, observed Garcia's car pull into appellant's driveway, saw a person leave appellant's house and approach Garcia's car on the driver's side. After a short delay the car returned to Madera. When Garcia returned home at approximately 8:10 p. m., he gave Nicholson 36 marijuana cigarettes and was arrested immediately thereafter. In most of the purchases made by Nicholson from Garcia the latter obtained the cigarettes elsewhere and kept one or two for himself, giving the remainder to Nicholson. He explained to Nicholson that the person from whom he got the cigarettes always gave him a commission; that he would take a commission from Nicholson's purchase also. Officer Daulton of the Madera Police Department participated in the arrest of Garcia. At the time of his arrest Garcia was not in his automobile nor was his automobile at his home. Daulton, accompanied by Officer Jones, went in search of Garcia's automobile and they found it about one-half block from Garcia's house. In the automobile were appellant and Richard Ingle. Officer Daulton had knowledge that the appellant was a known peddler or user of marijuana. Appellant and Ingle were ordered out of the car by the officers, placed under arrest and searched. The search of appellant produced 12 marijuana cigarettes which were taken from his person. A partly-smoked marijuana cigarette and a coin purse with several $1 bills in it were also found on appellant. The search of Ingle's person produced $20 in denominations of two $5 bills and ten $1 bills. These were identified as the same bills from which Inspector Shoemaker had recorded the serial numbers and which had been marked with green fluorescent crayon and orange fluorescent powder. Appellant and defendant Ingle were checked under an ultraviolet light immediately after arrest and both were found to have orange fluorescent powder on their hands. Appellant had orange fluorescent powder on the thumb and index finger of each hand and the inside of his coin purse contained orange fluorescent powder. One of the dollar bills found in the appellant's coin purse was found to have green fluorescent powder on it. This bill, however, apparently belonged to appellant and was returned to him and not introduced in evidence. After appellant's arrest he admitted to Inspector Shoemaker that the marijuana cigarettes found in the search of his person belonged to him. At about 8:15 p. m., January 22, 1958, immediately following appellant's arrest, his home was searched by police officers pursuant to a search warrant issued for the premises. In the course of the search 20 marijuana cigarettes were found in a dresser drawer in the house. Appellant admitted to Inspector Shoemaker that the cigarettes found in the search of his home belonged to him. A certified copy of the Abstract of Judgment entered in the Superior Court of the State of California in and for the County of Madera was introduced into evidence and showed that appellant had been convicted on August 6, 1954, by a plea of guilty to the crime of possessing marijuana in violation of Section 11500 of the Health and Safety Code. Certified copies of prison records introduced in evidence showed that appellant had been received at San Quentin Prison on August 11, 1954, under commitment for the above offense; that on January 12, 1956, his term was fixed at four years; and that on February 4, 1957, he was released on parole. At the trial appellant did not testify nor did he adduce any evidence in his behalf to explain or deny the prosecution's evidence against him. Following a brief opening statement, he rested his case. To complete the picture it ought to be stated that Ingle, upon a search of his home, was found to have been in possession of enough marijuana to make about 250 cigarettes and in possession of the type of paper used to roll them.

We think the evidence sufficient to support the finding that appellant sold the cigarettes to Garcia. Before the last two sales were made to Garcia on January 22d, a familiar pattern of operation began to appear. The inspector would give money to Garcia with which he was to obtain marijuana cigarettes. Garcia's car, although not tailed, would, nevertheless, quickly appear at appellant's residence where it was seen by a spotter. Shortly thereafter, Garcia would return and hand the cigarettes to the inspector. On January 22d, the day of the sale for which appellant was being prosecuted, his car was again seen at appellant's home and shortly after Garcia's arrest was found by the officers close to Garcia's home with appellant and Ingle sitting in it, Ingle being in possession of the marked money.

We think the jury from the entire picture could draw the conclusion that Garcia was obtaining his supply from appellant and that either appellant obtained his supply from Ingle and his wife, Sondra, or that the supply was one being operated in common by Ingle, his wife, and appellant. The supply found on hand in the home of appellant was large enough to warrant an inference that he was, through Garcia and in common with the Ingles, engaged in sales. The large supply found in the home of the Ingles adds significance to the whole picture. The evidence was fully as strong as that held sufficient in People v. Lee, 9 Cal.App.2d 99, 48 P.2d 1003, and in Sauvain v. United States, 8 Cir., 31 F.2d 732, referred to in People v. Lee.

[5] Appellant next contends that the court erred in receiving in evidence People's Exhibits Nos. 6, 7 and 8, which were the cigarettes taken from the person of appellant when he was arrested, a partly smoked cigarette found in his watch pocket, and a small coin purse taken from appellant at the time of his arrest, which had in it a dollar bill with powder on it. Appellant contends that these three exhibits were erroneously admitted in evidence because, as he asserts, they were obtained in violation of his constitutional rights against unreasonable searches and seizures and were admitted without a sufficient foundation having been laid to establish the legality of appellant's arrest and search.

[6–10] A peace officer may make an arrest without a warrant when he has reasonable cause to believe that the person to be arrested has committed a felony whether or not a felony has in fact been committed. Penal Code, § 836. Reasonable cause has been defined as such a state of facts as would lead a man of ordinary care and prudence to believe or entertain an honest suspicion that the person in question is guilty of a crime. People v. Gusukuna, 152 Cal.App.2d 135, 312 P.2d 714. If an arrest without a warrant is based on reasonable cause and is, therefore, lawful, a search and seizure incident thereto would also be legal because based on reasonable cause. People v. Brown, 45 Cal.2d 640, 290 P.2d 528. We think the officers had reasonable cause to believe in the guilt of appellant when they arrested him and that they made a lawful search and seizure as an incident thereto which turned up the exhibits admitted into evidence. It follows that the court did not err in admitting those exhibits. Whether or not reasonable cause exists in a particular case must be decided on the facts and circumstances of that case. Officers Jones and Daulton of the Madera Police Department arrested appellant on the evening of

January 22, 1958, at about 8:15 p. m. Both officers had participated in the arrest of Garcia for an illegal sale of marijuana just prior to appellant's arrest. Officer Daulton testified that when Garcia was arrested he was not in his car nor was the car at his house. This fact prompted the officers to search the area for the automobile. When it was located about one-half block from Garcia's home, the appellant and defendant Richard Ingle were seated in it. Daulton testified that he had knowledge that the appellant was a known peddler or user of marijuana. The court had enough before it to justify the ruling that the arrest, and the incidental search and seizure were lawful.

[11, 12] Appellant contends that the trial court prejudicially erred in allowing respondent's witness, Officer Daulton, to testify in the jury's presence and over objection that he had knowledge that appellant was a known peddler or user of marijuana. Appellant, acting as his own counsel, took no objection to the testimony. Objection was taken by his codefendant, Ingle, likewise acting as his own attorney. One party cannot take advantage on appeal for the first time of objections raised only by a codefendant or his counsel where the record does not show any stipulation or understanding that one defendant should have the benefit of objections made by the other. People v. Duran, 57 Cal.App.2d 363, 134 P.2d 305. Furthermore, the objection made by Ingle was that the officer was testifying to hearsay. But the officer testified that he had knowledge that appellant was a known user or peddler. That was not necessarily hearsay nor was it given as such and the trial court pointed out this situation to Ingle on overruling his objection.

[13–15] Appellant next contends that the court erred in instructing the jury that the prosecution was not required to call all persons shown to be present or to have knowledge of matters on trial. He contends also that the trial court erred in failing to instruct the jury pursuant to Section 2061, Subdivisions 6 and 7, Code of Civil Procedure, that evidence is to be estimated not only by its intrinsic weight but also according to the evidence which it is in the power of one side to produce and of the other to contradict and, therefore, that if weaker and less satisfactory evidence is offered when it appears that stronger and more satisfactory was within the power of the party, the evidence offered should be viewed with distrust. As to the first of these two assignments the instruction given has been approved as a proper one to be given in criminal cases. People v. Reingold, 87 Cal.App.2d 382, 408, 197 P.2d 175. As to the second assignment it has been held that such an instruction may be given by the court to the jury on all proper occasions, but that in criminal cases the proper occasions are so few and the improper occasions are so many that it would be better if the instruction were given rarely, if at all. People v. Cuff, 122 Cal. 589, 55 P. 407; People v. Trinidad, 198 Cal. 728, 247 P. 907; People v. Carroll, 20 Cal.App. 41, 128 P. 4. This case illustrates how the instruction can be a two-edged sword, for appellant himself did not take the stand, although he certainly must have had knowldege of matters in issue. Had the court given the instruction, the probability is that the industry and learning of his appointed attorney on appeal would have brought up an argument that the giving of the instruction was error and cause for reversal since it pointed so clearly to the failure of appellant to take the stand. See, People v. Cuff, supra; People v. Trinidad, supra; People v. Carroll, supra.

[16] Appellant next contends that the trial court erred in ruling that respondent could argue to the jury matters which had been excluded from evidence and not admitted at the trial. This refers to the argument made by the prosecuting attorney with respect to there having been proved a common plan of appellant and Ingle to sell marijuana, using Garcia as an agent. The court had excluded from evidence certain marijuana cigarettes sold on January 2d, 15th and 17th, preceding the sales

of the 22d upon which the prosecutions were based. When this ruling was made, the court made it clear that it applied only to the physical evidence involved and did not preclude the prosecuting attorney from arguing to the jury the effect and value of the plan and design. (Appellant did not object to the admission of evidence of plan and design.) In his argument to the jury the prosecuting attorney referred to the testimony concerning the sales on January 2d, 15th and 17th, and argued that it was evidence of a common plan to sell marijuana. No objection was made to the argument, nor was any request made that the court admonish the jury to disregard it. Under such circumstances the point is not good on appeal. People v. Codina, 30 Cal.2d 356, 181 P.2d 881; People v. Sykes, 44 Cal.2d 166, 280 P.2d 769. Since the point has not been preserved for appeal, it is needless to say more.

[17–20] Finally, appellant assigns a group of errors and says that the cumulative effect thereof, coupled with other claims of error heretofore discussed, resulted in the whole on the denial to appellant of a fair trial. The first of the group is the refusal of the court to appoint advisory counsel for appellant, after relieving Mr. Barcroft, and the court's denial, as appellant puts it, of a continuance to enable him to seek other counsel. We have already discussed the matter of relieving Mr. Barcroft and have noted that no request for a continuance was in fact made. We know of no obligation resting on a court to appoint advisory counsel. Next, appellant challenges the court's conduct in discussion concerning the relief of appellant's court-appointed counsel and the undertaking of appellant's defense in propria persona in the presence and presumably in the hearing of the prospective jurors gathered in the court room. Specifically, the assignment refers to the trial court's language, implying, as appellant asserts the fact to be, that he was a "fool" to conduct his own defense. We have already discussed this point also. The last of the group refers to a statement made by the court that a police officer making an arrest does not have to state the reason for the arrest. This incident arose during Ingle's cross-examination of one of the arresting officers:

> "Q. How was I placed under arrest? Do you remember? A. We told you you were under arrest.
>
> "Q. Did you state for what we were under arrest? A. I don't recall whether we did or not.
>
> "Q. You don't have to, is that right? You don't have to tell the individual what he is under arrest for, is that right? * * *
>
> "The Court: He does not have to. He places you under arrest, and that is it. I don't think you have to give any reason for it. If it is asked, you tell them. I think he just pats a person on the shoulder at such time, without saying a word, and that would constitute an arrest."

It may be said that the court erred at this point since Section 841 of the Penal Code states in part:

> "The person making the arrest must inform the person to be arrested of the intention to arrest him, of the cause of the arrest, and the authority to make it, except when the person to be arrested is actually engaged in the commission of or an attempt to commit an offense, * * *."

At the moment Ingle and appellant were arrested the sale had been made, Garcia had departed with the narcotics purchased by him and appellant and Ingle were seated in Garcia's car with the money received, as hereinbefore related. We think no prejudice was suffered by the appellant.

The judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

169 Cal.App.2d 641

In the Matter of the ESTATE OF Victor Clyde MANLEY, also known as Victor C. Manley, Deceased.

Edwin W. WILSON, Appellant,

v.

Edith B. MANLEY, Administratrix and Respondent.

Civ. 5688.

District Court of Appeal, Fourth District, California.

April 15, 1959.

Proceedings on petition for instructions as to whether certain sum should be included in decedent's gross estate for purpose of computing statutory attorney fees. The Superior Court of Kern County, Gordon L. Howden, J., ordered the amount excluded from the estate for the purpose in question, and an appeal was taken. The District Court of Appeal, Shepard, J., held that where value of estate of deceased member of teachers' retirement system was more than $29,000, and estate was thus necessarily required to go through probate regardless of amount received from retirement system, statutory provision for payment directly to surviving next of kin was inapplicable; and even though a portion of death benefit payable was community property of decedent and his widow and she was therefore entitled to a share thereof, such a share was subject to course of administration and was to be considered in computing attorney fees.

Order reversed.

Husband and Wife 🔑276(5)
Schools and School Districts 🔑146

Where value of estate of deceased member of teachers' retirement system was more than $29,000, and estate was thus necessarily required to go through probate regardless of amount received from retirement system, statutory provision for payment directly to surviving next of kin was inapplicable; and even though a portion of death benefit payable was community property of decedent and his widow and she was therefore entitled to a share thereof, such a share was subject to course of administration and was to be considered in computing attorney fees. West's Ann. Education Code, §§ 14661, 14662; Probate Code, §§ 202, 300.

Edwin W. Wilson, Bakersfield, in pro. per.

No appearance for respondent.

SHEPARD, Justice.

This is an appeal on the judgment roll from an order in probate directing the exclusion from the gross estate accounted for of money received as death benefit from Teachers' Retirement System of the state of California.

From the record before us it appears that respondent is the administratrix with the will annexed of the above entitled estate, and appellant is acting as her attorney in said estate proceeding. Deceased was a member during his lifetime of the California State Teachers' Retirement System. In 1938, by written designation duly filed with the Retirement Board, he designated his then wife Mylla Manley as beneficiary of record for death benefits receivable from said State Retirement System. He was later divorced from the said Mylla and in 1944 married respondent Edith B. Manley, who remained his wife until his death in 1957, and who is now his widow and the administratrix with the will annexed of his estate. The designation of said former wife Mylla as beneficiary of benefits receivable from said California State Teachers' Retirement System was, for reasons not disclosed by the record, never changed and the name of said respondent Edith B. Manley was never at any time filed with said board by him and never appeared at any time as beneficiary. An investigation after his death disclosed that all of his contributions to the retirement system after his marriage to respondent in 1944 were made from community funds of himself and respondent.

As a result thereof it was determined that $8,636.94 of the death benefit payable was the community property of the deceased and said respondent Edith B. Manley, and that she is therefore entitled by reason of her community interest to one-half thereof or $4,318.47. Modern Woodmen of America v. Gray, 113 Cal.App. 729, 733 [4], 299 P. 754; Gettman v. City of Los Angeles, Dept. of Water & Power, 87 Cal. App.2d 862, 865 [1], 197 P.2d 817; McBride v. McBride, 11 Cal.App.2d 521, 524 [3], 54 P.2d 480. The retirement board upon that determination caused that amount to be paid directly to respondent as an individual. Thereupon, respondent petitioned the superior court for instructions as to whether or not said $4,318.47 should be included in or excluded from decedent's gross estate for the purpose of computing statutory attorney fees. The trial court, by written instructions responsive to said petition, ordered said amount excluded from the estate for the purpose of computation of attorney fees or otherwise. From that order appellant appeals.

Division 7 of the Education Code deals with school employees and Chapter 14 thereof deals with the State Teachers' Retirement System. All of the sections of the Education Code hereinafter referred to are a part of said Chapter 14. Section 14278 exempts all benefits under said chapter from state or local taxation, including inheritance tax. Section 14575 provides that upon receipt of proof of a member's death certain benefits "shall be paid to such beneficiary as he has nominated by written designation duly filed with the Retirement Board." Section 14661 provides "Whenever nomination of a beneficiary is authorized by this chapter, and no beneficiary has been nominated, the estate of the person authorized to make the nomination shall be the beneficiary." Section 14662 provides "If the estate is the beneficiary, and if the estate need not be probated except for the payments due from the Retirement System, all of the amount due, including retirement allowances accrued but not received prior to death, shall be paid directly without probate to the surviving next of kin of the deceased, * * *."

From the record before us it appears that the total value of the whole estate, inventoried for probate, is in the amount of $29,050.05. It is therefore apparent that the estate was necessarily required to go through probate regardless of the amount received from the retirement system. Since this is true, the provision of said Section 14662 for payment directly to the surviving next of kin does not apply, and the amount thus received should have been paid directly into the estate of the deceased and not to Edith B. Manley as an individual. She received this money solely by reason of her community interest therein and it is clearly subject to the course of administration. Section 202 of the Probate Code provides that community property passing by reason of the husband's death "is subject to * * * administration and disposal under the provisions of Division 3 of this code." Probate Code Section 300 (a part of Division 3) provides that when a person dies all of his property shall be subject to the possession of the executor and to the control of the court for administration and shall be chargeable to the expense of administrating the estate.

The mere fact that the benefits from the teachers' retirement fund are not subject to creditor's processes nor to state or local taxes would not change this picture for there are many other expenses of administration which could properly be chargeable to it, among which is the family allowance. In re Estate of Coffee, 19 Cal.2d 248, 120 P.2d 661.

The wife's share of community property is properly considered in computing fees. In re Estate of Phillips, 123 Cal.App.2d 570, 574 [1b], 266 P.2d 954; In re Estate of Algee, 158 Cal.App.2d 691, 696 [2], 323 P.2d 221. From the foregoing we must necessarily conclude that the court's order excluding from the gross estate said amount of $4,318.47 received from the retirement system is erroneous.

The order is reversed.

GRIFFIN, P. J., and MUSSELL, J., concur.

169 Cal.App.2d 383

William R. DICKENS and Rose Dickens, Plaintiffs and Respondents,

v.

Chester R. BUNKER, dba Bunker Land Company, Lester V. Peterman and Does I to V, Inclusive, Defendants.

Lester V. Peterman, Appellant.

Gilbert COTA and Lucy A. Cota, Plaintiffs and Respondents,

v.

Chester R. BUNKER, dba Bunker Land Company, Lester V. Peterman and Does I to V, Inclusive, Defendants.

Lester V. Peterman, Appellant.

Civ. 23468, 23469.

District Court of Appeal, Second District, Division 2, California.

April 6, 1959.

Rehearing Denied May 1, 1959.

Hearing Denied June 3, 1959.

Actions for specific performance of two contracts for sale of two lots. The Superior Court, Los Angeles County, Roger Alton Pfaff, J., entered judgments in favor of plaintiffs and defendant-record owner of the realty appealed. The District Court of Appeal, Herndon, J., held that evidence was insufficient to establish that defendant-record owner of land who entered into an agreement with a purchaser to sell him a subdivision, including lots in question, for a certain sum payable in installments, made such purchaser record owner's agent, or that record owner gave purchaser ostensible authority to act as owner's agent in the sale of such lots, and therefore, owner, after default by purchaser on his agreement to purchase the subdivision was not bound by contracts purchaser had entered into for sale of specific lots therein.

Judgments reversed.

1. Principal and Agent 🔑99

The doctrine of ostensible authority is a specific application of the more general doctrine of estoppel.

2. Principal and Agent 🔑99

The essential elements of the doctrine of ostensible authority are representations by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from such reliance.

3. Principal and Agent 🔑22(1)

Statement of installment purchaser of a tract of land as to his authority to act on behalf of vendor could not be utilized to support finding of installment purchaser's ostensible authority to act as vendor's agent.

4. Principal and Agent 🔑99

Ostensible authority can be created only by the acts or declarations of the principal, and not by those of the agent.

5. Principal and Agent 🔑99

A belief that an agent has authority, founded on the agent's statement alone, is not sufficient, for a party has no right to take an agent's word for the existence of his authority.

6. Principal and Agent 🔑23(1)

In actions for owner's specific performance of two contracts for sale of two lots, evidence was insufficient to establish that record owner of land who entered into an agreement with a purchaser to sell him a subdivision, including lots in question, for a certain sum payable in installments, made such purchaser owner's agent, or that owner gave purchaser ostensible authority to act as owner's agent in the sale of such lots.

7. Vendor and Purchaser 🔑215

Where purchaser of a subdivision was not owner's agent for purpose of sale of lots from the subdivision, nor did owner give such purchaser ostensible authority to act as owner's agent in sale of such lots, owner, after default by purchaser under the agreement to purchase the subdivision, was not bound by contracts purchaser had entered into for sale of specific lots therein.

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Wallace J. Manley, Pasadena, for appellant.

Wallace R. Vernoff, Pasadena, for respondents.

HERNDON, Justice.

The two judgments here presented for review are identical in form and were rendered in companion cases, which were consolidated for purposes of trial. These judgments command appellant Lester V. Peterman specifically to perform certain contracts for the sale of land by executing deeds conveying the described parcels to respondents. The basic question is whether the evidence is sufficient to support the trial court's finding that one Chester A. Bunker acted as appellant's ostensible agent in entering into the contracts and in collecting from respondents the purchase money payments made pursuant thereto.

Under a written agreement dated September 1, 1947, Peterman agreed to sell to Bunker certain described tracts of land located in San Bernardino County. It was recited that Peterman recently had subdivided these tracts, one of which included the three lots here involved. By the terms of the agreement, Bunker agreed to pay Peterman a total purchase price of $58,140 in installments of $500 per month commencing on October 1, 1947, and continuing thereafter until the full amount was paid. The agreement also provided that so long as the buyer was not in default, the seller would be obligated to pay all taxes and assessments. The agreement incorporated a schedule of release prices for the lots and provided that the buyer should have the privilege at any time of using as a credit against the release price or prices of any lot or lots a sum equivalent to 90% of all payments theretofore made by the buyer on account of the purchase price. Upon receipt by the seller of notice declaring the buyer's election to procure the release of any lot or lots, the seller agreed to convey to the buyer or its nominee or nominees the lot or lots designated for release. The agreement also obligated Bunker to supply Peterman with a written statement describing each lot sold during the preceding month with the name and address of the purchaser thereof. The concluding paragraph provided "[t]hat the parties hereto agree that their relationship under this agreement shall be that of seller and buyer and that nothing herein contained shall be deemed or interpreted to create the relationship of principal and agent, employer and employee or of co-partners to exist between them."

In September of 1947 appellant filed with the Division of Real Estate of the State of California a notice of intention to subdivide and subdivision questionnaire in connection with these tracts, together with a copy of the Peterman-Bunker agreement above mentioned. Thereafter, the Real Estate Commissioner issued a report in accordance with section 11018 of the Business and Professions Code containing among other things the following statements: "Information furnished this Division shows title vested in Lester V. Peterman * * * A contract has been entered into between Lester Peterman and Bunker Land Company whereby the latter is buying the entire tract. Adequate provision is made for the release of any lot at any time under the terms of the contract."

Respondents purchased their respective lots from Bunker pursuant to written contracts dated August 11, 1952. These contracts called for payment of the respective purchase prices in monthly installments and entitled respondents to good and sufficient conveyances from Bunker upon complete performance. The buyers agreed to pay in addition to the specified purchase price all taxes and assessments assessed or levied after the date of the contracts. It appears that tax statements of the County of San

Bernardino for the 1953 taxes on the lots here involved were originally mailed to Peterman who testified that he pencilled in the names and addresses of respondents on the tax bills and forwarded them to the buyers.

Respondent Gilbert Cota testified that when he received the 1953 tax bill on the lot he was purchasing, he observed a stamped notation indicating that there had been a sale to the state. Thereupon, he and one John Deiro went to appellant's Pasadena law office to inquire about the situation. Apparently, Deiro also was a purchaser in the tract and likewise had received a tax bill bearing the same notation. When Deiro and Cota stated that they had purchased their lots and inquired about the notations on the tax bills, appellant told them that they would "have to see Mr. Bunker, that he takes care of those things".

Respondents thereafter paid the taxes on their respective lots for 1953 and subsequent years. They continued to pay the monthly installments on their purchase contracts to Bunker as they had done from the beginning. When their final payments were made in 1956, respondents received letters of acknowledgement from Bunker promising prompt delivery of deeds. When the promised deeds were not forthcoming, respondents made demand upon appellant. His refusal to recognize the Bunker contracts or to deliver deeds as demanded was followed by commencement of the instant actions.

Appellant testified that in 1953 he terminated his agreement with Bunker. When asked how the agreement was terminated, he replied: "Well, I sent them a letter that I wouldn't recognize any deal or any contract that they might make in reference to the sale of any lots, but that I would honor any sale that had been made prior to that time." The sales to respondents were made prior to the alleged termination of Bunker's contract and the record reveals no evidence that appellant ever notified respondents of such termination.

The court found that Bunker was "* * * acting as the ostensible agent of defendant Lester V. Peterman * * * [and] * * * the agency relationship was created by the words, acts, and conduct of * * * Peterman, * * *" But this finding is not sustained by the evidence. Respondents do not contend that Bunker was the actual agent of Peterman (Civil Code, § 2316) and the conduct of appellant in the case at bar, as reflected in our comprehensive statement of the case, was insufficient to justify the finding of the court as to ostensible authority. The record is devoid of evidence that *appellant* intentionally, or by want of ordinary care, or in any manner, caused or allowed respondents to believe that Bunker possessed authority to act as appellant's agent. Hall v. Remp, 73 Cal.App.2d 377, 380, 166 P.2d 372; Civil Code, § 2317.[1]

Assuming that appellant is chargeable with the statements in the report of the Real Estate Commissioner, nothing in that report indicates that Bunker was the agent of appellant. Indeed, that report indicates that the relationship of Peterman and Bunker was that of seller and buyer, a relationship logically inconsistent with that of principal and agent. Cf. Beyerle v. California Surety Co., 120 Cal.App. 236, 7 P.2d 1034.

The printed forms which Bunker employed as contracts of sale include on the reverse thereof a number of detailed restrictive covenants on the subject property, which respondent argues indicate an agency relationship. This printed material throughout refers to and identifies Peterman as the owner and subdivider of the subject property and the Bunker Land Company as a firm selling land in the tract, through Chester A. Bunker, identified as the corporation's president. Like the Real Estate Commissioner's report, discussed supra, the printed material to which respondents refer contains nothing which reasonably would suggest to a prospective buyer that Bunker was appellant's agent or had any rights other than the rights of a purchaser under a contract of sale. Finally, appellant's conversation with Cota and Deiro some months after the respondents had contracted with Bunker gives rise to no inference that Bunker had authority to bind appellant at the time the contracts were executed. It related exclusively to the payment of taxes which respondents were required to pay under their contract with Bunker. Appellant was obligated to pay the taxes under his contract with Bunker only so long as the latter was not in default. It is reasonably clear from the record that Bunker was in default in 1953.

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[1] § 2317. *"Ostensible authority defined* Ostensible Authority, What. Ostensible authority is such as a principal, intentionally or by want of ordinary care, causes or allows a third person to believe the agent to possess."

[1] The doctrine of ostensible authority is a specific application of the more general doctrine of estoppel. Cf. Johnson v. Schimpf, 197 Cal. 43, 239 P. 401; see 1 Restatement of Agency 2d, § 8, comment d. As stated in 2 Cal.Jur.2d 695, § 48: "Despite dissimilarities in the language used to express the doctrines of ostensible authority and estoppel, however, they appear to be sufficiently alike to indicate that the doctrine of ostensible authority is a particularized application of the broader doctrine of estoppel to the facts of the ordinary agency transaction, and is, for all practical purposes, the same as authority by estoppel. This is substantiated by the requirement that the facts must raise an estoppel before recovery on the theory of ostensible authority is permitted."

In Marks v. Bunker, 165 Cal.App.2d 695, 332 P.2d 340, on facts which are virtually identical with those before us, another purchaser of a lot in the subject tract proceeded against Bunker and appellant Peterman on a somewhat different theory. The trial court in that case had ordered appellant Peterman to perform on a theory that he "* * * was estopped 'from asserting or otherwise utilizing his pure record ownership' against the plaintiff 'to defeat her claim * * * to ownership of said real property.'" In reversing the judgment and in rejecting the buyer's theory that Peterman was somehow culpable in failing to supervise Bunker's activities, the appellate court observed: "The defendant Peterman was not charged with the duty of supervising Bunker's sales activities, and his failure to do so did not give rise to a charge of negligence against him. Nor under the circumstances, was he required to seek out the plaintiff and warn her of possible injury in the event her seller, Bunker, did not make his payments under the subdivision sale agreement and obtain a release as therein provided."

[2-7] The essential elements of the doctrine of ostensible authority are: representations by the principal, justifiable reliance thereon by the third party, and change of position or injury resulting from such reliance. Hobart v. Hobart Estate Co., 26 Cal.2d 412, 451-452, 159 P.2d 958; Ernst v. Searle, 218 Cal. 233, 237, 22 P.2d 715. The statements of Bunker as to his authority to act on behalf of Peterman cannot be utilized to support the finding of ostensible authority. "[I]t is established that ostensible authority can be created only by the acts or declarations of the principal, not by those of the agent, and this is implied in the code definition of ostensible agency. A belief that the agent has authority, founded on the agent's statement alone, is not sufficient, for a party has no right to take an agent's word for the existence of his authority." Morse v. Pacific Gas & Elec. Co., 152 Cal.App.2d 854, 857, 314 P.2d 192, 194; see 2 Cal.Jur.2d 698, § 50. In the instant case there is no evidence of acts of appellant Peterman sufficient to support the finding of ostensible authority. See Bernstine v. Jones, 108 Cal.App.2d 135, 238 P.2d 18.

Each judgment is reversed.

FOX, P. J., and ASHBURN, J., concur.

169 Cal.App.2d 446

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert Angelo TORRES, Jr., Defendant and Appellant.

Cr. 2887.

District Court of Appeal, Third District, California.

April 8, 1959.

Hearing Denied June 3, 1959.

Defendant was convicted of an offense and from a judgment of the Superior Court, Humboldt County, D. H. Wilkinson, J., following a plea of guilty for one count, the dismissal of a second count, and certification of the cause to the Superior Court, the defendant appealed. The District Court of Appeal, Van Dyke, P. J., held that where accused's motion to withdraw plea of guilty was predicated on sole statement of his counsel that county detective promised counsel "a consideration" if accused submitted a guilty plea, and such alleged "consideration" was a promise of a jail sentence in lieu of a prison term, denial of such motion was not an abuse of discretion.

Affirmed.

1. Criminal Law ⚷274, 1149

An accused who seeks to set aside a plea of guilty must show good cause therefor and granting or denial of such an application rests in sound discretion of trial judge, whose decision will not be disturbed on appeal unless an abuse of that discretion is clearly shown.

2. Criminal Law ⚷274

Where accused's motion to withdraw plea of guilty was predicated on sole statement of his counsel that county detective promised counsel "a consideration" if accused submitted a guilty plea, and such alleged "consideration" was a promise of a jail sentence in lieu of a prison term, denial of such motion was not an abuse of discretion.

Burton T. Bost, Orangevale, for appellant.

The Attorney General, by Lloyd Hinkleman, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment of the Humboldt County Superior Court, following a plea of guilty to one count of a complaint, a dismissal of a second count, and the certification of the cause to the superior court for further proceedings.

Appellant had been represented in the justice's court by the public defender and when he appeared in the superior court, pursuant to the certificate, the public defender's appointment was continued. The court inquired if, as represented by the record before it, the defendant's plea of guilty had been entered in the justice's court and was assured by defendant's counsel that the record was correct. The matter was then referred to the probation officer for a report and further proceedings were set for a later date. On the date set, the following occurred:

> "Mr. Monette [Counsel for Defendant]: * * * At this time due to the following circumstances I wish to make a motion to have this referred back to the Justice Court for the purpose of changing his plea. The day before the preliminary was set I was called and notified by the County Detective that he wished to plead, and I said I advised him not to do that, to go ahead with the preliminary, but they said they were going to bring him down there, and 'You bring him down there,' and I said, 'Is there going to be any consideration for this,' and I was promised a consideration, which, according to the Probation Officer's report, according to Mr. Hammond [Humboldt County District Attorney], that I haven't received. In addition to that, before I ever looked at this Probation Officer's report I was contacted by the defendant and he said that now he had found his wits and that he had—he would follow my advice in the matter and desired to move this Court to refer the matter back to

the Justice Court for change of plea, and I so make the motion.

"Mr. Hammond: May it please your Honor, for the purpose of the record, I wish to state that this defendant was in the court at one time for the purpose of making a plea. At that time the Public Defender asked me if I would change that to 499–B. [Penal Code.] I informed him at that time I would not, I would not consider it, and I walked out of court. He was returned then again on another day—I think it was a day subsequent, next day or the second day following—at which time this plea was entered. I made no representation to Mr. Torres or anybody else as to what the results would be. I have never made representations to anyone as to what the results would be if they pleaded to any particular charge. That's a matter and function that's solely the function of the Court, and I don't intend to infringe upon the jurisdiction of the Court. I wish to make that a matter of record, your Honor.

"Mr. Monette: I wasn't referring to Mr. Hammond. He wasn't there when the man made his plea, and when he was brought back. Every man is entitled to his day in court, especially when—and we make that motion.

"The Court: The motion will be denied."

[1, 2] The sole contention on appeal is that the trial court erred in refusing to permit the withdrawal of appellant's plea of guilty. It is settled that an accused who seeks to set aside a plea of guilty must show good cause therefor and that the granting or denial of such an application rests in the sound discretion of the trial judge, whose decision will not be disturbed on appeal unless an abuse of that discretion is clearly shown. People v. Ottenstror, 127 Cal. App.2d 104, 109, 273 P.2d 289. Appellant's motion to withdraw the plea of guilty was predicated on the sole statement of his counsel that the county detective promised appellant's counsel "a consideration" if appellant submitted a guilty plea. The alleged "consideration" was a promise by the county detective of a jail sentence in lieu of a prison term. Defense counsel asserted he was not charging that the promise was made by the district attorney or that the court had been contacted. Nothing more in the nature of evidence was advanced and the showing having been apparently completed, the trial court denied the motion upon the merits. The record treated most generously in favor of the appellant discloses no more than a situation where there is substantial support for the order of the trial court.

No cause appears for reversal of the judgment appealed from, and it is accordingly affirmed.

SCHOTTKY, J., and WARNE, J. pro tem., concur.

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169 Cal.App.2d 519

Myrtle McGINNIS, also known as Myrtle Ateman, Plaintiff and Respondent,

v.

Anna L. MONJOY, Individually, and Anna L. Monjoy, Executrix of the Estate of Robert B. Monjoy, deceased, County of Los Angeles, a body corporate and politic, et al., Defendants and Appellant.

Civ. 23720.

District Court of Appeal, Second District, Division 1, California.

April 10, 1959.

Action for recovery of possession of and title to realty. The Superior Court entered decree quieting title in the plaintiff. The defendants appealed. The plaintiff moved to dismiss the appeal. The District Court of Appeal, White, P. J., held that where more than 7 months had elapsed and appellants had not yet paid required fee for reporter's transcript, and appellants had ordered preparation of clerk's transcript but had not asked for inclusion therein of such necessary and important documents as complaint and answer, cross complaint and answer, findings of fact, conclusions of law, or even the decree quieting title, and the action had been before the courts for two and a half years, during all of which time the successful respondent had been out of possession, and respondent asserted that there had been no negotiations for settlement while appeal was pending, appeal would be dismissed for failure to complete record on appeal as provided for in the rules on appeal.

Appeal dismissed.

1. Appeal and Error ⚷611

Where more than 7 months had elapsed and appellants had not yet paid required fee for reporter's transcript, and appellants had ordered preparation of clerk's transcript but had not asked for inclusion therein of such necessary and important documents as complaint and answer, cross complaint and answer, findings of fact, conclusions of law, or even the decree quieting title in respondent, and action was for recovery and possession of and title to realty and had been before the courts for two and a half years, during all of which time the successful respondent had been out of possession, and respondent asserted that there had been no negotiations for settlement while the appeal was pending, the appeal would be dismissed for failure to complete record on appeal as provided for in the rules on appeal. West's Ann.Rules on Appeal, rules 4(a), 5, 10(a), 53(b).

2. Appeal and Error ⚷356

The court rules requiring prompt action on the part of appellants to perfect and prosecute their appeals with diligence should be strictly complied with in every respect. West's Ann.Rules on Appeal, rules 4(a), 5.

3. Appeal and Error ⚷356

It is the purpose of the law to expedite appeals in the interest of justice.

4. Appeal and Error ⚷784

While it is the policy of the law to hear all appeals on their merits, if it is reasonably possible to do so, nevertheless, the rules of procedure governing appeals are essential to the orderly handling and dispatch of the court's business, and such rules confer rights upon the adverse party which the latter may enforce. West's Ann. Rules on Appeal, rules 10(a), 53(b).

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Earl C. Broady, Los Angeles, for appellant.

Moore & Moore, Bender Moore, Los Angeles, for respondent.

WHITE, Presiding Justice.

[1] By this proceeding respondent seeks an order dismissing the appeal herein on the ground that appellant has failed to comply with the rules on appeal in that no record on appeal has been completed as provided for in Rule 10(a) of the Rules on Appeal.

The aforesaid rule provides in part as follows: "* * * If the appellant shall fail to perform any act necessary to procure the filing of the record or to pay the filing fee within the time allowed therefor or within any valid extension of that time, and such failure is the fault of the appellant and not of any court officer or any other party, the appeal may be dismissed on motion of the respondent or on the reviewing court's own motion."

The Certificate of the Clerk of the Superior Court reflects that this is an action for declaratory relief to cancel a deed and to quiet title to real property and was filed March 19, 1957. The relief prayed for is that the court declare that the described deed from Robert B. Monjoy to Robert B. Monjoy and Anna L. Monjoy, is void and of no effect; that by virtue of the death of Robert B. Monjoy plaintiff acquired all of his interest in the described property as surviving join tenant; that the court quiet title to said described real property in plaintiff against all claims of the defendants; that the court order defendant, Anna L. Monjoy, to deliver over possession of said described real property to plaintiff and account for all rents and profits received therefrom since the death of Robert B. Monjoy.

That a cross-complaint to quiet title was filed March 29, 1957, in which the relief prayed for was that plaintiff be required to set forth the nature of her claim to said property; that all adverse claims of plaintiff may be determined by decree of the court; that if by said decree it be adjudged that defendant is the owner of said undivided one-half interest in said premises and that plaintiff has no interest or estate whatever in said interest in said property, that plaintiff be forever debarred from asserting any claim whatever to said land adverse to defendant.

A decree quieting title was entered June 26, 1958, that plaintiff, Myrtle McGinnis is the owner of all the real property described in said judgment, and that the claims of defendant Anna L. Monjoy individually, and any claims of the Estate of Robert B. Monjoy, deceased, are without any right whatsoever, and that defendant Anna L. Monjoy, forthwith deliver over possession of the described real property to plaintiff; that defendant County of Los Angeles has a lien against said property in the sum of $445.18, and that said defendant county has a further lien against said property for any unpaid taxes thereon.

Notice of entry of judgment was duly served upon defendants and filed July 1, 1958. A notice of appeal to this court was filed July 3, 1958, and notice to the clerk that a transcript on appeal be made up and prepared was filed July 3, 1958. That pursuant to rule 4(a) of Rules on Appeal, a copy of the aforesaid notice was mailed July 16, 1958 to the court reporter.

That pursuant to Rule 4(a) of Rules on Appeal, the clerk's office received a copy of a letter dated July 22, 1958, addressed to Earl C. Broady, attorney for appellant, from Shirley O'Brien, court reporter, designating the estimated cost ($50) for the preparation of said reporter's transcript on appeal. That to date no arrangement with the clerk for the payment thereof has been made, and that no waiver of deposit has been filed by the reporter.

That pursuant to the provisions of Rule 5 of the Rules on Appeal adopted by the Judicial Council a notice by the clerk of the superior court designating the estimated cost for the preparation of the clerk's transcript was mailed July 28, 1958, to the attorney representing the appellant, to wit: Earl C. Broady. That thereafter on August 13, 1958, the estimated amount of $10.65 was received in this office from Earl C. Broady, attorney for the appellant, for the preparation of said clerk's transcript. That a clerk's transcript was filed September 12, 1958, but no reporter's transcript has been filed.

In response to said notice of motion to dismiss the appeal, appellant has filed an application for relief from default in failing to deposit with said clerk the estimated cost of preparing a reporter's transcript. In support of her application for relief appellant sets forth that on July 3, 1958, the date upon which her notice of appeal was filed, she filed with the clerk a notice to prepare a record on appeal, but that such notice was incomplete in that it failed to designate all of the records that should have been included therein, viz., complaint, answer to complaint, cross-complaint, answer thereto, pre-trial conference order, certain minute orders, findings of fact and conclusions of law, and the decree quieting title.

Appellant's counsel then avers that before he "could prepare an amended notice for a Clerk's Transcript, he was advised by a letter from the defendant (appellant) dated July 3, 1958 that she wished to hold in abeyance any further action in the appeal pending negotiations for the purchase by defendant of plaintiff's interest in the real property which is involved in this appeal.

"That in reliance on defendant's advice affiant did not prepare and file the amended notice to prepare a clerk's transcript, within the ten days prescribed by Rule 5; however, the cost of preparing the incomplete clerk's transcript on appeal was paid.

"That on July 22, 1958, affiant received a notice from Shirley O'Brien, court reporter, advising him of the estimate for preparation of the reporter's transcript, but in reliance on defendant's advice affiant did not deposit the costs for said transcript within the time requested by Rule 4 of Rules on Appeal.

"That thereafter negotiations continued between plaintiff and defendant relative to the purchase by defendant of said property, but finally plaintiff refused to sell said property to defendant on the terms that had been originally contemplated.

"That thereupon defendant advised affiant that she wished to continue with her appeal, but by that time defendant was already in default in the matters above mentioned.

"That affiant believes the appeal is meritorious and that defendant should have her day in court and that the matter be decided on the merits; that the reason for defendant's delay in prosecuting the appeal was due to her attempt and desire to settle the matter amicably without further court action."

After oral argument and a careful consideration of the circumstances surrounding the motion to dismiss the appeal herein, we have concluded that the discretion which is vested in this court on such motions should not be exercised in favor of appellant. Rule 53(b), Rules on Appeal.

[2-4] It has often been said by the courts of this state that the court rules requiring prompt action on the part of appellants to perfect and prosecute their appeals with diligence should be strictly complied with in every respect. That it is the purpose of the law to expedite appeals in the interest of justice. While it has also been frequently said by our courts that it is the policy of the law to hear all appeals on their merits, if it is reasonably possible to do so, nevertheless, the rules of procedure governing appeals are essential to the orderly handling and dispatch of the courts' business, and these rules confer rights upon the adverse party which the latter may enforce.

In the case now engaging our attention more than seven months have elapsed and appellants have not yet paid the requisite fee for a reporter's transcript and they admit that in the clerk's transcript which they ordered prepared they did not ask for the inclusion therein of such necessary and important documents as the complaint, answer thereto, cross-complaint, answer to the same, Findings of Fact, Conclusions of Law, or even the decree quieting title, from the rendition of which they filed this appeal. As asserted by respondent at the oral argument, this is an action for the recovery of possession of and title to real property and has now been before the courts for two and one-half years, during all of which time respondent has been out of possession.

Appellants urge that the lack of diligence upon their part is wholly attributable to the fact that their counsel believed they were attempting to settle the matter amicably and without further litigation by purchasing respondent's interest in the property involved. However, any such negotiations were denied by respondent's counsel who states that "She was given the entire real property, and to my knowledge there was absolutely no negotiations for settlement. It is merely a case where I allowed months and months to go by before I filed the application (motion to dismiss the appeal), to give them (appellants) a chance to get out."

Under the present circumstances we are satisfied that a failure to grant respondent's motion, if not a complete abuse of discretion, would at least constitute an unwarranted disregard of the rule here in point, and would require us to totally disregard the rights and equities of respondent thereunder.

The appeal is dismissed.

FOURT and LILLIE, JJ., concur.

169 Cal.App.2d 628

In the Matter of the ESTATE of Lulu DOLAN, also known as Lulu E. Dolan and as Lulu Elizabeth Dolan, Deceased.

Mae Maria WILSON, Petitioner and Appellant,

v.

Bertha E. SCHNAUSS, Administratrix, and Ruby E. Lovett, heirs at law, Respondents.

Civ. 9439.

District Court of Appeal, Third District, California.

April 15, 1959.

Proceeding, brought by natural sister of predeceased husband claiming right to share in his wife's estate with wife's sisters. The Superior Court, Sacramento County, Jay L. Henry, J., rendered judgment adverse to petitioner, and she appealed. The District Court of Appeal, Peek, J., held that after 1955 amendment, which was subsequent to husband's adoption, his natural sister was no longer related to him, for purpose of succession, and that when his wife died, in 1956, his natural sister was not entitled to share in his wife's estate, even though a portion of property in his wife's estate was formerly community property of herself and decedent.

Affirmed.

Adoption ⚿**23**

After 1955 amendment, which was subsequent to husband's adoption, his natural sister was no longer related to him for purpose of succession, and when his wife died in 1956, his natural sister was not entitled to share in his wife's estate, even though a portion of property in his wife's estate was formerly community property of herself and her predeceased husband. West's Ann.Prob. Code, §§ 228, 257.

◆

Roddan & Doyle, Oakland, for appellants.

Downey, Brand, Seymour & Rohwer, Sacramento, for respondents.

PEEK, Justice.

Frank E. Dolan, predeceased husband of Lulu E. Dolan, was an adopted person. Lulu died February 17, 1956. A portion of the property in her estate was formerly the community property of herself and Frank. The petitioner, Mae Maria Wilson, is Frank's natural sister. By this proceeding she seeks to share in Lulu's estate with the respondents, Bertha E. Schnauss and Ruby E. Lovett, the sisters of Lulu.

Prior to 1955, section 257 of the Probate Code provided for reciprocal succession between the adopted child and his adoptive parents and eliminated any such right as between the child and his natural parents. By the 1955 amendment to said section, an adoptive child was deemed a descendant of the adoptive parents for all purposes. The section retained the same restrictive provision as between the adoptive child and the natural parents and added the provision "* * * nor does such adopted child succeed to the estate of a relative of the natural parent, nor does any relative of the natural parent succeed to the estate of an adopted child." The intent of the 1955 amendment would appear quite obvious. It corrected the inequities so well illustrated in Re Estate of Calhoun, 44 Cal. 2d 378, 282 P.2d 880, and placed the adoptive child upon a completely equal footing with a natural child of the adoptive parents insofar as rights of succession are concerned. And by the same token it completely removed the adopted child from his natural family so that he would no longer succeed to the estate of any of his collateral relatives, nor could they succeed to his estate.

The petitioner further argues in effect that even if section 257 be so construed, nevertheless she would take under the provisions of section 228 of the Probate Code. Such contention wholly ignores the obvious purpose of the 1955 amendment to section 257. As noted, by that amendment, following Frank's adoption she was no longer related to him for purposes of succession, and hence, being precluded by such amendment from establishing the necessary facts to bring her within section 228, she was not entitled to succeed to any portion of his estate.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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169 Cal.App.2d 630

Rowland F. SWEET, Plaintiff and Appellant,

v.

Harvey F. JOHNSON, Jr., Defendant and Respondent.

Civ. 9565.

District Court of Appeal, Third District, California.

April 15, 1959.

Order April 28, 1959

Action for breach of contract. The Superior Court, Sacramento County, Albert H. Mundt, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Warne, J. pro tem., held that since action was one wherein trial court had discretion with regard to permitting prevailing party to recover his costs, failure to award nominal damages to plaintiff would not require reversal.

Judgment conditionally affirmed.

1. Damages 🔑9

Failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from actual damage, and plaintiff is entitled to recover nominal damages for breach of contract even where he is unable to show that actual damage was inflicted upon him. West's Ann.Civ.Code, § 3360.

2. Damages 🔑8

The maxim that the law will not be concerned with trifles does not, ordinarily, apply to violation of a contractual right and, accordingly, nominal damage is presumed as a matter of law to stem merely from breach of contract, and damages may properly be awarded for violation of contractual right. West's Ann.Civ.Code, § 3360.

3. Appeal and Error 🔑1171(6)

As a general rule, failure to award nominal damages is not alone ground for reversal of judgment or for new trial, but there are exceptions applicable (1) where nominal damages would have carried costs and (2) where object of action was to determine some question of permanent right.

4. Appeal and Error 🔑1171(6)

Where action was one wherein trial court had discretion with regard to permitting prevailing party to recover his costs, failure to award nominal damages to plaintiff would not require reversal. West's Ann.Civ.Code, § 3360; West's Ann. Code Civ.Proc. § 1032.

5. Appeal and Error 🔑907(3)

On a clerk's transcript appeal, reviewing court must conclusively presume that evidence is ample to sustain findings, and that only questions presented are as to sufficiency of pleadings and whether findings support judgment.

◆

Kneeland H. Lobner, Sacramento, for appellant.

Dwyer, King, Price & Mering, Sacramento, for respondent.

WARNE, Justice pro tem.

This is a judgment roll appeal from a judgment in favor of defendant in an action to recover damages for breach of contract.

It appears that on February 13, 1956, plaintiff and defendant entered into two separate contracts, identical in form, covering the development of two parcels of real property. Under the terms of said contracts plaintiff agreed to subdivide the property, arrange for and supervise the construction of lot developments, provide residential plans, construct homes on each improved lot, and arrange for and supervise the selling of said homes. In addition, plaintiff agreed to arrange for the financing for improving the lots, the construction of the homes, and the sale of the mortgages. Defendant agreed to finance the subdivision of the property and the construction and sale of the homes. Said contracts further provided that the plaintiff's compensation was to be equal to one-half of the net profit realized from the development of the two parcels of real property.

It also appears from the findings "that at the time of the execution of the contracts, certain work had already been accomplished in connection with the subdivision of the [two tracts of land] * * * and that following the execution of said contracts plaintiff made an investigation to ascertain what steps had already been accomplished * * * with reference to completing the engineering work and preparing the final subdivision maps; that in addition, plaintiff made certain preliminary inquiries with reference to securing financing for the construction of the lot developments and the construction of the homes, securing water service for the properties and engaging a sales agency to handle the sale of the homes."

Prior to the completion of the engineering work, and before construction work had commenced, i. e., on May 13, 1956, defendant, without legal justification, breached said contracts, by notifying plaintiff in writing that he was cancelling the same because he could not afford to develop the property or enter into contracts to construct residences. The trial court found "that the evidence offered by plaintiff to establish that the properties would be subdivided and that the homes would be constructed and sold at a profit is uncertain, contingent and speculative"; and that "* * * there exists no operating experience which would permit a reasonable estimate of the income and expenses of the proposed development and thus there is no provable data upon which to base a determination of the prospective profits, if any, to be realized therefrom."

Although the trial court found that the two contracts were valid and that defendant had wrongfully breached them, it nevertheless concluded that plaintiff had not been damaged as a result of the breach of said contracts. Judgment was entered in favor of defendant and he was allowed his costs in the amount of $307.04.

[1, 2] Plaintiff first contends that the conclusion of law that plaintiff suffered no legal damage is erroneous and cannot be upheld, since an award of nominal damages should have been made in favor of appellant. This contention is well taken.

A plaintiff is entitled to recover nominal damages for the breach of a contract, despite inability to show that actual damage was inflicted upon him (Bromberg v. Signal Gasoline Corp., 130 Cal.App. 469, 20 P.2d 83), since the defendant's failure to perform a contractual duty is, in itself, a legal wrong that is fully distinct from the actual damages. The maxim that the law will not be concerned with trifles does not, ordinarily, apply to violation of a contractual right. Kenyon v. Western Union Tel. Co., 100 Cal. 454, 35 P. 75. Accordingly, nominal damages, which are presumed as a matter of law to stem merely from the breach of a contract (Ross v. Frank W. Dunne Co., 119 Cal.App.2d 690, 260 P.2d 104), may properly be awarded for the violation of such a right. Kenyon v. Western Union Tel. Co., supra. And, by statute, such is also the rule in California. Section 3360 of the Civil Code provides: "Where a breach of duty has caused no appreciable detriment to the party affected, he may yet recover nominal damages."

[3, 4] Recognizing these principles of law, defendant concedes that the failure of the trial court to award nominal damages by reason of his breach of the contracts constituted error. However, he takes the position that if plaintiff is to prevail on appeal he must show that an award of damages is necessary to conserve some permanent right, or that an award of nominal damages would carry costs.

While the general rule is that the failure to award nominal damages is not alone ground for reversal of a judgment or for a new trial (see Kenyon v. Western Union Tel. Co., supra; Strait v. Wilkins, 23 Cal. App. 774, 139 P. 911; Gray v. Southern Pacific Co., 21 Cal.App.2d 240, 247, 68 P.2d 1011; Keister v. O'Neil, 59 Cal.App.2d 428, 435, 138 P.2d 723), there are exceptions to the rule as stated in the Kenyon case at pages 458 and 459 of 100 Cal., at page 76 of 35 P.: "But where a judgment is erroneous only because it fails to give nominal damages it will not be reversed unless nominal damages in the given case would carry costs. Sutherland on Damages, § 11, and cases there cited. If, however, as said by the author just cited, the object of the action is to determine some question of permanent right, the fact that he can only recover nominal damages will not prevent a reversal."

There is no issue here involving any permanent right, hence the only question is: Would a judgment for nominal damages entitle plaintiff to costs?

Section 1032 of the Code of Civil Procedure, as amended (Stats.1957, c. 1172, p. 2464, sec. 1) provides that "In the superior court, except as otherwise expressly provided, costs are allowed of course: * * * to plaintiff upon a judgment in his favor: * * * in an action for the recovery of money or damages * * *" And in subdivision (d) it further provides that "in all actions, whether mentioned in this section or not, if the prevailing party recovers a judgment that could have been rendered in a court inferior in jurisdiction in the county or city and county, such prevailing party shall not recover costs unless the judge, who presided at the trial, or, in the event of his inability for any reason to act, some other judge of the court, in his discretion, makes an order, allowing costs or such part thereof as he deems proper." Thus there is no express provision either absolutely denying or allowing costs to the prevailing party in an action for the recovery of money or damages when the recovery could have been rendered in a court inferior in jurisdiction. Therefore, since such prevailing party shall only recover his costs, or a part thereof, when the court in its discretion so orders, it may not be said in the instant case that a judgment for nominal damages would have carried costs. It follows, therefore, that this action does not come within the above-mentioned exception to the general rule.

[5] Plaintiff also contends that the judgment should be reversed, as the trial court failed to consider that the required proof is less where the wrongdoer by his breach of the contract makes proof of actual damages impossible. He argues that because the trial court erred in failing to award nominal damages, it follows that the trial court also erred in considering the quantum of proof required to establish profits. This contention cannot be considered on this appeal since this is a clerk's transcript appeal. As stated in Kompf v. Morrison, 73 Cal.App.2d 284, 286, 166 P.2d 350, 352: "It is elementary and fundamental that on a clerk's transcript appeal the appellate court must conclusively presume that the evidence is ample to sustain the findings, and that the only questions presented are as to the sufficiency of the pleadings and whether the findings support the judgment. [Citing cases.]" We are bound by the finding that there was no evidence upon which to base a determination of the prospective profits. See also

Freeman v. Gray-Cowan, Inc., 219 Cal. 85, 25 P.2d 415. Hence in the instant case the presumption is that there was no evidence upon which to base a determination of the prospective profits.

Respondent concedes that had nominal damages been awarded to appellant, he, the appellant, would have been relieved of the payment of respondent's costs and clearly to that extent appellant has been prejudiced by the court's error. He has stated to this court that he is now willing to refund appellant the sum of $307.04, which represents appellant's costs.

We conclude that the judgment should be reversed, unless the defendant, within 15 days remits the sum of $307.04 which he has recovered for his costs, which being done, the judgment shall stand affirmed, proof of payment to be filed with this court, and it is so ordered. Each party is to bear his own costs on appeal.

VAN DYKE, P. J., and PEEK, J., concur.

By the Court. April 28, 1959

Counsel for appellant having acknowledged receipt of the sum of $307.04 the judgment is affirmed as set forth in the opinion of the court filed in this case on April 15, 1959.

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169 Cal.App.2d 554

PEOPLE of the State of California,
Plaintiff and Respondent,

v.

James R. WADE and Raymond French,
Defendants and Appellants.
Cr. 1504.

District Court of Appeal, Fourth District,
California.
April 10, 1959.

Defendants were convicted of robbery. The Superior Court, Orange County, Karl Lynn Davis, J., entered judgments and denied motions for new trial, and defendants appealed. The District Court of Appeal, Stone, J. pro tem., held that where there was sufficient evidence in addition to that of accomplice to warrant jury finding defendants guilty, failure of trial court to instruct jury regarding testimony of accomplice did not constitute prejudicial error.

Judgments affirmed and attempted appeals from nonexistent orders denying motions for new trial dismissed.

1. Criminal Law 🔑1182

Where defendant by his notice purported to appeal from order denying motion for new trial as well as the judgment of conviction, but record failed to reveal any such motion or order, defendant did not file a brief or any type of memorandum nor did he make any appearance subsequent to filing his notice of appeal, judgment would be affirmed and attempted appeal from nonexistent order denying motion for new trial would be dismissed. West's Ann. Pen.Code, § 1253.

2. Criminal Law 🔑742(2)

In prosecution for robbery, question whether woman who sat in automobile with one defendant while two other men committed robbery was an accomplice of defendants was for jury. West's Ann.Pen. Code, § 31.

3. Criminal Law 🔑824(7)

Fact that defendants did not offer any instruction regarding accomplices did not relieve court of duty to give such instructions sua sponte, even though question was one of fact for jury. West's Ann.Pen.Code, § 1111.

4. Criminal Law 🔑780(1)

It is incumbent upon court to instruct jury fully upon law in a criminal case, including instructions concerning law pertaining to accomplices and corroboration when applicable. West's Ann.Pen.Code, § 1111.

5. Criminal Law 🔑1173(2)

Omission to instruct jury concerning accomplices does not necessarily constitute reversible error if there is substantial evidence to support judgment other than, and in addition to, the testimony of the accomplice. West's Ann.Pen.Code, § 1111.

6. Criminal Law ⚿1173(2)

In prosecution for robbery, in view of fact that there was sufficient evidence in addition to that of an accomplice to warrant jury finding the defendants guilty, failure of trial court to instruct jury regarding testimony of accomplice did not constitute prejudicial error. West's Ann.Pen.Code, §§ 31, 211, 1111.

7. Robbery ⚿24(1)

Evidence sustained conviction for robbery. West's Ann.Pen.Code, § 211.

◆

Raymond French in pro. per. and Russell Behrens, Santa Ana, for appellant, French.

James R. Wade in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Philip C. Griffin, Deputy Atty. Gen., for respondent.

STONE, Justice pro tem.

An information was filed by the District Attorney of Orange county charging appellants with the crime of robbery, a violation of Penal Code, section 211. It was alleged that they used a loaded revolver to rob one Chester Holcomb of money. They entered pleas of not guilty and after a trial by jury each was found guilty as charged in the information. Each in propria persona filed a notice of appeal from the judgment and from an alleged order denying a new trial.

[1] Defendant Wade failed to take any steps to perfect his appeal. By his notice he purported to appeal from an order denying a motion for a new trial as well as the judgment, but a review of the record fails to reveal any such motion or order. He did not file a brief or any type of memorandum nor did he make any appearance subsequent to filing his notice of appeal. The court, having reviewed the record in this case, as will hereinafter appear, does, pursuant to Penal Code, section 1253, order the judgment affirmed as to defendant Wade and the attempted appeal from the nonexistent order denying a motion for a new trial dismissed.

The appellant French made a request in writing to be represented by counsel and the court appointed the attorney who had represented him in the trial court to represent him on this appeal. The attorney filed the following statement in lieu of a brief:

> "1. That he represented the said defendant and appellant, Raymond French at the trial of this action in the Superior Court of the State of California In and for the County of Orange;
>
> "2. That he is unable to conceive of any meritorious grounds whatever on which to appeal the said defendant's case to the above entitled Court, and that he so informed the said defendant and appellant, as will appear in a copy of a letter annexed hereto."

In response to the above statement of counsel the Attorney General filed a memorandum rather than a brief, by which he reviewed the record of the case and concluded that no reversible error had been committed.

From the record it appears that the two defendants, together with a third man and a woman named Dicea Woodward, drove to the scene of the robbery. Dicea sat in the front seat of the parked car with defendant Wade while two of the men walked up an alley to a service station where Chester Holcomb was on duty. The two men then robbed Chester Holcomb of a quantity of money. This occurred during the early morning hours and it is apparent Dicea sat in the car with Wade to allay the suspicions of the police or any curious passerby.

Aside from the testimony of Dicea the record reflects that a neighbor and two police officers overheard the defendants make plans to commit a robbery. They heard one of the men ask Dicea to sit in the car during the time the holdup was to be committed. The neighbor watched the defendants and their two companions leave the premises and observed that two of the men were carrying guns and that defendant Wade was wearing gloves. After the robbery had been committed, the defendants were arrested and they had in their possession two pairs of gloves, two chrome plated revolvers and two stockings, one with eye holes cut out, the other with worn or torn places for eye holes. The victim Holcomb identified the guns and he was able to describe in detail one on which the chrome had corroded or had been worn off the barrel. His description of the stocking masks and the gloves worn by the men who robbed him matched those found in defendants' possession. The money which defendants had at the time of their arrest matched the paper denominations of the money taken. Holcomb's only uncertainty was as to the amount of small silver. He matched by description the clothing defendants were wearing at the time of their arrest.

The record also reflects extrajudicial statements of an incriminating nature made by the defendants concerning which the jury was properly instructed.

[2] Dicea was called as a witness for the people and although she denied any intent to participate in the robbery, the jury could very well have found her to be an accomplice of the defendants. Penal Code, section 31, provides:

> "*Principals defined.* Who Are Principals. All persons concerned in the commission of a crime, whether it be felony or misdemeanor, and whether they directly commit the act constituting the offense, or aid and abet in its commission, or, not being present, have advised and encouraged its commission, * * * are principals in any crime so committed."

If from the facts the jury believed Dicea was a principal in the commission of the robbery then she would have been an accomplice of both defendants.

Penal Code, section 1111, provides:

> "A conviction can not be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof.
>
> "An accomplice is hereby defined as one who is liable to prosecution for the identical offense charged against the defendant on trial in the cause in which the testimony of the accomplice is given."

[3–5] It does not appear from the record that defendants offered any instructions regarding accomplices. This does not relieve the court of the duty to give such instructions sua sponte, even though the question is one of fact for the jury. It is incumbent upon the court to instruct a jury fully upon the law in a criminal case. This rule includes instructions concerning the law pertaining to accomplices and corroboration when applicable. People v. Warren, 16 Cal.2d 103, 117–119, 104 P.2d 1024; People v. Davis, 43 Cal.2d 661, 673, 276 P.2d 801. However, the omission to instruct a jury concerning accomplices does not necessarily constitute reversible error if there is substantial evidence to support the judgment other than, and in addition to, the testimony of the accomplice.

[6, 7] As indicated by the résumé of the facts hereinbefore related, there was sufficient evidence in addition to that of the accomplice to warrant the jury finding the defendants guilty. Consequently, the failure of the trial court to instruct the jury regarding the testimony of an accomplice did not constitute prejudicial error warranting a reversal of the judgment. People v. Robinson, 110 Cal.App.2d 415, 418, 242 P.2d 676; People v. Sourisseau, 62 Cal.App.2d 917, 931–932, 145 P.2d 916; People v. Davis, supra, 43 Cal.2d 661, 674, 276 P.2d 801.

The judgments are affirmed and the attempted appeals from the nonexistent orders denying motions for new trial are dismissed.

GRIFFIN, P. J., and SHEPARD, J., concur.

169 Cal.App.2d 583

William O. BECK and Florence Beck, husband and wife, Plaintiffs and Respondents,

v.

Myrtle E. COMBS, sued herein as Myrtle Broyles, Defendant and Appellant.

Myrtle E. COMBS, sued herein as Myrtle Broyles, Cross-Complainant,

v.

William O. BECK and Florence Beck, husband and wife, Cross-Defendants.

Civ. 9522.

District Court of Appeal, Third District, California.

April 13, 1959.

Action to quiet title. The Superior Court, Stanislaus County, H. L. Chamberlain, J., rendered judgment for plaintiffs, and defendant appealed. The District Court of Appeal, Schottky, J., held that where vendors would not have been entitled to quiet title to property sold to defendant under contract which provided for payments in installments at different times with deed to be made when whole was paid, or to sue for balance or declare a forfeiture because whole of unpaid balance was due and they had never tendered a deed, plaintiffs, who thereafter purchased property from vendors with knowledge that defendant was in possession but never ascertained whether or not defendant claimed any right to the property, were not bona fide purchasers for value without notice and took subject to equitable rights of defendant and were not entitled to have their title quieted without first tendering a deed to defendant.

Reversed.

1. Quieting Title ⟹14
Vendor and Purchaser ⟹303, 312

Where, in contract for sale of land, price is made payable in installments at different times and deed is to be made when whole is paid, vendor may, upon purchaser's failure to pay any intermediate installment, forthwith sue for its recovery, but, if he allows the whole to become due, vendor must tender deed as condition to demanding payment of price, and he cannot, without such tender, declare a forfeiture, or maintain suit either for whole price, or for an intermediate installment, and same rule applies where vendor seeks to quiet title, if facts are not such as would show that tender would be unavailing.

2. Quieting Title ⟹14
Vendor and Purchaser ⟹232(7)

Where vendors would not have been entitled to quiet title to property sold under contract providing for payments in installments at different times with deed to be made when whole was paid or to sue for balance or declare a forfeiture because whole of unpaid balance was due and they had never tendered a deed, parties who purchased property from vendors with knowledge that purchaser was in possession but never ascertained whether or not purchaser claimed any right to the property, were not bona fide purchasers for value without notice and took subject to equitable rights of purchaser and were not entitled to have their title quieted without first tendering a deed to purchaser.

3. Appeal and Error ⟹1071(6)
Quieting Title ⟹46, 47(2)

Where purchasers of vendors' interest in property brought action to quiet title against conditional sales contract vendee who was in default, and vendee's right to relief from forfeiture had been put in issue by pleadings, failure to consider issue was reversible error, finding that vendee was in long-continued default was not sufficient and court should have ruled on willfulness or gross negligence of vendee before denying relief. West's Ann.Civ. Code, § 3275.

F. M. Brack, Modesto, for appellant.

Robert D. Carter, Modesto, for respondent.

SCHOTTKY, Justice.

Myrtle Broyles Combs, formerly Myrtle Broyles, has appealed from a judgment in favor of the above-named plaintiffs in an action to quiet title to certain real property in Modesto.

The record shows that in May, 1948, Myrtle Broyles entered into a conditional sales contract with John Frazier and his wife, Elsie L. Frazier, whereby the Fraziers agreed to sell and Mrs. Broyles agreed to purchase an unimproved parcel of real property in Modesto for the sum of $650, payable $10 down and the balance in installments of $10 per month, including interest at the rate of 6 per cent on the deferred balance. Mrs. Broyles made the down payment and a few of the monthly payments on time, but for the balance of the payments she was continually delinquent. The Fraziers sent Mrs. Broyles several notices of default but thereafter accepted payments from her. The last payment made by her was in November, 1953, and the last credit on the loan was an insurance refund of $7.68. This made the total balance due $163.83, plus interest from June 1, 1953. After Mrs. Broyles purchased the property she erected a small five room house on it. She estimated the value of the property to be between $1,500 and $2,000.

In November, 1954, the Fraziers mailed a notice of default to Mrs. Broyles, and in January of 1955 a notice of forfeiture was mailed. This last notice stated that all of Mrs. Broyles' rights under the contract had been terminated. Mr. Frazier testified that Mrs. Broyles never contacted him thereafter nor was he ever advised that she was willing to pay the balance due before he sold the property to the Becks.

The Becks purchased the property several months after January, 1955, for the sum of $765, which included the closing costs. When he purchased the property Mr. Beck knew that Mrs. Broyles was living on the property, and it was his understanding that he would have to get her off of the property. In January, 1956, the Becks brought this suit to quiet their title to the property. Mrs. Broyles answered and as a separate defense and by way of cross-complaint sought relief from forfeiture. It was uncontradicted that at the time of trial of this action the sum of $635 was deposited in escrow, which was for the purpose of paying the balance due on the contract.

The trial court quieted the title of the Becks, awarded them damages in the sum of $200, and adjudged that Mrs. Broyles had no interest or estate in the property. The court made no finding that the default of Mrs. Broyles was willful, fraudulent, or grossly negligent.

[1] An arithmetical calculation shows that if Mrs. Broyles had made all her payments when due the balance due after the payment due on November 1, 1954, would have been $1.22. Therefore, from a practical standpoint, the final payment on the contract was due and payable on that date. The notice of default was mailed by the Fraziers after November 1, 1954. A notice of forfeiture was mailed in January, 1955. The record does not disclose that Mr. Frazier ever tendered a deed to Mrs. Broyles. The court did not find that, nor does the evidence compel a finding that such tender would have been unavailing, so that it would be excused. It has long been the rule in this state "Where in a contract for the sale of land the price is made payable in installments at different times and the deed is to be made when the whole is paid, the vendor may, upon failure to pay any intermediate installment, forthwith sue for its recovery. But, if he allows the whole to become due, the payment of the price then becomes a dependent and concurrent condition, nonpayment alone does not put the vendee in default, the vendor must tender a deed as a condition to demanding payment of the price, and he cannot, without such tender, declare a forfeiture, or maintain a suit either for the whole price, or for an intermediate installment." Boone v. Templeman, 158 Cal. 290, 297, 110 P.

947, 950; see also Kerr v. Reed, 187 Cal. 409, 202 P. 142; Uren v. Troup, 110 Cal. App.2d 419, 242 P.2d 895; Thein v. Sticha, 93 Cal.App.2d 295, 209 P.2d 13; Katemis v. Westerlind, 120 Cal.App.2d 537, 261 P.2d 553; Holden v. Johnson, 95 Cal.App. 2d 872, 214 P.2d 18. The same rule applies where the vendor seeks to quiet title if the facts are not such as would show that tender would be unavailing. Sausalito Bay Land Co. v. Sausalito Imp. Co., 166 Cal. 302, 136 P. 57; Grimes v. Steele, 56 Cal.App.2d 786, 133 P.2d 874.

[2] Applying the above rules, it is clear that the Fraziers would not have been entitled to quiet title to the property or sue for the balance or declare a forfeiture because at the time they attempted to do so the whole of the unpaid balance was due and they had never tendered a deed. They had not fulfilled all the conditions precedent on their part. Before they were entitled to maintain their action, a duty was incumbent on them to do so. It is also clear that the Becks were not bona fide purchasers for value without notice. They knew that Mrs. Broyles was in possession of the property. They never ascertained whether or not she claimed any right to the property. As such they could not be bona fide purchasers for value without notice, and they took subject to the equitable rights of Mrs. Broyles. Bone v. Dwyer, 89 Cal. App. 535, 265 P. 292. Their rights would be no greater than those of the Fraziers. Accordingly, they were not entitled to have their title quieted without first tendering a deed.

What we have already stated requires a reversal of the judgment, and it is unnecessary to discuss other contentions made in the briefs. However, we shall discuss briefly appellant's contention that appellant was entitled to relief from forfeiture.

Section 3275 of the Civil Code provides for relief against forfeitures. It presupposes that the party seeking relief is in default. Barkis v. Scott, 34 Cal.2d 116, 120, 208 P.2d 367. The same case also states at pages 121–122 of 34 Cal.2d, at page 370 of 208 P.2d: "A vendee in default who is seeking to keep the contract alive, however, is in a better position to secure relief than one who is seeking to recover back the excess of what he has paid over the amount necessary to give the vendor the benefit of his bargain after performance under the contract has terminated. * * * [W]hen the default has not been serious and the vendee is willing and able to continue with his performance of the contract, the vendor suffers no damage by allowing the vendee to do so. In this situation, if there has been substantial part performance or if the vendee has made substantial improvements in reliance on his contract, permitting the vendor to terminate the vendee's rights under the contract and keep the installments that have been paid can result only in the harshest sort of forfeitures. Accordingly, relief will be granted whether or not time has been made of the essence. * * *"

[3] In the instant case the trial court was obligated to consider the issue of relief from forfeiture since it was put in issue by the pleadings. Failure to do so was reversible error. Crofoot v. Weger, 109 Cal.App.2d 839, 241 P.2d 1017. The finding that Mrs. Broyles was in long continued default does not answer the question. Under the facts of this case the trial court should have granted relief. At least the court should have ruled on the willfulness or gross negligence of Mrs. Broyles before denying her relief.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

169 Cal.App.2d 339

PACIFIC HARDWARE & STEEL COMPANY, Inc., Plaintiff, Appellant and Respondent,

v.

Leo G. CHEIM, Gladys Cheim, Robert Cheim, Cheim Lumber Company, Defendants, Respondents and Appellants.

Civ. 18189.

District Court of Appeal, First District, Division 2, California.

April 2, 1959.

Rehearing Denied May 1, 1959.

Hearing Denied May 27, 1959.

Action to recover damages for fire loss sustained by plaintiff as result of fire that had originated in defendant's lumber yard. The Superior Court, County of Santa Clara, Wright L. Calendar, J., entered orders granting new trial and motion of plaintiff to set aside the second new trial order and plaintiff appealed from both orders granting new trial, and defendant appealed from order vacating second new trial order. The District Court of Appeal, Draper, J., held that order stating that question to be determined was whether evidence had sufficient probative weight to indicate that defendants were negligent in maintenance of their promises and of sufficient strength to indicate that the alleged negligence was the proximate cause of fire, must be construed as being based upon the insufficiency of evidence to sustain verdict and there was no abuse of discretion in granting new trial but trial court had no power to enter another new trial order which could be vacated by it despite pendency of an appeal.

First order affirmed and second order rendered moot and appeal dismissed.

1. Appeal and Error 🔑933(4)

Order granting new trial which is general and does not designate ground on which it was granted must be presumed to be based on grounds other than insufficiency of evidence, but there is no rigid formula for statement that order is based upon insufficiency of evidence and order as a whole is to be construed. West's Ann.Code Civ. Proc. § 657.

2. New Trial 🔑163(2)

If it may be inferred from language used in order for new trial that insufficiency of evidence is the ground, order must be held to have been based upon such ground. West's Ann.Code Civ.Proc. § 657.

3. New Trial 🔑163(2)

Order reciting that question was whether there was sufficient probative weight to evidence to indicate that defendants were negligent and whether evidence was of sufficient weight to indicate that negligence was proximate cause, must be construed as specifying insufficiency of evidence as ground for granting new trial. West's Ann.Code Civ.Proc. § 657.

4. Appeal and Error 🔑977(3)

In action for loss caused by fire which had originated on defendant's premises, record disclosing conflicting evidence as to presence of combustible waste materials on defendant's land and as to steps taken to guard against entry of children, showed there was no abuse of discretion as to warrant reversal of order granting new trial following jury verdict for plaintiff.

5. Appeal and Error 🔑439

New Trial 🔑163(1)

Where court entered order granting new trial, trial court had no power to enter a second order granting new trial and since such second order was wholly beyond the power of the trial court it could be vacated despite pendency of an appeal.

◆

Bohnett, Hill, Cottrell & Bohnett, San Jose, Hall, Henry, Oliver & McReavy, San Francisco, for plaintiff, appellant and respondent.

Campbell, Custer, Warburton & Britton, William G. Clark, San Jose, for defendant, respondent and appellant.

DRAPER, Justice.

A fire which originated in defendant's lumber yard spread to the adjoining building of plaintiff. This action is for damages for the loss sustained by plaintiff. The fire was started by three 7-year old boys who were playing with matches in a building called the "tank house" which, although located on defendant's property, was but slightly used in his business. It is not wholly clear whether plaintiff's case was tried on the theory that defendant proximately contributed to spread of the fire by negligent maintenance of his property (Reid & Sibell, Inc. v. Gilmore & Edwards Co., 134 Cal.App.2d 60, 285 P.2d 364), or facilitated its start by letting combustible waste materials accumulate in the small building and by failing to reasonably guard against assertedly foreseeable use of that building by children for play.

Judgment was entered upon jury verdict in favor of plaintiff. After hearing on defendant's motion for new trial, the court filed memorandum opinion which concluded with the statement "motion for a new trial * * * is hereby granted." The next day, order granting new trial "on the ground of insufficiency of the evidence to justify the verdict" was filed. Plaintiff moved to set aside the second of these orders, and that motion was granted. Plaintiff (by notice filed before the order of vacation) appeals from both orders granting new trial, and defendant appeals from the order vacating the second new trial order.

Disposition of the appeal from the first order will determine the issues. The question is whether that order was based upon the ground of insufficiency of the evidence to sustain the verdict. The portion of the order relevant to that question is:

> "The second proposition advanced by defendants presents a more serious question and that is whether the evidence produced by the plaintiff indicates evidence having sufficient probative weight to indicate that the defendants were negligent in the maintenance of their premises, particularly the tank house and if that evidence, assuming it supports the plaintiff's position that the defendants were negligent, was of sufficient strength to indicate that that negligence was the proximate and direct cause of the fire which destroyed plaintiff's property. It is felt that the evidence adduced at the trial by the plaintiff through the testimony of the two boys directly connected with the fire and that of Carol Johnson, who was the first person except the boys to see the fire, fails to substantiate a finding by the jury that the negligence of the defendants in properly maintaining their property was the direct and proximate cause of the jury [sic] and that the tank house as testified to by the boys and Miss Johnson was an attractive nuisance. True the property was not guarded nor was it fenced and there was testimony that children played in or about the premises with the knowledge of the defendants, but it is not felt that that knowledge would place the defendants on notice that children or others would enter upon the property with matches and proceed to so carelessly play with such matches as to cause the same to ignite the tank house which in turn spread to the lumber yard and thence to the plaintiff's property. While no California cases have been cited, nor have we been able to locate any, we are convinced that based upon cases of Moody v. Gulf Ref[ining] Co. [142 Tenn. 280], 218 S.W. 817 [8 A.L.R. 1243] and Aune v. Oregon Trunk Ry. [151 Or. 622], 51 P.2d 663, that the negligence of the defendants if any was not the proximate cause of the injury and that such negligence is the proximate cause only when the injury is the natural and probable result of it and in the light of attending circumstances it ought to have been foreseen by the defendants. Here there is nothing to indicate that any third person would bring a dangerous substance, to wit: Matches, upon the premises and by lighting them start a fire.
>
> "It is therefore concluded that the defendants' motion for a new trial ought to be and the same is hereby granted."

[1, 2] An order which is general and does not designate the ground on which it was granted, i. e., "Motion for a new trial * * * granted" (Renfer v. Skaggs, 96 Cal.App.2d 380, 215 P.2d 487, 488) must be presumed to be based upon grounds other than insufficiency of the evidence (Code Civ.Proc. § 657; Pierce v. Nash, 126 Cal. App.2d 606, 611, 272 P.2d 938). But there is no rigid formula for the statement that the order is based upon insufficiency of the evidence. The order as a whole is to be construed. If it may be inferred from the language used that such insufficiency is the ground, the order must be held to have been based upon such ground. Secreto v. Carlander, 35 Cal.App.2d 361, 364–365, 95 P.2d 476; Lucerne Country Club v. Beal, 21 Cal. App.2d 121, 126–127, 68 P.2d 408. If the order "uses any language that reasonably can be construed as including insufficiency of the evidence, the language will be interpreted as including that ground." Piru Citrus Ass'n v. Williams, 95 Cal.App.2d 911, 915, 214 P.2d 426, 428.

[3] In the light of these rules, the order before us must be construed to specify insufficiency of the evidence to support the decision as a ground for granting the new trial. The order states that the question to be determined is whether the evidence has "sufficient probative weight to indicate that the defendants were negligent in the maintenance of their premises" and was "of sufficient strength to indicate that that negligence was the proximate * * * cause of the fire." This statement of the issue to be determined makes clear that the court's conclusion was based upon insufficiency of the evidence. The language appears to us even clearer than that of the somewhat comparable order considered in Piru Citrus Ass'n v. Williams, supra.

Plaintiff stresses those portions of the order which could be construed to suggest that the court believed liability could be imposed only if the specific event which caused the fire was foreseeable by defendant. Such a view seems too narrow. McEvoy v. American Pool Corp., 32 Cal.2d 295, 195 P.2d 783; Mosley v. Arden Farms Co., 26 Cal.2d 213, 157 P.2d 372, 158 A.L.R. 872. But the order by no means compels the conclusion that the court applied an erroneous rule of law in weighing the sufficiency of the evidence. Both negligence and proximate cause are, in the circumstances here presented, questions of fact. The order of the trial court must be construed to be based upon the insufficiency of the evidence on these two issues to sustain the verdict.

[4] Plaintiff does not strongly argue that the evidence does not warrant such an order. We have reviewed the record and find conflicting evidence as to the presence of combustible waste materials in the tank house and as to the steps taken to guard against entry of children. Also, there is room for conflicting inferences as to whether a reasonable standard of care was met in maintenance of other portions of the lumber yard. Thus there is no such abuse of discretion as to warrant reversal of the order. Brooks v. Metropolitan Life Ins. Co., 27 Cal.2d 305, 307, 163 P.2d 689.

[5] The concluding sentence of the memorandum makes clear that it is an order granting a new trial. Thus it was conclusive and the trial court had no power, save under circumstances not present here, to enter another new trial order. Drinkhouse v. Van Ness, 202 Cal. 359, 369–370, 260 P. 869. An order wholly beyond the power of the trial court may be vacated by it despite the pendency of an appeal. Svistunoff v. Svistunoff, 108 Cal.App.2d 638, 641–642, 239 P.2d 650.

The first order granting new trial and the order vacating the second such order are affirmed. The appeal from the second order granting new trial is thus rendered moot, and that appeal is dismissed. Costs are awarded to defendant.

KAUFMAN, P. J., and DOOLING, J., concur.

169 Cal.App.2d 479

In the Matter of the ESTATE OF Charles F. BIALY, also known as Charles V. Bialy, Deceased.

Pearl BIALY, also known as Petronela Bialy, Plaintiff and Respondent,

v.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, as Executor of the Estate of Charles F. Bialy, Deceased, Marie B. Turner and Teresa Musselwhite, Defendants and Appellants.

Civ. 5963, 5964.

District Court of Appeal, Fourth District, California.

April 9, 1959.
Rehearing Denied May 8, 1959.
Hearing Denied June 3, 1959.

Action to have executor declared constructive trustee of community property and for declaratory relief which action, by stipulation of parties and by order of the trial court, was consolidated with and tried as a part of probate proceedings in the matter of the estate of decedent. From a judgment of the Superior Court, Orange County, John Shea, J., the executor and others appealed. The District Court of Appeal, Mussell, J., held, inter alia, that where husband and wife at time or execution of property settlement agreement, at time of declaratory relief action and at time of interlocutory decree of divorce were dealing at arm's length, wife was represented by counsel who had ample opportunity to ascertain character and extent of husband's property, husband had contended that all property was his, counsel conducted an investigation to determine extent of husband's property, and wife's counsel entered into a stipulation that judgment be entered declaring the property settlement agreement valid and in divorce action wife's counsel consented that case be heard as a default and that settlement agreement be submitted to court for approval, the interlocutory decree of divorce and declaratory judgment were res judicata on validity of property settlement agreement.

Reversed.

1. Judgment ⚷540

The principle of res judicata precludes parties or their privies from relitigating an issue that has been finally determined by a court of competent jurisdiction, and such principle rests upon sound public policy that there must be an end of litigation and accordingly, persons who have had one fair trial on an issue may not again have it adjudicated.

2. Judgment ⚷540

The application of principle of res judicata in a given case depends upon affirmative answers to three questions: (1) was the issue decided in prior adjudication identical with the one presented in the subsequent litigation? (2) was there a final judgment on the merits? and (3) was the party against whom the principle is invoked a party or in privity with a party to the prior adjudication?

3. Divorce ⚷255

Judgment ⚷567

Where husband and wife at time of execution of property settlement agreement, at time of declaratory relief action and at time of interlocutory decree of divorce were dealing at arm's length, wife was represented by counsel who had ample opportunity to ascertain character and extent of husband's property, husband had contended that all property was his, counsel conducted an investigation to determine extent of husband's property and wife's counsel entered into a stipulation that judgment be entered declaring the property settlement agreement valid, and in divorce action wife's counsel consented that case be heard as a default and that settlement agreement be submitted to court for approval, the interlocutory decree of divorce and declaratory judgment were res judicata on validity of property settlement agreement.

4. Husband and Wife ⚷248½, 257

Where decedent's marriage, commenced in 1906, continued until it was terminated by death of wife in 1946, and in 1916 plaintiff and decedent had commenced living together as husband and wife at which time plaintiff knew that he was married, and source of all of decedent's property was acquired prior to his marriage to plaintiff in 1947, and there was no evidence that decedent worked at any gainful occupation after such date, the rent, issues and profits from separate realty of decedent and increase in value thereof were decedent's separate property and hence judgment awarding plaintiff one-half of such property on theory that it was community property was erroneous.

◆

Guerin, Guerin & Graham, John J. Guerin, Los Angeles, for appellant Bank of America.

David Welts, Los Angeles, for appellants Turner and Musselwhite.

M. S. Bernard, Santa Ana, Harry J. Crawford, Pasadena, and Richard E. Reese, Los Angeles, for respondent.

MUSSELL, Justice.

This is an action by Pearl Bialy, the divorced wife of Charles F. Bialy, deceased, to have executor declared constructive trustee of community property and for declaratory relief. By stipulation of the parties and by order of the trial court the action was consolidated with and tried as a part of the probate proceedings in the matter of the estate of Charles F. Bialy, deceased. The trial court rendered judgment impressing a trust on one-half of the property of decedent's estate as being the community property of the widow and decedent. The Bank of America National Trust and Savings Association, as executor, and defendants Marie B. Turner and Teresa Musselwhite, children of the decedent by a former marriage, appeal from the judgment.

Charles F. Bialy was born in Poland. He married Josefa Bialy in Russia in 1906 and this marriage continued until terminated by the death of Josefa in August, 1946. Their daughter, appellant Marie Turner, was born in Lithuania in 1907 and their other daughter, Teresa Musselwhite, was born in Roumania in 1910. Respondent Pearl Bialy was born in Lithuania November 30, 1899. Decedent's wife, Josefa, and respondent were first cousins. Prior to the time respondent came to America in 1913 she lived in Lithuania about eight miles from the home of decedent. She visited the home of decedent and his wife and they, in turn, visited the home of respondent's father, with whom respondent lived.

Decedent came to America early in 1914 and in 1916 or 1918 met respondent in Chicago, where she was living with her brother. Soon thereafter respondent and decedent obtained an apartment in Chicago and lived together there for about two years. There was no marriage ceremony between respondent and decedent until December 16, 1947. In this connection respondent testified that shortly after decedent met her he told her he was going to marry her and stay with her; that he said he had a license and that she believed him, although she knew Josefa in the old country; that he gave her a ring and told her they were married. When asked if she considered herself married to the decedent, she replied, "I don't know."

A son, Alfred, was born to decedent and Pearl in 1919 and in 1921 decedent went to a technical school, where he took a two year course, after which he came back to Chicago and while working in a hospital there, he met Henry Dawson, a fifteen year old cripple, became his nurse and went to California to take care of him. In 1921 respondent moved to East Orwell, Ohio, and purchased a farm in partnership with one Sophia Jacoba. They made a down payment on the purchase price of $2,500 and gave a mortgage as security for the balance. Mary, the second child of respondent and decedent was born on the Ohio farm in 1924. The decedent was in Chicago at that time. Respondent moved to Cleveland, Ohio, in 1934 or 1935, where she worked in a store. She testified in her deposition that she was separated from the decedent from 1920 to 1942. However, there is substantial evidence in the record that decedent and respondent did not live together from 1921 to 1945, with the exception of occasional visits.

On March 23, 1943, respondent withdrew $1,000 from a savings and loan account in Cleveland, Ohio, and sent it to decedent at Pasadena, and on October 9, 1943, decedent and respondent opened a small joint account at a savings and loan company in Pasadena. Respondent came to Pasadena to live in about 1945. At that time decedent had retired and was living by himself. He told his daughter, Mrs. Turner, that respondent was coming to Pasadena to be a housekeeper for him. Decedent and respondent then lived together in Pasadena in Mr. Dawson's house, then on San Gabriel and then on Nina Street.

In 1946 decedent received a letter informing him that his wife, Josefa, had died in Lithuania on August 18, 1946. He discussed this letter and the death of his wife with his daughter, Mrs. Turner, in the presence of respondent. Mrs. Turner testified that decedent stated that since Josefa was gone, it would be better for him to marry respondent instead of having her as housekeeper. Decedent and respondent were legally married at Santa Ana, California, on December 16, 1947.

The record shows that prior to this marriage decedent had acquired real property in Pasadena which sold at different times for $82,000, Orange county real estate (two items acquired in 1948), which sold at different times for $29,000 (not including residence) and stocks in 1946, amounting to $66,764. Decedent's income and earnings, after his marriage to respondent in 1947, consisted of the rents, issues and profits of property previously acquired by him as shown by his income tax returns.

Respondent testified that she sent decedent $1,000 from her savings and loan account in Cleveland and gave him another $2,000 by giving him her pass book when she came to Pasadena. However, the record of said account shows that the total amount in said account was $1,665.14, which was withdrawn by respondent $1,000 on March 23, 1943, and $665.14 on October 4, 1943. Respondent further testified that decedent used the money she gave him from the savings and loan account in the purchase of the property on Sierra Madre Boulevard in Pasadena and that all money furnished by her at or about the time she came to Pasadena was used in connection with Pasadena real estate purchased by the decedent.

At the time of his death in 1955 decedent left property which was appraised in his estate at $205,835.53. It consisted of cash, stocks, notes secured by trust deeds on real estate, and the residence property at Costa Mesa. Decedent's will and codicil, in which he left most of his property to his children, was admitted to probate on December 2, 1955, and the Bank of America was appointed executor thereof. The bank filed its inventory and appraisement of the estate on April 27, 1956. On September 24, 1957, Marie Turner and Teresa Musselwhite filed notices of appeal in the probate matter, as did the executor, appealing from the judgment entered in the within civil action.

In August, 1952, respondent was living in the house on Sierra Madre Boulevard. This property was in decedent's name and he sold it to a school. Respondent refused to move out of the house and went to see R. H. Aarons, an attorney. She testified in this connection that she was having trouble with decedent; that she was fighting for her property; that she told Aarons she wanted to make a property settlement agreement with Bialy and that she wanted to get settled up with him.

Attorney N. J. Clarke, who represented Bialy during the negotiations, testified that Bialy stated it was his intention to divide equally the property mentioned in the property settlement agreement and that this was the general conversation. Attorney Aarons stated that after discussion Bialy agreed that respondent was entitled to half.

A property settlement agreement was entered into between the parties on August 16, 1952. The specific real property mentioned therein consisted of the Sierra Madre Boulevard property in Pasadena (then in the process of being sold), the property on Nina Street in Pasadena, and the residence property and lots in Costa Mesa. Bialy stated he had no cash, stocks or bonds or brokerage accounts. He took the position that all the property belonged to him, individually; that the agreement was unfair to him because it did not give him a fair share of the community property and that the $21,500 trust deed was half of his entire worth. Under this agreement respondent was to and did receive a $21,500 trust deed, which was approximately $2,000 more than the valuation placed on the property therein and she was to give Bialy a note for $2,000 and pay the attorneys' fees.

The property settlement agreement provided, among other things, that it was the desire of the parties to settle their respective property rights for all times, irrespective of whether they might become divorced, continue to live apart, or resume marital relations; that all property acquired by either of them would be their respective property, including the future income of each of them; that the settlement was a complete disposition and release of the property rights existing between them; that the agreement might be submitted to any court for approval and if so approved, it should be made a part of the decree in any action for divorce, and further, that "Each party solemnly and specifically avers that the foregoing agreement has been separately read and entered into after advice of council, and without undue influence, fraud, coercion or misrepresentation, or for any cause except as herein specified, and that it contains the entire agreement of the parties."

After the 1952 property settlement agreement was entered into decedent and respondent lived in Pasadena for a short time and then moved to Costa Mesa. They went to Europe early in 1953 and then returned to Costa Mesa.

Bialy filed a divorce action against respondent in Orange county on September 29, 1953, and in this action respondent's attorney, Mr. Bradley, made an affidavit and obtained a subpoena duces tecum which was served on Bialy requiring him to bring his income tax records and his records of stocks, bonds and securities into court on October 2, 1953. When the case was called in court, it was announced by plaintiff's council that a dismissal had been filed. On December 8, 1953, Bialy filed against respondent an action for declaratory relief in the Pasadena Branch of the Superior Court of Los Angeles county. In this action it was alleged that a controversy existed between the parties as to the validity of the 1952 property settlement agreement. Respondent was represented by Mr. Aarons and Edward P. Hart. She filed an amended answer, alleging, among other things, that the property settlement agreement was entered into through fraudulent representations by decedent as to his worth and that decedent falsely represented that he had no stock, no bonds or other property. It was further alleged that respondent furnished decedent money to purchase property as partners and that she worked improving the property that was purchased by decedent. She also attached to her answer a notice of rescission of the property settlement agreement. The pretrial order in this matter contained the statement that the main question in the action was the validity of the property settlement agreement. On June 14, 1954, judgment was entered in this action reciting that the parties, through their respective council, had entered into and filed a stipulation regarding the judgment to be rendered in said action, waiving findings of fact, conclusions of law and the rights of new trial and appeal. The judgment stated that the court was fully advised in the premises and it was ordered, adjudged and decreed that the said property settlement agreement was fair, valid, subsisting and in full force and effect; that it was binding on both parties and enforceable according to its terms; that there had been no reconciliation or other change of substance affecting any portion thereof.

On February 24, 1954, respondent, through her same attorneys, filed an action for separate maintenance against Bialy in the Superior Court of Orange county, being case number 66205. In the complaint respondent alleged that Bialy had active brokerage accounts with certain named firms which had in their possession community property belonging to the parties, and in her affidavit in support of an order to show cause for allowance pending trial she alleged that Bialy was in possession of the community real and personal property in excess of $100,000, and had income therefrom in excess of $1,000 per month. After hearing on the order to show cause, on March 26, 1954, the court made an order denying respondent's motion for an allowance pending trial. A special demurrer by Bialy was sustained on March 26, 1954. Respondent did not file an amended complaint, and on April 15, 1954, the court entered a judgment of dismissal in the action.

On June 3, 1954, Bialy filed a divorce action against respondent in the Superior Court of Orange county, being case number 62824. It was alleged in the complaint that there was no community property and approval was asked of the 1952 property settlement agreement. Respondent filed a written appearance in said action, dated June 8, 1954, signed by her and also her attorneys, consenting that the case be tried as a default and that the 1952 property settlement be submitted to the court for approval and made a part of any decree of divorce granted in the action. An interlocutory judgment of divorce by default was granted to decedent on June 17, 1954, and by the decree the 1952 property settlement agreement was approved and made a part of the decree by reference. The affidavit for final judgment of divorce reciting that the parties had not become reconciled was notarized in Illinois by Mary Bialy, daughter of respondent and decedent, and final judgment of divorce was rendered on July 1, 1955.

On May 17, 1954, respondent appeared in the office of Jacob Chaitkin, decedent's attorney, to give her deposition in the declaratory relief action. At that time a settlement was discussed with Mr. Hart in decedent's presence. He stated that he had given respondent half of his property at the time of the settlement agreement and Mr. Hart stated he was not prepared to show that decedent had a net worth of more than $40,000. Mr. Hart told Mr. Aarons, who entered the meeting at that time, that since they had not been able to discover any assets, perhaps they should make some adjustment of the case. A settlement was discussed and decedent made an offer of $1,500, plus cancellation of respondent's note to him. Mr. Hart recommended this settlement and Mr. Chaitkin suggested that there be an employment agreement as decedent wanted to continue to live with respondent. A settlement was agreed upon on this basis. Decedent's check for $1,500, dated June 22, 1954, payable to respondent and her attorneys, was endorsed and cashed. Respondent's note to decedent for $2,000, dated August 16, 1952, was returned to her and an employment agreement, dated June 17, 1954, between respondent and decedent was delivered.

On May 21, 1956, respondent filed the within action, alleging, inter alia, that at no time from June 3, 1954, until the time of the death of the decedent was there any separation of the parties from their continuous cohabitation together; that at all times decedent stated to plaintiff that he had no money and no property at the time of the property settlement agreement in 1952; that decedent failed to disclose the extent of the community property then existing; that a marriage ceremony was performed between plaintiff and decedent on or about December 16, 1947, validating a recognized and existing common law marriage; that a final decree in the divorce action filed by decedent was obtained by means of a fraudulent affidavit. In the prayer plaintiff asked that the final judgment of divorce, signed on July 1, 1955, and the property settlement agreement of August 16, 1952, be declared null and void; that the court find that a putative marriage existed between plaintiff and defendant from 1916 to the date of decedent's death; that the defendant bank be ordered to hold one-half of the estate of decedent in trust, and that an injunction issue restraining the executor from parting with or distributing any of the estate until further order of the court.

The trial court found, inter alia, that plaintiff and decedent commenced to live together as husband and wife in the state of Illinois in the year 1916, at which time plaintiff knew decedent was married to Josefa Bialy; that decedent was married to said Josefa Bialy in Odessa, Russia, in 1906, and said marriage continued until it was terminated by the death of Josefa Bialy in 1946; that at no time either before or after the filing of the divorce complaint in action number 62824 until the time of the death of decedent was there any true separation of the parties from their continuous open cohabitation together as husband and wife; that the affidavit for entry of the decree of divorce was false in that plaintiff falsely swore therein that there had been no cohabitation of the parties since the entry of the interlocutory decree; that the decedent falsely represented that he had no money or property other than that disclosed at the time of the property settlement agreement and at the time of negotiations for the settlement of the declaratory relief action and in court in the separate maintenance action; that plaintiff had no knowledge of property acquired during the years of their marriage; that plaintiff never had a hearing on the merits in the declaratory relief action by reason of the false representations as to the extent of the community property, knowingly made by decedent to plaintiff and her attorney; that plaintiff believed and relied on his statements; that decedent during the marriage accumulated large sums of money and concealed that fact from plaintiff; that all of the property listed in the inventory and appraisement herein was and is the community property of plaintiff and decedent and that the executor shall hold one-half of said property in trust for plaintiff, the total value of said one-half being $102,500 on November 13, 1955, subject to those costs of administration and taxes which are by law chargeable to plaintiff; that the estate of Charles F. Bialy has no interest in the community property interest of Pearl Bialy after November 13, 1955, or the fruits thereof since said date; that plaintiff had no plain or adequate remedy at law and that she must resort to equity to impose a trust on the executor herein; that none of the prior decrees were res judicata nor was the plaintiff estopped by reason of any of the prior judicial decisions; and that plaintiff was not required to restore anything of value that she might have obtained during decedent's lifetime.

The trial court ordered that plaintiff take judgment against the said bank and Marie B. Turner and Teresa Musselwhite for one-half of the estate as it appears in the inventory and appraisement, subject to costs of administration and taxes which are chargeable by law to plaintiff. It was further ordered that the said executor deliver and pay one-half of said estate now held in trust by the bank to plaintiff and make accounting together with said payment.

Appellants contend that the trial court erred in failing to determine that the interlocutory decree of divorce in action number 62824 and the declaratory relief action in the Pasadena Branch of the Superior Court of Los Angeles county are res judicata on the validity of the property settlement agreement of August 16, 1952. We are in accord with this contention.

[1, 2] The principle of res judicata precludes parties or their privies from relitigating an issue that has been finally determined by a court of competent jurisdiction. It rests upon the sound public policy that there must be an end of litigation and accordingly, persons who have had one fair trial on an issue may not again have it adjudicated. The application of the principle in a given case depends upon affirmative answers to three questions: (1) Was the issue decided in the prior adjudication identical with the one presented in the subsequent litigation?; (2) Was there a final judgment on the merits?; and (3) Was the party against whom the principle is invoked a party or in privity with a party to the prior adjudication? Dillard v. McKnight, 34

Cal.2d 209, 213–214, 209 P.2d 387, 11 A.L.R. 2d 835.

In Shore v. Shore, 43 Cal.2d 677, 681–682, 277 P.2d 4, 6, the court said:

> "It is settled, however, that a judgment in a prior action between the same parties on the identical cause of action is res judicata, and a bar to a second suit thereon, not only as to issues actually determined therein but also as to issues necessarily involved. (Citations.) And even though the causes of action be different, the prior determination of an issue is conclusive in a subsequent suit between the same parties as to that issue and every matter which might have been urged to sustain or defeat its determination. (Citations.)"

Respondent does not question the holdings in these cases and states in her brief that "When Pearl signed the stipulation for judgment in the Pasadena case she utterly foreclosed herself from any further relief from the property settlement agreement of 1952 unless she was induced to do so by the extrinsic fraud of Charles."

In Westphal v. Westphal, 20 Cal.2d 393, 397, 126 P.2d 105, it was held that the final judgment of a court having jurisdiction over persons and subject matter can be attacked in equity after the time for appeal or other direct attack has expired only if the alleged fraud or mistake is extrinsic rather than intrinsic; that fraud or mistake is extrinsic when it deprives the unsuccessful party of an opportunity to present his case to the court; that if an unsuccessful party to an action has been kept in ignorance thereof or has been prevented from fully participating therein, there has been no true adversary proceeding, and the judgment is open to attack at any time; that a party who has been given proper notice of an action, however, and who has not been prevented from full participation therein, has had an opportunity to present his case to the court and to protect himself from any fraud attempted by his adversary; that fraud perpetrated under such circumstances is intrinsic, even though the unsuccessful party does not avail himself of his opportunity to appear before the court; that having had an opportunity to protect his interest, he cannot attack the judgment once the time has elapsed for appeal or other direct attack.

In Jorgensen v. Jorgensen, 32 Cal.2d 13, 22, 193 P.2d 728, it is said that a husband at the time of divorce or separation is entitled to take a position favorable to his own interest in claiming as his separate property assets that a court might hold to be community property; that confronted with the assertion by the husband that certain assets are his separate property, the wife must take her own position and if necessary investigate the facts; and that if the wife and her attorney are satisfied with the husband's classification of the property as separate or community, the wife cannot reasonably contend that fraud was committed or that there was such mistake as to allow her to overcome the finality of a judgment.

In Collins v. Collins, 48 Cal.2d 325, 330–331, 309 P.2d 420, it was held that when one undertakes an investigation and proceeds with it without hindrance, it will be assumed that he continued until he had acquired all the knowledge he desired and was satisfied with what he learned; that he cannot be heard to say that he relied upon the representations of the other party; that when the parties to a marriage are negotiating a property settlement agreement with recognition that their interests are adverse and are dealing at arms length, neither spouse owes to the other the duty of disclosure which he or she would owe if their relation remained in fact a confidential one.

[3] In the instant case the record shows that the decedent and respondent at the time of the execution of the property settlement agreement, at the time of the declaratory relief action, and at the time of the interlocutory decree of divorce were dealing at arms length. Respondent was represented by counsel at all times, who had ample opportunity to ascertain the character and extent of decedent's property. The dece-

dent contended that all the property was his at all times and respondent's counsel were aware of this contention. They conducted an investigation to determine the extent of decedent's property and in the declaratory relief action the main issue was the question of the validity of the property settlement agreement. Respondent's attorneys entered into a stipulation that judgment be entered declaring that the property settlement agreement was fair, valid, subsisting and in full force and effect. In the separate maintenance action filed by respondent she claimed decedent had certain brokerage accounts and that he was in possession of real property in excess of $100,000. A hearing was had on an order to show cause in said matter. Again, in the divorce action filed by decedent on June 3, 1954, it was alleged in the complaint that there was no community property and approval was asked of the 1952 property settlement agreement. In that action the attorneys for respondent consented that the case be heard as a default and that the 1952 property settlement agreement be submitted to the court for approval and made a part of any decree of divorce granted in the action. Counsel for respondent apparently did not make a thorough check of the records to ascertain decedent's real property holdings. They did not take his deposition or check his income tax returns. Under the circumstances shown by the record it is apparent that respondent had ample opportunity to present her case to the court on more than one occasion. Having had such opportunity to protect her interests, she cannot attack the judgment since the time has elapsed for appeal or other direct attack.

[4] The trial court found that decedent and Josefa Bialy were married in Odessa, Russia, in 1906 and that such marriage continued until it was terminated by the death of Josefa Bialy in 1946; that in about the year 1916 respondent and decedent commenced living together as husband and wife, at which time respondent knew that decedent was married to Josefa Bialy. Respondent presented in evidence records of stocks and dividends kept by the decedent from 1940. These, together with income tax returns, show that the source of all of decedent's property was acquired prior to his marriage to respondent on December 16, 1947. There was no evidence that the decedent worked at any gainful occupation after this date and his total net income, exclusive of 1949, from January 1, 1948, until his death was $1,934.03, a little over $300 per year. The rents, issues and profits from the separate real property of decedent and the increase in value thereof were decedent's separate property. Huber v. Huber, 27 Cal.2d 784, 791, 167 P.2d 708. The evidence before us is insufficient to support the trial court's finding that the property listed in the inventory and appraisement is the community property of decedent and respondent and the judgment awarding respondent one-half of said property was error.

In Vallera v. Vallera, 21 Cal.2d 681, 134 P.2d 761, it was held that a woman who lives with a man as his wife in the belief that a valid marriage exists is entitled, upon termination of their relationship, to share in the property acquired by them during its existence; that the essential basis of a putative marriage, however, is the genuine belief in the existence of a valid marriage. It was further held therein that the fact that a man and woman in good faith believe that they are married does not preclude the court from protecting their respective interests in jointly acquired property. In Flanagan v. Capital Nat. Bank, 213 Cal. 664, 666, 3 P.2d 307, it was held that in all of these cases the essential basis of recovery is a bona fide belief on the part of the "wife" in the existence of a valid marriage. In Shore v. Shore, supra, 43 Cal.2d 677, 679–680, 277 P.2d 4, 5, the court said:

> "When the property rights of the parties are properly put in issue by the pleadings in an annulment action, the court may determine them. (Citations.) If the purported marriage was not entered into in good faith, however, the court may not properly award the property of the parties as if the

marriage had been valid and the property community in character. (Citations.)"

In the instant case the evidence clearly shows that respondent was well aware that the decedent was married to Josefa Bialy at the time she began living with him in Chicago. Her property rights were settled in the agreement of 1952 and the validity of that agreement was settled in the declaratory relief action, the separate maintenance action and in the action for divorce. In view of this conclusion it is unnecessary to pass upon the other points presented by appellants.

Judgment reversed.

GRIFFIN, P. J., and SHEPARD, J., concur.

Hearing denied; TRAYNOR, J., dissenting.

Carolyn H. GARDNER et al., Petitioners and Respondents,

v.

CALIFORNIA EMPLOYMENT STABILIZATION COMMISSION, Harry W. Stewart, Director of Employment, The Den, Archie's Steak House, et al., Appellants and Respondents.*

Civ. 18296.

District Court of Appeal, First District, Division 2, California.

April 10, 1959.

Unemployment compensation proceeding. From a judgment of the Superior Court, County of Santa Clara, John D. Foley, J., the State and others appealed. The District Court of Appeal, 336 P.2d 198, affirmed. On petition for rehearing, District Court of Appeal held that record clearly showed that trial court did review the evidence and determined the facts itself and hence it could not be claimed that trial court did not exercise its independent judgment on the facts.

Petition denied.

Social Security and Public Welfare ⚷660

Where trial court specifically found in unemployment compensation proceeding that decision of appeals board was contrary to the facts developed within the administrative record and that decision of referee was a correct determination of the facts, it was clear that trial court reviewed the evidence and itself determined the facts, and hence it could not be claimed that trial court had not exercised its independent judgment on the facts.

◆

Edmund G. Brown, Atty. Gen., Irving H. Perluss, Asst. Atty. Gen., William L. Shaw, Deputy Atty. Gen., for appellants California Employment Stabilization Commission and Stewart.

Rea, Frasse, Anastasi, Clark & Chapman, San Jose, for employer appellants The Den et al.

Johnson, Thorne, Speed & Bamford, San Jose, for respondents.

PER CURIAM.

Appellant director and appellant employers separately petition for rehearing. The employers point out that the trial judge, on motion for new trial, stated "The Court here didn't weigh the testimony," and made other similar statements. They argue from these statements that the trial court did not exercise its independent judgment on the facts. Thus, they say, our holding that the question was one of fact for the trial court does not determine the questions presented on this appeal. But in its findings of fact the trial court specifically found that the decision of the appeals board "is contrary to the facts developed within the administrative record," and that "the decision of the referee * * * was a correct determination of the * * * facts." Other findings directly upon the fact issues are specifically made. It is clear that the trial court did review the evidence and itself determine the facts. No cases are cited, and we find none, which would give to the comments of the trial judge on argument on motion for new trial the effect of a modification of the written findings.

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* Opinion vacated 346 P.2d 193.

Petitions for rehearing denied.

169 Cal.App.2d 444

Stanley OSMULSKI, Petitioner,

v.

SUPERIOR COURT of State of California, IN AND FOR COUNTY OF PLACER, and the People of the State of California, Respondents.

Civ. 9667.

District Court of Appeal, Third District, California.

April 8, 1959.

Rehearing Denied May 4, 1959.

Hearing Denied June 5, 1959.

Proceeding for writ of prohibition restraining the Superior Court, Placer County, from further prosecution of a charge against petitioner. The District Court of Appeal, Van Dyke, P. J., held that a petitioner who had been an inmate of prison and who was thereafter charged with escape from honor camp was not entitled to writ prohibiting court from further prosecution of such charge on ground that he was denied his statutory right to be taken before a magistrate and was denied his constitutional right to speedy trial where petitioner made no demand that the People proceed to trial since under statute a prisoner in position of petitioner must make demand that People proceed to trial before he can complain.

Stay order and alternative writ theretofore issued discharged and peremptory writ denied.

1. Criminal Law 🔑575

Where at time the charge of escape from honor camp was made against petitioner he was a prisoner serving a sentence in a state prison, his rights were governed by statute providing that when a charge is filed against person during time such person is serving a sentence it is mandatory upon district attorney of county in which such charge is filed to bring it to trial within 90 days after person shall have delivered to district attorney written notice of place of his imprisonment and his desire to be brought to trial upon such charge and after such notice is given, and if such person is not brought to trial within 90 days action pending against him must be dismissed. West's Ann.Pen.Code, § 1381.

2. Criminal Law 🔑576(8)

A petitioner who had been an inmate of prison and who was thereafter charged with escape from honor camp was not entitled to writ prohibiting court from further prosecution of such charge on ground that he was denied his statutory right to be taken before a magistrate and was denied his constitutional right to speedy trial where petitioner made no demand that the People proceed to trial since under statute a prisoner in position of petitioner must make demand that People proceed to trial before he can complain. West's Ann.Pen. Code, § 1381.

Stanley Osmulski, in pro. per.

The Attorney General, by Doris H. Maier and Lloyd Hinkelman, Deputy Attys. Gen., for repondent.

VAN DYKE, Presiding Justice.

Stanley Osmulski, petitioner, an inmate of the State Prison at Folsom, California, was on May 30, 1958, confined to Folsom Honor Camp No. 7 in Placer County and was thereafter charged with escape therefrom.

He petitioned this court for a writ of prohibition, restraining the respondent court from further prosecution of that charge against him. He proceeds herein in forma pauperis and in propria persona. The burden of his complaint is that (1) on his arrest he was denied his statutory right to be taken before a magistrate, and (2) he has been denied his constitutional right to speedy trial. We issued an alternative writ and respondents have demurred thereto. We have concluded that the demurrer must be sustained without leave to amend.

[1, 2] It appears by the petition that at the time the charge of escape was made against him he was a prisoner serving a sentence in a state prison. Therefore, the provisions of Section 1381 of the Penal Code govern his rights. People v. Godlewski, 22 Cal.2d 677, 140 P.2d 381. That section provides that when a charge is filed against a person during the time such person is serving a sentence in any state prison it is mandatory upon the district attorney of the county in which such charge is filed to bring the same to trial within 90 days after said person shall have delivered to said district attorney written notice of the place of his imprisonment and his desire to be brought to trial upon said charge. It is further provided that after said notice is given, and if such person is not brought to trial within 90 days, the action pending against him must be dismissed. A prisoner in the position of petitioner is entitled to the rights given him under Section 1381 and must make the demand that the People proceed to trial before he can complain. Petitioner has made no such demand. Said the court in People v. Godlewski, supra, 22 Cal.2d at page 684, 140 P.2d at page 385: "We find nothing unreasonable in the requirement for a demand. It does not abrogate the constitutional guarantee. It is merely regulatory of it. Persons already incarcerated in prison will not suffer imprisonment during delay."

The stay order and the alternative writ heretofore issued by this court are discharged and the peremptory writ is denied.

SCHOTTKY and PEEK, JJ., concur.

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169 Cal.App.2d 645

Ann HOFFMAN and Henry Hoffman, Plaintiffs and Appellants,

v.

CITY OF PALM SPRINGS, Defendant and Respondent.

Civ. 5984.

District Court of Appeal, Fourth District, California.

April 15, 1959.

Action for personal injuries allegedly sustained when wife plaintiff allegedly stepped into an unlighted and unguarded excavation constructed and maintained by defendant city upon a public sidewalk. The Superior Court of Riverside County, R. Bruce Findlay, Judge pro tem., granted defendant's motion for judgment on the pleadings, and the plaintiffs appealed. The District Court of Appeal, Mussell, J., held that where claim which injured person sent to city contained no affidavit as to truth of matter therein set forth, and notary public's jurat did not contain a statement that the matters stated in the claim were true and the jurat was not made a part of an affidavit, the claim was not a "verified claim" required by the statute.

Affirmed.

1. Municipal Corporations ⚷741(2)

Where claim which injured person sent to city contained no affidavit as to truth of matters therein set forth, and notary public's jurat did not contain a statement that the matters stated in the claim were true and the jurat was not made a part of an affidavit, the claim was not a "verified claim" required by the statute. West's Ann.Gov.Code, § 53052.

See publication Words and Phrases, for other judicial constructions and definitions of "Verified Claim".

2. Estoppel ⚷62(4)

That city declined to investigate accident or claim did not estop city from asserting that the claim filed against city was not a verified claim as required by statute. West's Ann.Gov.Code, § 53052.

3. Municipal Corporations ⚿741(1)

Amended and supplemental claim filed by plaintiffs against city after statutory 90-day period for filing claim could not relate back to date of filing of original defective claim which was filed within the 90-day period. West's Ann.Gov.Code, § 53052.

◆

Isador I. Smuckler, Los Angeles, for appellants.

Thompson & Colegate and Robert D. Allen, Riverside, for respondent.

MUSSELL, Justice.

This is an action for damages for personal injuries alleged to have been suffered by appellant Ann Hoffman when she stepped into an unlighted and unguarded excavation constructed and maintained by respondent city of Palm Springs upon a public sidewalk in said city. In the second amended complaint appellants alleged that on December 12, 1957, they caused to be served upon and filed with defendants and each of them, in writing, a verified claim sworn to by said plaintiffs before their attorney of record as a notary public, setting forth the claims for damages sued upon. A copy of the said claim was attached to the complaint, marked exhibit "A", and incorporated therein by reference. The claim is as follows:

"Isador I. Smuckler
Attorney at Law
3450 Wilshire Boulevard
Los Angeles 5
"DUnkirk 5-1381

"December 11, 1957

"City Clerk
"City of Palm Springs
"Palm Springs, California

"Re: Mr. and Mrs Henry Hoffman vs. City of Palm Springs

"Gentlemen:

"The following is being sent to you as a claim against the City for personal injuries and property damage sustained by Mrs. Ann Hoffman and her husband Mr. Henry Hoffman.

"On Saturday, November 30, 1957, at approximately 8:00 P.M., the claimants parked their car near the entrance to the Dunes restaurant, 240 North Palm Canyon Drive in Palm Springs, California for the purpose of entering the restaurant. On the sidewalk portion of the Boulevard your city maintains a tree, and at the time of this incident the tree basin was excavated to a depth of approximately 10 or 11 inches below the sidewalk level. The lighting at this particular spot is very poor and was not at the time sufficient to reveal the excavation in the tree basin.

"While Mrs. Hoffman was in the act of returning to her car, not knowing of the essence of the dangerous condition of the tree basin, she stepped into it, which in turn caused her to fall, as a result of which she sustained personal injuries to her foot, ankle, leg, hip and back. The total extent of the injury is not now known to the claimants. In addition, damage was caused to her clothing and fur coat.

"Claim is herewith made for damages for personal injuries and property damages sustained in connection with the above.

"/s/ Henry Hoffman
Henry Hoffman
"/s/ Ann Hoffman
Ann Hoffman

"Subscribed and sworn to before me this 11 day of December, 1957.

"/s/ Isador I. Smuckler
Notary Public in and for said
County and State."

[1] A motion for judgment on the pleadings was filed by the defendant city, contending that exhibit "A" was not a verified claim as required by section 53052 of the Government Code. On July 30, 1958, following a hearing thereon, the trial court granted the said motion and judgment on the pleadings as against plaintiffs was entered.

Respondent city concedes that the claim filed is sufficient to comply with the requirements of section 53053 of the Government Code as to the name and address of the claimant, the time and place of the accident and extent of the injuries or damages received but contends that the claim upon its face is not a verified claim. The appellants contend that the claim filed is a substantial compliance with section 53052 of the Government Code and that the city is estopped to set up strict compliance with the statute since it declined to investigate the accident or claim.

Government Code, section 53052, provides as follows:

> "When it is claimed that a person has been injured or property damaged as a result of the dangerous or defective condition of public property, a verified written claim for damages shall be filed with the clerk or secretary of the legislative body of the local agency within ninety days after the accident occurred."

In Osborn v. City of Whittier, 103 Cal. App.2d 609, 619, 230 P.2d 132, 138, (hearing denied by the Supreme Court), the court, in considering the question of the sufficiency of the verification of a claim against the city of Whittier, said:

> "The statute involved here provides merely that the claim be verified. Stats.1931, ch. 1167, § 1, p. 2475. No particular form of verification is prescribed. Cf. Pol.Code, § 4076, where a prescribed form of verification is provided for claims filed against a county. A verification is an affidavit of the truth of the matters stated. Code Civ.Proc., §§ 446, 2009; Pol.Code, § 4076; McCaffey Canning Co. v. Bank of America, 109 Cal.App. 415, 420, 294 P. 45; Pasqualetti v. Hilson, 43 Cal. App. 718, 720, 185 P. 693. Its object is to insure good faith in the averments or statements of a party. Patterson v. Ely, 19 Cal. 28, 39; Bittleston Law etc. Agency v. Howard, 172 Cal. 357, 360, 156 P. 515. The term 'verified,' as applied to claims against municipalities, has a settled meaning, and refers to an affidavit attached to the claim, as to the truth of the matters therein set forth. Patterson v. City of Brooklyn, 6 App.Div. 127, 40 N.Y.S. 581, 582, 74 N.Y.St.R. 1009; Bristol v. Buck, 201 App.Div. 100, 194 N.Y.S. 53, 55. The chief test of the sufficiency of an affidavit is whether it is so clear and certain that an indictment for perjury may be sustained on it if false. Davis-Heller-Pearce Co. v. Ramont, 66 Cal.App. 778, 781, 226 P. 972; Gee Chong Pong v. Harris, 38 Cal.App. 214, 217, 175 P. 806; Kelley v. City of Flint, 251 Mich. 691, 232 N.W. 407, 408."

In Baker v. Cohen, 139 Cal.App.2d 842, 843–844, 294 P.2d 518, 519, the court said:

> "Though the original requirement of strict compliance with the statute has given way to a rule requiring only substantial compliance, Peters v. City & County of San Francisco, 41 Cal.2d 419, 426, 260 P.2d 55; Cruise v. City & County of San Francisco, 101 Cal. App.2d 558, 563, 225 P.2d 988, it has been held repeatedly that the filing of an unverified claim is not a substantial compliance and hence cannot form the basis for an action against a municipality under the Public Liability Act. (Citations.)"

In Whitson v. La Pay, 153 Cal.App.2d 584, 590, 315 P.2d 45, 49, it is held that

> "The filing of an unverified claim is not a substantial compliance with a statute or ordinance requiring the filing of a verified claim (Spencer v. City of Calipatria, 9 Cal.App.2d 267, 269, 49 P.2d 320; Cooper v. County of Butte, 17 Cal.App.2d 43, 47, 61 P.2d 516) and the doctrine of substantial compliance is not applicable to a claim which fails to state the claimant's address where the statute or ordinance so requires. Eppstein v. City of Berkeley, 52 Cal.App.2d 395, 397, 126 P.2d 365."

In Parodi v. City & County of San Francisco, 160 Cal.App.2d 577, 580, 325 P. 2d 224, 226, it is said:

> "The California cases considering claim statutes have held that substantial compliance with the statute only is re-

quired and have set forth what is necessary to constitute substantial compliance. Thus Silva v. County of Fresno, 1944, 63 Cal.App.2d 253, 257–258, 146 P.2d 520, 522, states: '* * * the plain purpose of the statute is to guard the county against imposition by requiring notice of the circumstances of an injury upon which a claim for damages is made so that its authorities may be in a position to investigate the facts as to the time and place and to make proper investigation of the condition of the premises and decide whether the case is one for settlement or litigation. When a notice contains the information necessary for that purpose it is substantial compliance with the statute, but when it falls short of that test it is insufficient.'

> "As to what is substantial compliance Perry v. City of San Diego, 1947, 80 Cal.App.2d 166, 169, 181 P.2d 98, 101, says: '* * * it seems clear that the California courts have taken a reasonably liberal view of the claim statutes and that where a reasonable attempt is made to comply with the law in good faith and no intent to mislead or conceal appears the claim will be upheld in the absence of anything indicating that the municipality has been mislead (sic), if the claim substantially conforms to the requirements of the statute.' "

In the instant case there is no affidavit attached to the claim as to the truth of the matters therein set forth and it does not appear that an indictment for perjury could be sustained on it if false.

In 1 American Jurisprudence, section 18, page 945, it is said that the jurat is simply a certificate evidencing the fact that the affidavit was properly made before a duly authorized officer. And in 2A Words and Phrases, Affidavit, page 332, it is said that "A jurat is that part of an affidavit where the officer certifies that it was sworn to before him. It is not the affidavit. Theobald v. Chicago, M. & St. P. Ry. Co., 75 Ill.App. 208, 213." In 2 C.J.S. Affidavits § 21, p. 961, the statement is made that "A jurat alone, unaccompanied with a statement of facts, sworn to by affiant cannot be considered as an affidavit.—Theobald v. Chicago, etc. R. Co., 75 Ill.App. 208.—McGuire v. Iowa County, 133 Iowa 636, 111 N.W. 34." Since the jurat here involved does not contain a statement that the matters stated in the claim are true and it is not made a part of an affidavit, it follows that it is not sufficient to meet the requirements of Government Code, section 53052.

[2] The argument of appellants that the city is estopped to set up strict compliance with said section 53052 because it declined to investigate the accident or claim is without merit. In Baker v. Cohen, supra, 139 Cal.App.2d 842, 845, 294 P.2d 518, 520, the court said:

> "Appellant's claim of estoppel depends upon the letter from the city attorney to plaintiff and the silence of other officials following the filing of the unverified claim. Certainly, silence alone can afford no basis for such a finding. The city attorney's letter gave plaintiff no assurances of any kind, offered no compromise, suggested no course of action for plaintiff to take."

[3] Appellants contend that the amended and supplemental claim filed by them relates back to the date of the filing of the original claim. This contention is likewise without merit. In Steed v. City of Long Beach, 153 Cal.App.2d 488, 491–492, 315 P.2d 101, it was held that a supplemental claim filed after the 90-day statutory period had expired could not relate back to the date of the filing of the original claim so as to be considered a part thereof.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

169 Cal.App.2d 558

Olive CLAPP, Barbara Barnard, Administratrix of the Estate of Eugene F. Fredericks, Deceased, Plaintiffs and Respondents,

v.

Michael HESTER, Administrator of the Estate of Thomas P. Hester, Deceased, Defendant and Appellant.

Civ. 18256.

District Court of Appeal, First District, Division 1, California.

April 13, 1959.

Rehearing Denied May 6, 1959.

Hearing Denied June 3, 1959.

Action for death of laborer in automobile accident, in which driver was also killed, against driver's administrator. The Superior Court, County of Alameda, Richard H. Chamberlain, J., rendered judgment for plaintiffs, and administrator appealed. The District Court of Appeal, Fred B. Wood, J., held that where driver was in process of going to place to make tests for employer and had taken one of employer's laborers to assist him, trip was made in driver's truck for which driver was permitted to obtain gas and oil from employer, laborer was a passenger and driver was liable for ordinary negligence.

Affirmed.

1. Automobiles ⚷242(1)

When guest law is involved a rider claiming status of passenger has burden of proving that compensation was given for the ride. West's Ann.Vehicle Code, § 403.

2. Automobiles ⚷245(24)

Question whether automobile driver receives a tangible benefit, which is motivating influence for furnishing transportation to rider is usually one of fact but if admitted facts can give rise to only one reasonable conclusion, question as to whether or not compensation was given for ride becomes one of law. West's Ann. Vehicle Code, § 403.

3. Automobiles ⚷181(2)

Where driver was in process of going to place to make tests for his employer and had taken one of employer's laborers to assist him, trip was made in driver's truck for which driver was permitted to obtain gas and oil from employer, laborer was a "passenger" and, under guest statute, driver was liable for ordinary negligence resulting in death of laborer. West's Ann. Vehicle Code, § 403.

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Ricksen, Freeman, Hogan & Vendt, Carl R. Vendt, Haley, McInerney & Logan, Richard G. Logan, Oakland, for appellant.

J. Adrian Palmquist, Oakland, Francis T. Cornish, Berkeley, for respondents.

FRED B. WOOD, Justice.

Eugene Fredericks met death in an automobile accident. The car belonged to and was driven by Thomas Hester, who also died as a result of the accident.

Fredericks' mother sued Hester's administrator for the death of her son. Fredericks' administratrix sought recovery of funeral and burial expenses. In support of his appeal from an adverse judgment the defendant assigns but a single error: An instruction to the jury that Fredericks was a passenger and that Hester owed him a duty of ordinary care.

[1] When the guest law (Vehicle Code, § 403) is involved a rider claiming the status of passenger has the burden of proving that compensation was given for the ride. Martinez v. Southern Pacific Co., 45 Cal.2d 244, 250, 288 P.2d 868.

"Where * * * the driver receives a tangible benefit, monetary or otherwise, which is a motivating influence for furnishing the transportation, the rider is a passenger and the driver is liable for ordinary negligence. [Citations.]" Whitmore v. French, 37 Cal.2d 744, 746, 235 P.2d 3, 5. What is such a benefit is well indicated by the following cases: When the rider goes along to assist the driver in loading, talleying weights and using tire chains (Fedler v. Hygelund, 106 Cal.App.2d 480, 235 P.2d 247); when he goes for the purpose of assisting the driver in search of a market for the latter's oranges (Haney v. Takakura, 2 Cal.App.2d 1, 37 P.2d 170, 38 P.2d 160); when invited by the driver to aid the latter with her Christmas shopping (Kruzie v. Sanders, 23 Cal.2d 237, 143 P.2d 704); when a newspaper representative takes a prospective carrier out on a route to acquaint him with his prospective duties (Sumner v. Edmunds, 130 Cal.App. 770, 21 P.2d 159); when a real estate broker takes her receptionist out to visit certain properties to enable the latter to familiarize herself with real estate activities, the better to perform the duties of her employment (Gillespie v. Rawlings, 49 Cal.2d 359, 317 P.2d 601); when two real estate brokers go to examine certain property which they expect will enable them to close a deal in which one of them represents the buyer and the other the seller (Parrett v. Carothers, 11 Cal.App.2d 222, 53 P.2d 1023); when three appraisers, each engaged by the same loan company to appraise certain property (none of whom can receive his appraisal fee until all three appraisals have been made) travel together in the car of one of them to make an appraisal (Jensen v. Hansen, 12 Cal.App.2d 678, 55 P.2d 1201); when three fellow employees take a business trip in the car of one of them, their employer paying the driver mileage for the use of his car; even without such reimbursement, the riders would be deemed passengers (Thompson v. Lacey, 42 Cal.2d 443, 267 P.2d 1); when a rider is taken on a business trip to help unload melons (Christiana v. Rattaro, 81 Cal.App.2d 597, 184 P.2d 682); when a rider accompanies the driver to guide the latter along the highway (Lerma v. Flores, 16 Cal.App.2d 128, 60 P.2d 546); when the rider's presence is desired by the driver to share in the driving (Druzanich v. Criley, 19 Cal.2d 439, 122 P.2d 53).

[2] The question whether such a benefit accrues to the driver is usually a question of fact; "[h]owever, if the admitted facts can give rise to but one reasonable conclusion, the question as to whether or not 'compensation' was given for the ride becomes one of law. [Citations.]" Winn v. Ferguson, 132 Cal.App.2d 539, 543, 282 P.2d 515, 517.

Here, the evidence on this subject, given solely by the defendant Michael Hester and his principal witness, Thomas Wintch, convinces us that the trial judge correctly determined that the only reasonable inference that could be drawn was that compensation was given and that Fredericks was a passenger.

Thomas Hester worked for McGuire and Hester, a construction firm whose office and main yard are in East Oakland. It is a family corporation managed by decedent's brother Michael who, as administrator of Thomas' estate, is the defendant herein.

[3] Michael testified that Thomas had been with him long enough to supervise small jobs. On this occasion some one in the organization had instructed Thomas to pick up a laborer and go out and do a certain job. The superintendent probably gave Thomas such orders.* The witness did not know that of his own knowledge but said "you could say that I assumed they [the orders] had been given." Michael satisfied himself that at the time of the accident Thomas was in the process of going to Antioch to make some test holes for McGuire and Hester. He had with him some tools (an electric motor, augers, wrenches and other tools) of McGuire and Hester, equipment necessary for Thomas to do that job. Thomas needed some help to do this work. He had with him Eugene Fredericks, one of McGuire and Hester's men, a laborer in the firm's employ. Thomas was using his own truck. Michael knew he was using it in the firm's business. It was Thomas' privilege to fill up his gas tank with the firm's gas whenever he wanted to. If he needed oil, he could get oil from the same source.

Thomas Wintch, employed by McGuire and Hester as chief estimator, testified it was necessary to make some soil tests in preparing bids for construction work near Antioch. It was Thomas' job to dig the test holes. Wintch told Thomas to meet him at a certain point near Antioch the next morning at 8:00 o'clock. Nothing was said about Thomas having anyone with him on the job. Wintch gave Thomas no instructions as to whom he should use. That was left to Thomas' judgment. "[I]f he felt he needed some help he would pick someone." On several prior occasions Thomas had Fredericks on the job with him. On those occasions it was left to Thomas to make the selection.

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* Defendant's witness Thomas Wintch testified that Mr. Alrick, the firm's general superintendent, had authority to tell Thomas to pick up a laborer and go out and make those tests.

To test the soil, Thomas had to be out there where the soil was. The trip was necessary for Thomas. Asked if Fredericks just went along for the ride, Wintch said "I would say no; I would say that Mr. Hester asked him to go out to assist him." Thomas "had the right to select anyone he wished to take to Antioch." Wintch knew of no reason why Fredericks would be going to Antioch outside of a business purpose to perform his duties for McGuire and Hester. "To my knowledge, he had no other reason."

There was no way of bringing the soil to the firm's main yard to be tested. They had to go to the soil and they needed certain equipment. Wintch assumed they would bring it with them. He assumed Thomas would bring the augers "because those were the tools with which he would perform the soil tests." Thomas knew what to bring. No method of transportation was mentioned. If Thomas had had only a bicycle, McGuire and Hester would have had to take those tools out there some other way. Wintch might have taken them. This whole thing was being done on behalf of McGuire and Hester.

These two men were on their way with one purpose and one purpose only, a business trip on behalf of McGuire and Hester. They would have met Wintch but for the accident, and would have tested the soil. If Fredericks had shown up with Hester, Wintch would have raised no question. He would have let Fredericks do the things Hester told him to do to make the soil test. This evidence impels the conclusion that this driver and this rider took this trip in the pursuit of a business enterprise in which each was interested, each for himself and for his employer. One benefit to the driver would be the assistance which the rider's services would be to him in making the soil tests. It seems equally apparent that taking the firm's tools and transporting a needed assistant to the field of operation were within the purview of the purposes for which the employer furnished the driver with gas and oil for use in his pick-up truck. The trial judge correctly instructed that Fredericks was a passenger.

Defendant mistakenly relies upon Benjamin v. Rutherford, 146 Cal.App.2d 561, 303 P.2d 1079, in which this court held it could not be inferred as a matter of law that the rider was a passenger. There was in that case no such specific, positive and uncontradicted evidence of the business nature of the trip and the benefits accruing to the defendant as in this case.

The judgment is affirmed.

BRAY, Acting J., and HANSON, J. pro tem., concur.

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169 Cal.App.2d 503

T. R. FORD, Plaintiff and Respondent,

v.

Lawrence R. LOANEY, etc., et al., Defendants,

William Fage, Individually and doing business as Eagle Rock Cabinet, Appellant.

Civ. 23374.

District Court of Appeal, Second District, Division 1, California.

April 10, 1959.

Action was brought to quiet title. The Superior Court of Los Angeles County, Kenneth M. Chantry and Bayard S. Rhone, JJ., entered a default judgment against one of the defendants, and he appealed. The District Court of Appeal, Fourt, J., held that plaintiff was not estopped from taking advantage of alleged clerical error in naming of individual defendant as a corporation in answer, where, if there was a dilemma, it was self-imposed by that defendant, and did not result from anything that plaintiff said or did.

Judgment affirmed.

1. Parties 🔑95(3)

Under some circumstances, error in name of a party may be corrected by an amendment, but trial court is not in every instance compelled to grant the motion of a party to correct a name in the pleading, or to correct some other mistake. West's Ann. Code Civ.Proc. § 473.

2. Parties 🔑95(3)

A broad discretion is properly placed in trial court to grant motion to correct mistake in name of a party. West's Ann. Code Civ.Proc. § 473.

3. Parties 🔑95(4)

Where attorney's secretary misunderstood dictation of attorney and named individual defendant in answer as a corporation, and attorney signed the answer which was unverified, as attorney for corporation, trial court did not abuse its discretion in refusing to correct the name of that defendant. West's Ann.Code Civ.Proc. § 473.

4. Parties 🔑95(7)

In a proper case, error in name in a document can be corrected nunc pro tunc as of time that document was filed. West's Ann.Code Civ.Proc. § 473.

5. Judgment 🔑153(1)

Generally, a default entered after an answer is on file may be stricken at any time.

6. Judgment 🔑103

Where there was no answer of defendant on file at time of default, it was proper to have default entered because of defendant's failure to appear. West's Ann. Code Civ.Proc. § 585.

7. Pleading 🔑271

An omission of a verification of an answer may be cured in a proper case by an amendment.

8. Pleading 🔑290(3)

An unverified answer is not necessarily a nullity.

9. Pleading 🔑271

In quiet title action, trial court did not abuse its discretion under circumstances in denying motion of defendant to cure omission of verification of answer by amendment.

10. Parties 🔑96(6)

Plaintiff was not estopped from taking advantage of alleged clerical error in naming of individual defendant as a corporation in answer in quiet title action, where, if there was a dilemma, it was self-imposed by defendant, and did not result from anything that plaintiff said or did.

Fadem & Memel, Los Angeles, for appellant.

Lester M. Fleischner, Los Angeles, for respondent.

FOURT, Justice.

This is an appeal (according to the Notice of Appeal) by the defendant William A. Fage, doing business as Eagle Rock Cabinet, from a default judgment entered against him in a quiet title action.

In an action filed in Los Angeles county on February 6, 1956, the plaintiff sought to quiet title to a parcel of real property which was particularly described in the complaint. The plaintiff had been a purchaser of such real property at a sale conducted by a trustee in a foreclosure proceeding of a deed of trust. In the complaint to quiet the title to the property, the defendant William A. Fage, doing business as Eagle Rock Cabinet, was named as one of the several defendants, and he was served with a copy of the summons and complaint on March

8, 1956. The appellant thereafter apparently consulted with Jerrold Fadem of Fadem & Memel, attorneys at law, with reference to the matter. Mr. Fadem apparently then contacted the then attorneys for the plaintiff and had the time extended fifteen days within which to answer or appear. After the first extension of time was granted the appellant asked for and received another extension of about twenty days. At the end of the second extension, still another extension of time was asked for and received.

Eagle Rock Lumber Co., Inc., a corporation, was named a defendant and was represented by the law firm of Dally and Saulque. Dally and Saulque caused to be filed an answer for that corporation on March 6, 1956.

On or about April 26, 1956, Jerrold A. Fadem, supposedly as the attorney for Eagle Rock Lumber Co., Inc., a corporation, filed what purported to be an unverified answer for that corporation. Fadem in fact had never been the attorney for the Lumber Company, and had never been consulted by the corporation with reference to the matter at hand or otherwise. Fadem had never before represented William A. Fage and did not know of him prior to representing him in this particular cause.

No pleading having been filed on behalf of William A. Fage, so far as the record disclosed, on May 8, 1956, the default of William A. Fage was entered at the request of the attorneys for the plaintiff. On or about August 17, 1956, the plaintiff substituted himself as attorney for himself, in lieu of his former attorneys who filed the action in quiet title in the first instance. On March 5, 1957, the plaintiff substituted his present counsel for himself as attorney of record in the cause.

On April 8, 1957, about eleven and one-half months after the default of the appellant had been entered, appellant made a motion to amend the answer filed on April 26, 1956, nunc pro tunc, to show that said answer was not filed in behalf of the Eagle Rock Lumber Co., Inc., a corporation, as set forth and stated in the document, but was filed on behalf of William A. Fage, individually, and doing business as Eagle Rock Cabinet. The attorney for the appellant filed an affidavit with said notice of motion, wherein he set forth in effect that the appellant had consulted with him with reference to the matter after he, the appellant, was served with the summons and complaint, and that he, the attorney, could not determine whether there was a good defense to the action without an extensive investigation; that he got two extensions of time within which to answer or appear in the cause, and then filed an answer on April 26, 1956, in behalf of the appellant, but erroneously written and signed on behalf of Eagle Rock Lumber Co., Inc., a corporation, instead of appellant William A. Fage. The attorney further set forth in effect that it all was the fault of his secretary in misunderstanding his dictation, and this in spite of the fact that the attorney himself signed the answer, which was unverified, as the attorney for the defendant Eagle Rock Lumber Co., Inc. That motion of the appellant was submitted as of April 12, 1957, and on April 15, 1957, the court denied the same and counsel were notified accordingly.

On May 13, 1957, the plaintiff filed a notice of motion for an order to have the default of the defendant Eagle Rock Lumber Co., Inc., a corporation, entered. Accompanying that motion was a stipulation by the attorneys Dally and Saulque, who represented the corporation, that the answer theretofore filed by them for the corporation could be withdrawn, and authorizing the plaintiff to take a default against the corporation. The clerk refused to enter the default of the corporate defendant, apparently because Fadem had filed, on April 26, 1956, an answer purporting to be on behalf of the corporate defendant. The clerk would do nothing about entering the default of the Corporation unless and until Fadem authorized it in writing, although Fadem was not in fact, and never had been the attorney for the corporation. Fadem would not authorize the default of the corporation.

On May 16, 1957, the appellant filed a "notice of motion to correct the name of defendant, file verification to answer and strike default," (of William A. Fage, doing business as Eagle Rock Cabinet).

On May 21, 1957, each of the motions last mentioned was heard. The court at that time granted the motion of the plaintiff to enter the default of defendant Eagle Rock Lumber Co., Inc., a corporation. The motion of appellant to file a verification to the answer, to change the name of Eagle Rock Lumber Co., Inc., a corporation, to read William A. Fage, doing business as Eagle Rock Cabinet, and to strike the default of William A. Fage, doing business as Eagle Rock Cabinet, were submitted, and on May 23, 1957, each such motion was denied.

On December 5, 1957, plaintiff secured a decree which in effect set forth that the plaintiff was the owner in fee simple absolute, subject to deeds of trust of record, of the property in question as of January 6, 1956; further, that the named defendants, as of January 6, 1956, did not have any right, title, interest or lien in and to the property or any part thereof. The decree was entered on December 9, 1957, and on February 4, 1958, the appellant filed his notice of appeal.

The appellant asserts:

(1) that an error in the name of a party may be corrected by an amendment at any time;

(2) that an error in name can be corrected as of the time the document was filed;

(3) that a default entered after an answer is on file may be stricken at any time;

(4) that an omission of a verification may be cured by amendment;

(5) that an unverified answer is not a nullity;

(6) that the plaintiff here sued the wrong person;

(7) that the plaintiff should be estopped from taking advantage of what appellant terms to be a clerical error.

It is true that under *some* circumstances an error in the name of a party may be corrected by an amendment. Counsel has cited for authority such cases as Nisbet v. Clio Mining Co., 2 Cal.App. 436, 441, 83 P. 1077; Thompson v. Southern Pac. Co., 180 Cal. 730, 734, 183 P. 153; Smith v. Pickwick Stages System, 113 Cal.App. 118, 122, 297 P. 940. However, a reading of the cases cited by appellant discloses that the facts in each case are entirely dissimilar to the facts in the instant case.

Section 473 of the Code of Civil Procedure reads in part:

"The court *may,* in furtherance of justice, and on such terms as may be proper, allow a party to amend any pleading or proceeding by adding or striking out the name of any party, or by correcting a mistake in the name of a party, or a mistake in any other respect; * * *." (Emphasis added.)

[1-3] It is clear that the court is not in *every* instance compelled to grant the motion of a party to correct a name in the pleading, or to correct some other mistake. A broad discretion is properly placed in the trial court. In this case the trial judge heard the evidence which was presented at the hearing, he read the affidavits submitted by the respective parties, and our review indicates to us that the trial judge was correct in his determination, and there was no abuse of discretion.

[4] It is true that in some proper cases (as the appellant asserts) an error in a document can be corrected as of the time that the document was filed. The trial court in this instance, however, found in effect that under the circumstances, this was not a proper case within which to permit such a correction.

[5, 6] The appellant further states that a default entered after an answer is on file may be stricken at any time, and such is in general a correct statement of the law.

However, in the case at hand, there was no answer of William A. Fage on file at the time of the default on May 8, 1956, and therefore it was proper to have the default of William A. Fage entered because of his failure to appear. Under section 585, Code of Civil Procedure, the clerk was required to enter the default of the appellant, under the circumstances of the case. Even if the stenographer in this case should have recognized that her employer meant William A. Fage, when he apparently said "Eagle Rock Lumber Co., Inc., a corporation," the clerk is not required to have any such clairvoyance. There being nothing on file in behalf of William A. Fage on May 8, 1956, the clerk complied with the request to enter the default of such person, he having theretofore been properly served and the time having expired for an answer or appearance. No steps were taken within the six months' period provided for in section 473, Code of Civil Procedure, to set aside the default.

[7–9] The appellant is correct in his assertion that an omission of a verification may be cured in a *proper* case by an amendment, and it is also true that an unverified answer is not necessarily a nullity; but the trial court ruled in this particular matter that it was not such a proper case, and a complete reading of the record convinces us that there was no abuse of the discretion which reposed in him.

As to appellant's contention that the plaintiff sued the wrong person, there is no merit whatsoever.

[10] The last assertion of the appellant is in the nature of a contention that the plaintiff should be estopped from taking any advantage of the so-called clerical error. The trial court apparently did not believe that there were any of the elements present which bring estoppel into play in this cause, and we are of the same opinion. It is not up to opposing counsel to keep his opponent informed as to whom the opponent does or does not represent. In this instance if there was a dilemma, it was self-imposed, and did not result from anything the respondent said or did.

Furthermore, in this case, the sole defense was based upon a mechanic's lien upon the real property in question. At the oral argument it was stipulated that this court might have before it for consideration the municipal court file having to do with the action of appellant in foreclosing his mechanic's lien. A reading of the documents in that file discloses that the appellant did not join the respondent herein as a defendant in that action, and it is readily apparent that the appellant has not complied with the provisions of section 1198.1 (a), Code of Civil Procedure, namely, bringing an action within ninety days from the date of filing of the lien; therefore the probabilities are great that even if this case were reversed, a summary judgment would be granted in favor of the respondent.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

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169 Cal.App.2d 436

CALIFORNIA CENTRAL AIRLINES, a California corporation, Plaintiff and Appellant,

v.

F. J. FRITZ, James Springer, F. J. Fritz and James Springer, a co-partnership, Defendants and Respondents.

Civ. 18198.

District Court of Appeal, First District,
Division 2, California.

April 8, 1959.

Action for breach of airplane rental agreement. The Superior Court, County of Alameda, Donald K. Quayle, J., granted summary judgment for defendant and plaintiff appealed. The District Court of

Appeal, Draper, J., held that where it appeared that action had been inadvertently filed in the name of a nonexistent corporation but defendants were familiar with the transaction out of which action arose and proposed corporate defendant was the only corporation of that name, it was error not to allow the amendment of complaint to substitute named corporation as proper party defendant.

Reversed with directions.

1. Pleading ⚷248(1)

In determining whether a wholly different cause of action is introduced by amendment of pleading within general rule that an amendment must not state a new or different cause of action or bring in any new or different party, technical considerations or ancient formulae are not controlling, and nothing more is meant than that defendant is not required to answer a wholly different legal liability or obligation from that originally stated.

2. Parties ⚷95(5)

Where plaintiff bringing an action for breach of rental contract inadvertently filed the same in the name of nonexistent corporation and sought to amend complaint to allege the correct corporation as party defendant, and it appeared that defendants were familiar with the transaction and proposed corporate defendant was the only corporation with that name, and there was no showing that defendants were in any way misled, it was error to refuse plaintiff right to amend complaint to allege corporation as party defendant. West's Ann.Code Civ.Proc. § 437c.

Joseph Bernfield, Lee J. Cohen, Los Angeles, for appellant.

William L. Beeman, Vallejo, for respondents.

DRAPER, Justice.

Plaintiff appeals from summary judgment in favor of defendants. Code Civ. Proc., § 437c. Complaint filed May 18, 1956 in its caption listed "California Central Airlines, a California corporation" as plaintiff, and alleged that plaintiff is a California corporation. The complaint alleged that by an oral contract made May 10, 1956 defendants agreed to lease to plaintiff a described commercial aircraft. It was alleged that plaintiff had paid $500 and had delivered specified airplane equipment to defendants on account of rentals, but that defendants had refused to perform the agreement on their part. The answer consisted in large part of denials but did admit receipt of the $500 payment and of the aircraft equipment described in the complaint.

At pre-trial conference December 4, 1957, plaintiff's attorney stated that the action had inadvertently been filed in the name of the wrong corporation, and that in fact the contract was by California Coastal Airlines, a California corporation, doing business as California Central Airlines. The case was dropped from the pre-trial calendar. Plaintiff filed its motion to amend the complaint by substituting as plaintiff California Coastal Airlines. Defendants moved for summary judgment. Affidavits were filed by both sides. After hearing, the court denied leave to amend and granted summary judgment in favor of defendants.

The affidavits show that a California corporation known as California Central Airlines, Inc. once existed, but was dissolved in 1953 and succeeded by California Central Airlines, Inc., a Nevada corporation. This latter corporation was adjudicated a bankrupt in 1955 and was suspended from doing business in California January 2, 1957. California Coastal Airlines was incorporated in California before March 23, 1955, and on that date filed of record its certificate of doing business under the fictitious firm name of California Central Airlines. It will be noted that all the events listed in this paragraph occurred before the making of the agreement here sued upon, and, of course, before filing of the complaint herein.

Defendants rely upon the general rule that an amendment "must neither state a new or different cause of action nor substitute or bring in any new or different party" (37 Cal.Jur.2d 375, Parties, § 43) and cite many cases to that general effect. However, as is so commonly true of the broader generalities of the law, there are many qualifications of the rule.

[1] Literally applied, the above language would bar amendment of any pleading to which a general demurrer is sustained. Clearly that view is unacceptable. Actually "[i]n determining whether a wholly different cause of action is introduced by the amendment technical considerations or ancient formulae are not controlling; nothing more is meant than that the defendant not be required to answer a wholly different legal liability or obligation from that originally stated." Klopstock v. Superior Court, 17 Cal.2d 13, 20, 108 P.2d 906, 910, 135 A.L.R. 318. In Klopstock a stockholder's representative action was brought by the executor of the will of the widow of a deceased stockholder. The District Court of Appeal reversed judgment in favor of plaintiff on the ground that the husband's estate was the proper party plaintiff. After remittitur, the trial court granted the motion of plaintiff executor to substitute the husband's personal representative as plaintiff. Defendants sought mandamus to compel dismissal. The Supreme Court held that the amendment was properly allowed. We are unable to distinguish the facts of the case at bar. Amendment has been permitted to add "E. A. Curtis Company, a corporation" as plaintiff in an action brought by E. A. Curtis, individually, and judgment for the corporation alone was affirmed. Curtis v. Nye & Nissen, 86 Cal.App. 507, 261 P. 747.

[2] The rule and the reasoning of these decisions indicate that plaintiff should be allowed to amend. The obligation asserted by plaintiff is fully described in the complaint. The answer reveals that defendants are fully aware of the details of the transaction out of which it is claimed to arise. The affidavits do not show that any corporation named California Central Airlines (without the "Inc.") ever existed. The only entity called California Central Airlines shown ever to have existed is the corporation sought to be substituted, doing business under that name. Defendants' affidavits nowhere seek to show that the original complaint in any way misled them as to the transaction sued upon or the true party asserting the claim against them. In no sense would they be required to "answer a wholly different legal liability or obligation from that originally stated." Of course, the evidence may reveal that the substituted plaintiff is not the lessee named in the oral agreement, or is not qualified to sue. But these are issues to be determined upon the amended complaint.

In the cited cases, the trial court had permitted amendment, and the appellate court affirmed such exercise of discretion. However, the rule is equally clear that denial of leave to amend is, in similar circumstances, reversible error. Rabe v. Western Union Tel. Co., 198 Cal. 290, 244 P. 1077. Such denial is comparable to sustaining of a demurrer without leave to amend and, in the circumstances here present, requires reversal. Ginsberg Tile Co. v. Faraone, 99 Cal.App. 381, 388–389, 278 P. 866; see also 2 Witkin, Calif. Procedure, § 594 [2]. Had plaintiff been permitted to amend its complaint, the ground upon which summary judgment was granted would disappear.

Judgment reversed, with directions to the trial court to grant plaintiff's motion to amend.

KAUFMAN, P. J., and DOOLING, J., concur.

169 Cal.App.2d 439

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Gerald Lee ARTER, Defendant and Appellant.

Cr. 6517.

District Court of Appeal, Second District, Division 2, California.

April 8, 1959.

The defendant was convicted of possession of heroin. The Superior Court of Los Angeles County, Edward R. Brand, J., entered judgment, and the defendant appealed. The District Court of Appeal, Herndon, J., held that there was adequate basis for implied finding of trial judge that officer had reasonable cause to arrest defendant without warrant.

Affirmed.

1. Arrest ⊂⇒63(4)

In prosecution for possession of heroin, the evidence, including evidence that arresting officer had known the informant for approximately one year and that informant during that time had occupied a position of responsibility with a substantial firm and that informant had given information of detailed nature and a complete description of defendant and his modus operandi and that such information had been independently verified in substantial part, was adequate basis for trial judge's implied finding that officer had reasonable cause to arrest defendant without warrant. West's Ann. Pen.Code, § 836.

2. Arrest ⊂⇒63(4)

"Reasonable cause" to justify an arrest without a warrant may consist of information obtained from others and is not limited to evidence that would be admissible at trial on issue of guilt. West's Ann.Pen. Code, § 836.

See publication Words and Phrases, for other judicial constructions and definitions of "Reasonable Cause"

3. Arrest ⊂⇒63(4)

"Probable cause" for arrest without warrant is shown if man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of guilt of accused. West's Ann.Pen.Code, § 836.

See publication Words and Phrases, for other judicial constructions and definitions of "Probable Cause".

4. Criminal Law ⊂⇒394.5(1)

Where officer makes arrest without warrant based on information supplied by informant, whether informant was reliable and whether officer relied on information received has first to be determined by trial court so long as it acts with sound discretion. West's Ann.Pen.Code, § 836.

5. Arrest ⊂⇒63(4)

It is credibility of officer and soundness of his reasons for relying on information that must impress court before it can determine that officer was authorized to make arrest without warrant. West's Ann.Pen. Code, § 836.

6. Criminal Law ⊂⇒260(11)

The weight to be accorded the information upon which the arresting officer acts when he makes an arrest without a warrant is a question of fact for the trial court. West's Ann.Pen.Code, § 836.

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Sam Bubrick, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Robert M. Sweet, Deputy Atty. Gen., for respondent.

HERNDON, Justice.

[1] Appellant was convicted and sentenced to state prison for possession of heroin. His sole contention on appeal is that he was arrested without a warrant and without reasonable or probable cause, so that the incriminating evidence seized in the course of the ensuing search was inadmissible. By stipulation the case was submitted to the trial judge upon the transcript of the testimony taken at the preliminary examination.

On the night of June 13, 1958, Donald J. Johnson, the arresting officer, had a conversation with a man to whom he referred as "the foreman". Apparently the person referred to was the foreman of the Spray Electric Company, appellant's employer. Officer Johnson testified that he had known this informant for approximately one year and believed him to be a user of narcotics. The information imparted to the officer by this informant included the following: that a person known as Jerry Arter worked at the Spray Electric Company as a draftsman; that Arter worked at a front window, and that when a person desired to purchase heroin from Arter, he would walk back and forth past the window on the opposite side of the street until Arter recognized him; that Arter would then leave the establishment, go out to the sidewalk and there make the sale; that Arter was selling heroin at $3 per capsule; that Arter usually had the heroin in his possession when he entered the plant to work, and that Arter, himself, was an addict. The informant described Arter as being a slender, dark-haired young man of approximately 25, standing about five feet eight or nine inches in height. Further, the informant told the officer that Arter lived in a large apartment house on 5th Avenue, just below Pico, near a Sears and Roebuck store, and that Arter drove a black 1958 Volvo sedan which he parked in the garage near the rear of the apartment house.

Shortly after receiving this information, and by way of verifying it, officer Johnson went to the location referred to by the informant and there found an apartment house similar to that which the informant had described. The officer went to the garage at the rear of the apartment and upon opening the garage found therein a black 1957 or 1958 Volvo sedan. After obtaining the license number of the vehicle, the officer verified its ownership through the Department of Motor Vehicles.

It appears that the officer made certain inquiries and received information from the "Record and Identification bureau". Although it is not entirely clear from the record, it may be inferred that this bureau was an agency of the police department. When the officer was about to testify to the results of his inquiries at this bureau, counsel for defendant interposed an objection "to anything he received from his record bureau, as being immaterial." When this objection was sustained, the district attorney directed the witness to proceed with the following statement: "Don't tell us what you learned from the record department, but tell us what else you did on checking out the information". The officer then proceeded to relate that he and officer Korby went to the parking lot adjacent to the Spray Electric Company where they awaited the arrival of appellant.

At approximately 10 a. m. the officers observed a black 1957 or 1958 Volvo sedan enter the parking lot. As appellant got out of the vehicle, the officers approached him, stating that they were police officers. Observing that appellant had "something in his hand", officer Korby extracted from appellant's left hand a package containing heroin. Another package of heroin was found in the glove compartment of appellant's vehicle.

Following his arrest, appellant admitted that the heroin was his; that he had bought three grams "from a fellow named Pico, down around Figueroa". Appellant further stated "the reason I was late for work, I just scored this morning." When asked "Did you use any this morning" he replied "Yes, I just had a fix before I got here". Appellant further stated that he had been using heroin for approximately five or six years at the rate of two or three grams a day; that he sold heroin for $3 a capsule, and that he had paid $12.50 per gram for the narcotics which were in his possession on that day.

[2–6] It is apparent from the foregoing recital that there was adequate basis for the implied finding of the trial judge that the arresting officer had reasonable cause to justify the arrest here in question. As recently stated in People v. Barnett, 156 Cal.App.2d 803, 806, 320 P.2d 128, 130:

"A peace officer, may without a warrant, arrest a person when a felony has been committed and the officer has reasonable cause for believing the person arrested to have committed it. Pen.Code, § 836. '[R]easonable cause to justify an arrest may consist of information obtained from others and is not limited to evidence that would be admissible at the trial on the issue of guilt.' People v. Boyles, 45 Cal.2d 652, 656, 290 P.2d 535, 537. 'Probable cause is shown if a man of ordinary caution or prudence would be led to believe and conscientiously entertain a strong suspicion of the guilt of the accused.' Bompensiero v. Superior Court, 44 Cal.2d 178, 183, 281 P. 2d 250, 254. 'Whether the informant was reliable and whether the officer relied on the information received has first to be determined by the trial court so long as it acts with sound discretion.' People v. Dean, 151 Cal.App.2d 165, 167, 311 P.2d 85, 87. 'It is the officer's credibility and the soundness of his reasons for relying upon his informant that must impress the court before it can determine that the officer was authorized to make the arrest.'". As recently stated in People v. Weathers, 162 Cal.App.2d 545, 328 P.2d 222, 224: "[I]t is the credibility of the officer and the soundness of his reasons for relying on the informant which is the primary question. The reliability of the informant is not paramount. People v. Dean, 151 Cal.App.2d 165, 167, 311 P.2d 85. Further, the weight to be accorded the information upon which the arresting officer acts is a question of fact for the trial court. Lorenzen v. Superior Court, 150 Cal.App.2d 506, 510, 310 P.2d 180; People v. Gonzales, 141 Cal.App. 2d 604, 607, 297 P.2d 50."

Cases relied upon by appellant involving *anonymous* informants are not in point. The arresting officer in the instant case had known the informant for approximately one year. The fact that the informant, during this period of time, had occupied a position of responsibility with a substantial firm could be regarded as substantial evidence of his honesty and reliability. Moreover, the detailed nature of the information given and the completeness of the description of the accused and his modus operandi—especially after the information had been independently verified in substantial part—were such as to give the information an aspect of intrinsic reliability. At no time during the trial, or the preliminary hearing, did appellant seek disclosure of the informant's name. Thus, it is practically an inescapable inference that appellant also knew the informant's identity. Nor did appellant move to strike the officer's testimony regarding the communications which he had received from the informant. In such a case "* * * evidence of information from a reliable informer is * * * unobjectionable and may be sufficient to sustain a finding that the search was made with reasonable cause * * *." Priestly v. Superior Court, 50 Cal.2d 812, 819–820, 330 P.2d 39, 44.

Furthermore, in this case, as in People v. Boyles, supra, 45 Cal.2d 652, 656, 290 P.2d 535, 537, "* * * defendant is not in a position to challenge the failure of the record to establish the basis for the officer's belief. When the prosecuting attorney sought to establish that basis, defendant objected and the committing magistrate ruled that the matter should be gone into on cross-examination. At that time defendant limited the examination to a determination that the officer had not personally witnessed any activity of defendant with regard to narcotics." Likewise, in the instant case, appellant, by interposing an objection, successfully prevented the prosecution from presenting evidence which presumably would have developed more fully the information upon which the officer acted in making the arrest.

Affirmed.

FOX, P. J., and ASHBURN, J., concur.

169 Cal.App.2d 536

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Harold L. McDANIEL, Defendant and Appellant.

Cr. 6408.

District Court of Appeal, Second District, Division 3, California.

April 10, 1959.

Defendant was convicted of selling heroin. The Superior Court of Los Angeles County, Richard C. Fildew, J., entered judgment, and defendant appealed therefrom and from order denying motion for new trial. The District Court of Appeal, Shinn, P. J., held that the evidence sufficiently identified the defendant as the man who sold heroin to undercover narcotic inspector some three weeks prior to defendant's arrest.

Judgment and order affirmed.

1. Criminal Law ⚷566

In prosecution for selling heroin, evidence sufficiently identified defendant as the man who sold heroin to undercover narcotic inspector some three weeks prior to defendant's arrest.

2. Criminal Law ⚷1165(1)

In prosecution for selling heroin, record disclosed that defendant was not prejudiced by delay of some three weeks between alleged sale to undercover narcotic inspector and the arrest of defendant. West's Ann.Pen.Code, § 800.

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H. Clay Jacke, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Robert M. Sweet, Deputy Atty. Gen., for respondent.

SHINN, Presiding Justice.

Harold L. McDaniel was indicted for and in a jury trial convicted of selling heroin. His motion for new trial was granted upon the ground of the insufficiency of the evidence to support the verdict and the matter was retried to the court. McDaniel was convicted at the second trial and was sentenced to state prison. He appeals from the judgment and the denial of his motion for new trial.

Richard Velasquez, an undercover narcotic inspector for the State of California, was the only witness for the People. The following is the substance of his testimony. At about 9 p. m. on August 19, 1957, Velasquez saw appellant standing outside a drive-in restaurant on the southwest corner of Adams and Normandie in Los Angeles. The inspector approached McDaniel and asked him "if he had anything." Upon receiving an affirmative answer, Velasquez asked appellant if he had a "ten dollar paper." McDaniel said that he did and asked to see the inspector's money. Velasquez replied that he would have to see the "stuff" first. Appellant told the inspector to accompany him and the two men started to walk south on Normandie. McDaniel said that he was one of the biggest peddlers in the area and supplied most of the peddlers on the corner. At his request, Velasquez exhibited the $10. Appellant then departed, returning a few minutes later. The inspector gave him the money and McDaniel handed Velasquez a rubber balloon that was proved to contain heroin. Velasquez then asked appellant where he could see him again if he wanted more narcotics and McDaniel replied that he could see him "right there at the corner."

The inspector testified that he did not recall having seen McDaniel prior to August 19th. He saw him in the vicinity of the drive-in on three occasions between August 19th and September 13th. On one of those occasions, McDaniel told Velasquez to be careful because "the heat is around here." On another occasion, Velasquez gave a description of appellant to two other narcotic inspectors who picked him up for questioning and released him after ascertaining his name and address. Velasquez was standing beside McDaniel at the drive-in when the officers accosted him.

Appellant was arrested on September 13th during a round-up of narcotic peddlers in which 25 other persons were also arrested.

On cross-examination, Velasquez was asked to describe the man who sold him the heroin on August 19th. He testified that the seller was a male Negro, about 32 years of age, approximately 5 feet 8 inches tall and weighing about 150 pounds. The witness was shown the transcripts of his testimony before the grand jury and at the previous trial and he admitted testifying on the latter occasion that the seller was between 5 feet 8 and 5 feet 9 "hat and all" and weighed about 140 pounds. Although he told the grand jury that the seller had a horizontal scar over the right cheek, Velasquez admitted testifying at the previous trial that the blemish was a crease or wrinkle rather than a scar, that it was on the left cheek rather than the right, and that it ran diagonally rather than horizontally. In explaining the discrepancy, Velasquez stated that the description he gave the grand jury was a mistaken one; when he first noticed the blemish, he was facing the seller and the blemish appeared to be on his (the inspector's) right.

McDaniel denied selling any heroin to Velasquez. He testified that he was 5 feet 6 inches tall and weighed 130 pounds. A half inch scar was visible on his left cheekbone. Although he lived near the intersection of Normandie and Adams and was around the drive-in "more or less all the time", McDaniel never saw Velasquez prior to his arrest. He admitted being picked up by the other inspectors for questioning. On August 19th, he made a down payment on an apartment and signed a rental agreement. At 6:15 p. m. he bought some hamburgers at the drive-in and went to the apartment of a Mrs. Taylor, where he remained all night.

Mary Elizabeth Taylor testified on appellant's behalf that she had no specific recollection of the events of August 19th. However, she recalled a day during the late summer of 1957 when McDaniel told her about renting an apartment. On that occasion, appellant arrived at her apartment at about 7 p. m. and they took a ride in his car, returning about 10 p. m. McDaniel did not leave until the following morning.

The points on the appeal are that the court based its finding of guilt upon matters not in evidence and that McDaniel was deprived of a fair trial by reason of the three week delay in effecting his arrest. Neither contention is meritorious.

[1] Under his first point, appellant directs our attention to the following statements made by the court during the course of the trial: "The defendant before the Court, I think, closely fits the description here. We have evidence that they are in the vicinity, a description, and these narcotic peddlers up there. *But, all the men that work under cover try to watch these defendants until they make a sale. They watch these fellows sometimes for a long time before they try to make a buy, even if it is a week or ten days, and they get a good picture of them because they are going to identify them six, eight, or ten months later. Now I think the evidence is that he has seen this man around there numerous times in the vicinity of Adams and Normandie.* He sees the defendant at the scene there. His size; he has a general description of him. He can establish that in his own mind and afterwards he sees the man and pointed him out again. I don't think there is any showing that this is not the man; he fits the general description." (Emphasis added.)

McDaniel argues that since there was no evidence that he was kept under a lengthy surveillance or that the inspector saw him in the vicinity of the drive-in on more than three occasions, the court must be deemed to have based its finding of guilt upon matters outside the record. The record does not support this contention. Appellant was ably represented by a deputy public defender. The point he now urges was vigorously argued to the trial court. The sufficiency of the evidence of identification depended upon the court's acceptance of the testimony of Officer Velasquez. The court gave it full credit. It is not for this court to say that the identification was insufficient. People v. Alonzo, 158 Cal.App.2d 45, 47–48, 322 P.2d 42.

[2] Under his second point, McDaniel argues that he was prejudiced by the delay in arresting him because the lapse of time rendered identification uncertain and made it more difficult for him to remember his own whereabouts on August 19th. The argument is untenable. The grand jury indicted appellant within the 3 year period of limitations and the delay was without legal significance. Penal Code § 800; People v. Bradford, 130 Cal.App.2d 606, 608, 279 P.2d 561. Appellant was able to account for his actions on the evening of the alleged offense. If the court had believed him and the testimony of Mrs. Taylor, he would doubtless have been acquitted.

The judgment and order appealed from are affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

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169 Cal.App.2d 473

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Sereldo PEREZ, Defendant and Appellant.

Cr. 2917.

District Court of Appeal, Third District, California.

April 9, 1959.

Defendant was convicted in the Superior Court, Merced County, R. R. Sischo, J., of grand theft, and he appealed. The District Court of Appeal, Peek, J., held that mere fact that person who allegedly attempted to suppress testimony of complaining witness was defendant's brother did not of itself establish that he had been acting on behalf of defendant in so doing or that he had been authorized by defendant to do so; and, in absence of any showing that defendant had been connected with alleged attempt to suppress testimony, error in admitting evidence of such attempt would require reversal.

Reversed.

1. Criminal Law ⇨80

Question of whether or not person who is shown to have been present at time and place of commission of crime aided and abetted therein is one of fact for jury to decide from all of circumstances proved.

2. Criminal Law ⇨351(10)

Defendant's efforts to suppress testimony show consciousness of guilt, and evidence with regard thereto is admissible.

3. Criminal Law ⇨351(10)

If attempt to suppress evidence was made by third person outside of presence of defendant, it must appear that third person was acting on behalf of defendant in so doing, or was authorized by him to do so, but authority of third person may be shown by circumstantial evidence.

4. Criminal Law ⇨351(10), 1169(1)

That person who allegedly attempted to suppress testimony of complaining witness was defendant's brother did not of itself establish that he had been acting on behalf of defendant in so doing or that he had been authorized by defendant to do so; and in absence of any showing that defendant had been connected with alleged attempt to suppress testimony, error in admitting evidence of such attempt would require reversal of grand theft conviction. West's Ann.Pen.Code, §§ 31, 487, subd. 2.

Michael & Papas, Stockton, for appellant.

The Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment of conviction of grand theft and from the order denying his motion for a new trial.

The record shows that one Emedio Ramierez, a 76-year-old laborer, had received and cashed a Social Security check for $420. He left $250 for safe keeping with the owner of the liquor store where he cashed the check and took the balance with him. Thereafter Ramierez went to the Mission Tavern in Merced, had a few beers, watched a card game, loaned a friend $30 and talked to defendant. Around 10 p. m. defendant said to Ramierez, "Let's go to the hotel, I have some girls." Defendant had seen Ramierez' money on the occasion of the $30 loan. The two went to the Central Hotel where defendant registered Ramierez under the name of Perez, telling the clerk that Ramierez was his father. He was given room 19 which adjoined the one occupied by defendant and his common law wife. Ramierez entered the room with the woman and remained there approximately an hour, resting on the bed and dozing lightly. Defendant was not in the room during this time. While Ramierez was in the room with the woman he took off his shoes and placed his wallet in them. He was certain no one touched his wallet during this time. Also, during this time, the hotel clerk heard some one pacing the hallway and, upon investigation, saw defendant outside room 19 and heard him say, "Now stay in the bed, pop." Defendant told the clerk that Ramierez was his father; that Ramierez had been sick for a long time; that he was going to try to get him to go back to Sacramento where defendant's mother was; that Ramierez wanted to go to Sacramento; and that, "He has got some money on him * * * and there is some people up there trying to get it off of him." Subsequently all three departed in a taxi, ostensibly for the Torino Hotel. Upon arriving at that hotel, Ramierez said he was going home. Defendant and the woman suggested that they accompany him, but Ramierez said he wanted to go alone. Eventually the three left together. Shortly after arriving at his home Ramierez bent over to pick up a magazine from the floor. As he did so he felt his wallet being taken out of his pocket and then saw it in the woman's hands. Defendant was standing three or four feet away from him at the time. Ramierez said he was going to call the police and left for his next door neighbor's house to use the telephone. Upon returning to his own home he saw defendant and the woman leaving. Ramierez ran after them and grabbed the woman but was pushed away by defendant. The next morning he found his wallet on the ground with only the receipt in it for the money he had left with the liquor store proprietor. There was approximately $90 in his wallet when the three went to his home.

Defendant and the woman returned to the Central Hotel, but upon seeing a police car in front left without obtaining their belongings and took a bus to Stockton.

At the trial defendant testified that he had taken Ramierez to the Central Hotel at Ramierez' request; that Ramierez himself asked defendant to register him as his father; and that Ramierez had invited him and the woman to his home. Defendant denied that any money had been taken from Ramierez. He further denied that he had made the statement to the room clerk that some one was trying to get money from Ramierez, and also denied the truth of Ramierez' statements regarding the events that took place at Ramierez' home, and stated that he and the woman left his home because Ramierez had been drinking too much.

Defendant contends (1) that the evidence is insufficient to establish that he was a principal in the commission of the offense; (2) that the trial court committed error in admitting evidence of the attempt of defendant's brother to suppress the testimony of the complaining witness; and (3) that the trial court committed error in allowing the police officer to testify to the statement he made to the complaining witness.

Section 487 of the Penal Code states: "Grand theft is theft committed in any of the following cases: * * * 2. When the property is taken from the person of another * * *" Section 31 thereof provides that all persons concerned in the commission of a crime, whether they directly commit the act constituting the offense, or aid or abet in its commission, are principals in any crime so committed.

[1] It is well settled that the question of whether or not a person who is shown to have been present at the time and place of the commission of a crime has aided and abetted therein, is one of fact for the jury to decide from all the circumstances proved. People v. Woodward, 45 Cal. 293; People v. Kauffman, 152 Cal. 331, 92 P. 861; People v. Silva, 143 Cal.App.2d 162, 300 P.2d 25. While the record in the instant case discloses circumstantial evidence from which the jury could find defendant guilty of the requisite participation in the crime charged, it cannot be said that such evidence presents a strong case for the prosecution.

The testimony which forms the basis of defendant's second contention was given by the prosecuting witness and was admitted over the vehement objections of defense counsel. It began with a question by the district attorney that if, subsequent to the arrest of defendant, the witness had received a visit "from the defendant or any of his relatives as to the testimony you were to give?" to which he answered, "No." A like question was again asked. The objection of defense counsel was overruled and the district attorney continued: "Did you ever have a visit from either the defendant or his brother? A. Yes, his brother came to the house at 11:00 o'clock at night. I was in bed * * *. Q. And did he talk about this—is the brother here in Court today? Do you see him? A. Yes. Yes, he came and he told me he wanted me to go to Stockton * * * to talk to an attorney." Again counsel's objection was overruled. The witness answered: "Yes, he came over and he wanted me to go to Stockton to talk to an attorney, and that they were returning the money." Again counsel's objection was overruled and his request that the answer be stricken and the jury admonished to disregard the testimony was denied. Thereafter, in response to a query from the court as to the purpose of the testimony, the district attorney replied that it "is to show an attempt to get testimony of this witness changed." Again counsel objected and cited the statement of the district attorney as prejudicial misconduct. This time the court replied: "All this will go out due to the fact it hasn't touched upon the question of evidence so far. What he has said has nothing to do with what they are going to get in the way of evidence from him. They only wanted to go to Stockton. Did they tell you what they wanted you in Stockton for? A. They said they would return me some money and that they wanted me to say in Court that I had given his brother some money to buy some whiskey." Counsel again stated he would cite this as prejudicial misconduct and asked that the entire statement be stricken and the jury admonished to disregard it. In response to a further statement by counsel that the witness had not identified the man who talked to him as the defendant's brother, the court again queried the witness: "Was the man you were talking to this man's brother? A. Yes. He told me that the girl who was there, he take out in the —" Again counsel objected. The district attorney intervened, stating: "So we can identify him, your Honor, I will ask him this one question, if you will permit it. Is the man that talked to you present in Court here today? A. Yes, he is right there, it is his brother." The court then addressed the district attorney: "You are asking that the evidence be permitted for the purpose of showing what? A. An attempt to influence the evidence and influence a witness, which—" Again counsel objected, demanding that the court declare a mistrial and that, if not, any further discussion should be held in the absence of the jury. In reply the court stated: "Your request is denied. Your objection is overruled. I will permit the evidence to stand as it is. It is a question for the jury to determine. This being the defendant's brother, who has come to this man to talk to him, whether or not he was attempting to influence this witness is a question for the jury. No, I will leave it stand as it is." The district attorney then continuing asked the witness: "Have you seen these two together, the two brothers? A. No, I don't know them. The Court: How do you know he is his brother? A. When they were in Stockton, a man told me there that they were brothers." Again defense counsel objected. The court interrupted, stating: "Did you ask this man who he was? A. No, I did not ask him. He is the one that talked to me first. Q. Did he tell you who he was? A. No, he just told me that his brother was in jail, and that he did not want him to go to the penitentiary." Again counsel objected, asking that the statement go out and the jury be admonished to disregard it. "The Court: It won't go out." The record shows further questioning of the witness by the court and the district attorney concerning the relationship. Finally the court stated: "Let's clear this question up. Call that man on the stand as soon as this man gets off. You may call him as your own witness if there is any question about his being a relative." Counsel stated there was no question of his being a relative, to which the court replied: "What are you objecting about then?"

[2-4] There can be no question as to the admissibility of testimony relative to the efforts of a defendant to suppress testimony, since such actions show a consciousness of guilt. People v. Kendall, 111 Cal.App.2d 204, 244 P.2d 418. However, if the attempt is made by a third person outside of the presence of the defendant, it must appear that the third person is acting on behalf of the defendant in so doing, or is authorized by him to do so. The authority of the third person may be shown by circumstantial evidence. People v. Kendall, supra. In the instant case it is not denied that the person identified by the complaining witness as the person making the offer was defendant's brother. But mere relationship, of itself, has never been held sufficient, respondent's contention to the contrary notwithstanding. See People v. Moore, 70 Cal.App.2d 158, 160 P.2d 857. In each of the cases cited by respondent there was additional evidence tending to connect the defendant with efforts to tamper with the witness.

In People v. Gilliland, 39 Cal.App.2d 250, 103 P.2d 179, 182, 183, a somewhat similar situation was presented. There Gilliland was recalled on cross-examination and asked if he had not stated to the complainant's maid that if she would testify to certain facts, his codefendant Goetz, would pay her well. Following categorical denials by Gilliland, the maid was called as a witness and permitted to testify that such statements were made by him to her. The reviewing court held: "We have no hesitancy in saying that this testimony should not have been admitted as against appellant Goetz * * * The record before us is * * * barren of any evidence showing that appellant Goetz was connected with or authorized the efforts to tamper with the witness. Hence it was palpable error to receive in evidence as against appellant Goetz the acts and declarations of his former alleged coconspirator made without his proven knowledge, consent or presence * * *" See also People v. Weiss, 50 Cal. 2d 535, 327 P.2d 527.

The prosecution in the Gilliland case, as here, argued in support of the judgment that even if it was error to have admitted such testimony, it was not prejudicial under section 4½, article VI of the Constitution. In view of the state of the record, it appears to this court that the judgment cannot be saved by said section. "We do not understand section 4½ of article VI of the Constitution as intended to mean that merely because the evidence may legally be able to stand up under the weight of the judgment, that is sufficient reason in all cases for refusing to set aside the judgment. * * * If a defendant cannot be fairly convicted, he should not be convicted at all; to hold otherwise would be to provide ways and means for the conviction of the innocent. It cannot be gainsaid that you cannot inspire or preserve respect for the law by withholding its protection from those accused of crime. While deviation from the prescribed rules of law governing trials may result in justice for the particular defendant who is before the bar, it is dangerous to the community and its citizens." People v. Gilliland, supra, 39 Cal.App.2d at page 264, 103 P.2d at page 186.

By reason of what we have heretofore said, it becomes unnecessary to discuss defendant's remaining contention.

The judgment and the order denying defendant's motion for a new trial are reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

169 Cal.App.2d 432

Rose ROONEY, Plaintiff and Appellant,

v.

Raymond L. SULLIVAN, as Executor of the Will of Mary E. Burke, deceased, Defendant and Respondent.

Civ. 18172.

District Court of Appeal, First District, Division 2, California.

April 8, 1959.

Hearing Denied June 3, 1959.

Action to recover for services performed and money expended in caring for decedent. The Superior Court, City and County of San Francisco, John B. Molinari, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Dooling, J., held that where services are rendered under an oral agreement to compensate person rendering them by will of promisor and oral promise to compensate by will is not carried out, law implies obligation to pay reasonable value thereof; and held that unless there is prior repudiation, of promise to compensate by will, of which promisee has knowledge (in which event statute might commence to run from date of such repudiation) no cause of action upon contract implied in law arises until death of promisor without carrying out express promise to compensate by will, and statute of limitations commences to run from death of promisor rather than from date of termination of services.

Judgment reversed.

Frauds, Statute of 🔑138(4)
Limitation of Actions 🔑49(2)

Where services are rendered under an oral agreement to compensate person rendering them by will of promisor and oral promise to compensate by will is not carried out, law implies obligation to pay reasonable value thereof; and unless there is prior repudiation, of promise to compensate by will, of which promisee has knowledge (in which event statute might commence to run from date of such repudiation) no cause of action upon contract implied in law arises until death of promisor without carrying out express promise to compensate by will, and statute of limitations commences to run from death of promisor rather than from date of termination of services. West's Ann.Civ.Code, § 1624, subd. 6; West's Ann.Code Civ.Proc. §§ 339, and subd. 1, 1973, subd. 6.

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Thomas P. O'Brien, San Francisco, for appellant.

Malone & Sullivan, San Francisco, for respondent.

DOOLING, Justice.

This is an appeal from a judgment entered on an order sustaining without leave to amend defendant's demurrer to plaintiff's second amended complaint.

The second amended complaint contained three causes of action. The first was for the reasonable value of services performed and actual amount of money expended. It was alleged that during 1944 decedent requested appellant to render services and to provide food, supplies and transportation for her. Decedent promised in return for this assistance to execute a will wherein she would devise to appellant a certain lot of land and a home thereon together with certain furniture and furnishings. Appellant in reliance on this promise rendered services "until about October, 1951," of the reasonable value of $6,000 and expended the sum of $1,606.66. Decedent executed a will devising the property promised to appellant but decedent was subsequently declared incompetent and her appointed guardian thereafter caused the property so devised to be sold.

Appellant's second and third causes of action sought recovery in common counts for reasonable value of services and for money expended.

Respondent generally demurred and specifically raised the statute of frauds (Code Civ.Proc. § 1973, subd. 6, Civ.Code, § 1624, subd. 6) and the statute of limitations (Code Civ.Proc. § 339).

Although appellant suggests that the pleading does not state that the agreement was an oral one, it does not seem that this point is being seriously emphasized, since the appeal is based on the rule of implied in law agreement to pay reasonable value of services when an express oral agreement to compensate by will is not fulfilled. In any event this could readily be cured by amendment and under present well-settled rules the sustaining of a demurrer on that ground without leave to amend would be error.

An action upon a contract not evidenced by an instrument in writing must be commenced within two years after the action accrues. Code Civ.Proc. § 339, subd. 1.

Where services are rendered under an oral agreement to compensate the person rendering them by the will of the promisor and the oral promise to compensate by will is not carried out the law implies an obligation to pay the reasonable value thereof. Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84; DeMartini v. Katz, 49 Cal.App.2d 67, 69, 120 P.2d 944.

The substantial question presented is whether in such cases the statute of limitations commences to run on this contract implied in law from the date of the termination of the services or from the death of the promisor. The cases have been in some confusion on the question. Toney v. Security First Nat. Bank, 108 Cal.App.2d 161, 166, 238 P.2d 645, holding that the statute runs from the date of death; Beard v. Melvin, 60 Cal.App.2d 421, 429–430, 140 P.2d 720, holding that it runs from the date of termination of the services; see also the expressions by way of dictum only in Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146; Winder v. Winder, 18 Cal.2d 123, 114 P.2d 347, 144 A.L.R. 935; Tabata v. Murane, 24 Cal.2d 221, 148 P.2d 605. DeMartini v. Katz, supra, 49 Cal.App.2d 67, at page 70, 120 P.2d 944, at page 945, did not consider this question, since we expressly held that as to the period 1910–1914 at which the services had been interrupted there was no evidence of an oral promise to compensate for those particular services by will.

Unless there is a prior repudiation of the promise to compensate by will of which the promisee has knowledge, in which event the statute might commence to run from the date of such repudiation (Maddox v. Rainoldi, 163 Cal.App.2d 384, 329 P.2d 599), logic compels the conclusion that no cause of action upon the contract implied in law arises until the death of the promisor without carrying out the express promise to compensate by will, since it is the failure of the promisor to carry out the express promise which gives rise to the implied promise to pay the reasonable value. This was the rationale of our holding in Maddox v. Rainoldi, supra. In that case we said (163 Cal.App.2d at page 391, 329 P.2d at page 604):

"* * * The basis of such recovery is the repudiation of the oral trust and the unjust enrichment which would accrue to the oral trustor thereby. The action is on the implied promise which the law imposes to repay advances where the original oral promise in reliance upon which the money was advanced cannot be enforced because of the statute of frauds. Zellner v. Wassman, 184 Cal. 80, 88, 193 P. 84; Paul v. Layne & Bowler Corp., 9 Cal.2d 561, 566, 71 P.2d 817; Leoni v. Delany, 83 Cal.App. 2d 303, 310, 188 P.2d 765, 189 P.2d 517. * * *

"The very basis of the cause of action * * * is the implied promise which the law raises because the oral promise cannot be enforced. It seems logical to hold that until the repudiation of the oral promise, or its breach in some other fashion, the law imposes no such implied promise to repay. Such is the rule in the case of actions to recover money paid the vendor under oral contracts to convey real property. Laffey v. Kaufman, 134 Cal. 391, 66 P. 471, 86 Am.St.Rep. 283. In that case the court said at page 393 of 134 Cal. at page 472 of 66 P.: 'The right of the vendee of land, upon a verbal contract, to recover the money or other consideration paid is by all the authorities confined to those cases where the vendor has refused or become unable to carry out the contract * * *.' To the same effect: Thompson v. Schurman, 65 Cal.App.2d 432, 437–438, 150 P.2d 509; Rest., Contracts, § 355(4); 49 Am. Jur., Statute of Frauds, § 564, p. 870. The statute of limitations only commences to run 'after the cause of action shall have accrued' (Code Civ.Proc. § 312) and the 'cause of action accrues when a suit may be maintained thereon, and the statute of limitations therefore begins to run at that time' (Dillon v. Board of Pension Com'rs, 18 Cal.2d 427, 430, 116 P.2d 37, 136 A.L.R. 800).

"We are satisfied that until defendant's oral promise was repudiated no suit for restitution could have been maintained and hence the statute of limitations is no bar to these counts. This question was not decided in Long v. Rumsey, 12 Cal.2d 334, 84 P.2d 146, nor in any of the other cases cited by respondent."

In neither Beard v. Melvin, supra, 60 Cal.App.2d 421, 140 P.2d 720 nor Toney v. Security First Nat. Bank, supra, 108 Cal.App.2d 161, 238 P.2d 645, which announce conflicting rules on this subject, was a hearing sought in the Supreme Court. However in Maddox v. Rainoldi, supra, the Supreme Court denied a petition for a hearing.

The reasoning of Maddox, hereinabove quoted, compels the conclusion that the statute of limitations did not commence to run in this case upon the termination of the services. Actually the decedent not only did not repudiate her oral promise to compensate by will, but did everything in her power to carry it out, and only the misfortune of her becoming incompetent frustrated her purpose.

Judgment reversed.

KAUFMAN, P. J., and DRAPER, J., concur.

169 Cal.App.2d 468

**PEOPLE of the State of California,
Plaintiff and Respondent,**

v.

**Richard Isidore ALCALA, Defendant and
Appellant.**

Cr. 6532.

District Court of Appeal, Second District,
Division 2, California.

April 9, 1959.

Prosecution for unlawful possession of marijuana. The Superior Court, Los Angeles County, Edward R. Brand, J., entered judgment of conviction after denying defendant's motion to set aside the information, and defendant appealed. The District Court of Appeal, Fox, P. J., held that where police officers received information by telephone from an unnamed informant that defendant had marijuana in his apartment, and one of the officers while talking to defendant in his apartment noticed defendant's speech was rather rapid, loud and slightly incoherent, and that his eyes were extremely dilated, and it was the opinion of such officer that defendant was under the influence of narcotics, and based upon such opinion, defendant was placed under arrest, and officers entered and searched his apartment, and found narcotics therein, defendant's speech, appearance and behavior warranted a good faith belief on part of the officers that defendant was then under the influence of narcotics, and therefore, there was probable cause for his arrest without a warrant, and subsequent search of his apartment and seizure of marijuana found therein, even though conducted without a warrant, was lawful.

Judgment affirmed.

1. Arrest 🔑63(4)

Where speech, appearance and behavior of a defendant charged with unlawful possession of a narcotic warranted a good faith belief on part of the arresting officers that defendant was under the influence of narcotics, a public offense, officers were justified in arresting defendant without a warrant. West's Ann.Health & Safety Code, § 11721.

2. Arrest 🔑71

A search without a warrant is valid where it is incident to a lawful arrest, if it is reasonable and made in good faith, and a seizure, during such a search, of evidence related to the crime, is permissible.

3. Arrest 🔑63(4), 71

Where police officers received information by telephone from an unnamed informant that defendant had marijuana in his apartment, and one of the officers while talking to defendant at his apartment noticed defendant's speech was rather rapid, loud and slightly incoherent, and that his eyes were extremely dilated, and it was opinion of such officer that defendant was under the influence of narcotics, and based upon such opinion, defendant was placed under arrest, and officers entered and searched his apartment, and found narcotics therein, defendant's speech, appearance and behavior warranted a good faith belief on part of the officers that defendant was then under the influence of narcotics, and therefore there was probable cause for his arrest without a warrant, and subsequent search of his apartment and seizure of marijuana found therein, even though conducted without a warrant, was lawful. West's Ann.Health & Safety Code, § 11500.

4. Witnesses 🔑216

It is not necessary to reveal the identity of an informer who merely points the finger of suspicion at a defendant and an arrest thereafter is based solely on observations made by law enforcement officers reasonably leading them to believe a public offense was being committed in their presence.

5. Criminal Law 🔑452(1)

Where, in prosecution for unlawful possession of a narcotic, testimony of an arresting officer as to his opinion that defendant was under the influence of narcotics at the time of his arrest, was not offered to establish defendant's guilt of that offense, but only as a basis for establishing probable cause for defendant's arrest and subsequent search of defendant's apartment, in light of officer's experience in observing over 100 people under the influence of narcotics, he was clearly qualified and competent to express an opinion for such purpose, even though he might not have been qualified to express an expert opinion as to whether in fact defendant was under the influence of narcotics. West's Ann. Health & Safety Code, § 11500.

6. Criminal Law ⟹1023(8)

An order denying a motion to set aside an information is not appealable. West's Ann.Pen.Code, § 1237.

◆

David Keene Leavitt, Beverly Hills, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., David B. Allen, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was convicted of violating section 11500, Health and Safety Code (possession of marijuana). He has appealed from the judgment (order granting probation). He has also attempted to appeal from the order denying his motion to set aside the information.

On April 30, 1958, Deputies Kalas and Rodriguez, of the Narcotic Detail of the sheriff's office, received information by telephone that defendant had marijuana in his apartment, giving his name and address. Officer Brown, of the Los Angeles Police Department, received like information from the same person that evening. Although the officers had had no previous experience in testing the reliability of this informant's information, they met about 8:30 p. m. near defendant's residence. Defendant arrived home about 1:00 a. m. Soon after he entered his apartment the officers knocked on the door. A voice from within inquired who was there. Officer Kalas replied, "Police officers." Defendant opened the door and stood in the light. He asked what they wanted. Officer Kalas identified himself and the officers exhibited their badges. Defendant looked at the officers and again inquired what they wanted. While defendant was talking to Kalas, Officer Rodriguez, who was one of the arresting officers, noticed that defendant's "speech was rather rapid, loud, and slightly incoherent"; that "his eyes were extremely dilated"; that he "did not seem to look at any one person for any particular amount of time * * * glancing from one to the other in a very nervous manner * * *." Rodriguez smelled defendant's breath while Officer Kalas was talking to him but did not detect any odor of alcohol. He was within a foot or two of the defendant when he made these observations. It was Officer Rodriguez' opinion that defendant was under the influence of narcotics. This opinion was based on the experience of having observed more than 100 persons under such influence. Defendant was then placed under arrest, the officers entering and searching the apartment. They found a plastic bag containing a leafy material that proved to be marijuana. While in the apartment, defendant pointed to the bag and stated to the manager of the apartment house: "That is marijuana." During the booking procedure, defendant stated to the deputies that he had obtained the marijuana from a Mexican in downtown Los Angeles and that he had paid $5 for it. He said he smoked marijuana in order to relax.

On cross-examination the defense sought disclosure of the informant's identity. Objection was sustained. This ruling was not followed by any motion to strike the officers' testimony. Defendant also objected to receipt in evidence of the marijuana on the ground that it was obtained as a result of an unlawful search and seizure.

The officers did not have a search warrant or a warrant for defendant's arrest.

The defendant did not testify.

In seeking a reversal, defendant contends that (1) there was no probable cause for his arrest and the subsequent search of his apartment and the seizure of the marijuana found therein; (2) the court erred in not requiring the disclosure of the informant's identity; (3) the court erred in permitting Deputy Rodriguez to testify that defendant was under the influence of narcotics, and (4) the court unduly restricted the cross-examination of Rodriguez.

Penal Code, section 836, provides in part:

> "A peace officer * * * may, without a warrant, arrest a person:
>
> "1. Whenever he has reasonable cause to believe that the person to be arrested has committed a public offense in his presence."

[1] Health and Safety Code, section 11721, makes it a misdemeanor for any person to be under the influence of narcotics. Defendant's speech, appearance and behavior warranted a good faith belief on the part of the officers that defendant was then under the influence of narcotics in violation of section 11721, a misdemeanor. Thus he was committing a public offense in their presence, which would justify an arrest without a warrant.

[2] This court held in People v. Coleman, 134 Cal.App.2d 594, 599, 286 P.2d 582, 586, "that a search without a warrant is valid where it is incident to a lawful arrest, if it is reasonable and made in good faith; and that a seizure, during such a search, of evidence related to the crime is permissible." In re Dixon, 41 Cal.2d 756, 761–762, 264 P.2d 513; Harris v. United States, 331 U.S. 145, 151, 67 S.Ct. 1098, 91 L.Ed. 1399; United States v. Rabinowitz, 339 U.S. 56, 61, 70 S.Ct. 430, 94 L.Ed. 653.

[3] In the instant case, as previously noted, the arrest was lawful and the search was made as an incident thereto. There is nothing to suggest the search was not made in good faith or that it was unreasonable either in scope or manner of execution. It therefore follows that the marijuana seized during the search was properly admitted in evidence.

Defendant's contention that the informer's identity should have been disclosed under Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39, is not well taken.

[4] It is not necessary to reveal the identity of an informer who merely points the finger of suspicion at a defendant and an arrest thereafter follows which is based solely upon observations made by law enforcement officers which reasonably led them to believe a public offense was being committed in their presence. Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L.Ed. 151; People v. Williams, 51 Cal.2d 355, 333 P.2d 19; People v. Amado, 167 Cal.App.2d 345, 334 P.2d 254; People v. Smith, 166 Cal.App.2d 302, 333 P.2d 208.

Defendant's argument that the informant's identity should have been revealed under the ruling in People v. McShann, 50 Cal.2d 802, 330 P.2d 33, is not valid since the informer was neither a participant nor a material witness to the offense for which defendant was prosecuted, nor does it appear that he would have been able to give any testimony which would be relevant or helpful to the defense of the accused or essential to a fair determination of the cause. People v. Amado, supra. In this connection it should be noted that defendant admitted knowledge and possession of the marijuana which the officers found in his apartment.

[5] In arguing that Officer Rodriguez' testimony that defendant was under the influence of narcotics at the time of his arrest should not have been admitted on the theory that he was not an expert misconceives the purpose for which this testimony was offered. Defendant was not prosecuted for being under the influence of narcotics. The testimony of Rodriguez was not offered to establish defendant's guilt of that offense but only as a basis for establishing probable cause for defendant's arrest and the subsequent search of his apartment. In light of Rodriguez' experience he was clearly qualified and competent to express an opinion for this purpose. The evidence to which we have referred supports the reasonableness of his opinion.

Defendant's contention that his right of cross-examination of the officers with respect to the informant was unduly restricted is without merit. In effect, he is simply recasting his argument that the informant's identity should have been revealed. As previously pointed out, this was not necessary.

[6] Since an order denying a motion to set aside an information is not appealable (see Penal Code, § 1237), the purported appeal therefrom is dismissed.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

Albert WIESE, Plaintiff and Appellant,

v.

Arthur RAINVILLE, individually, and doing business as "The Rainville Co.," Auto-Vac Company, a corporation, Woodrow Pearce and Jane Doe Pearce, husband and wife, doing business as Pearce Plastics Company, et al., Defendants,

Arthur Rainville, individually, and doing business as "The Rainville Co.," and Woodrow Pearce, doing business as Pearce Plastics Company, Respondents.*

Civ. 23233.

District Court of Appeal, Second District,
Division 3, California.
April 14, 1959.

Rehearing Granted May 14, 1959.

Action for personal injuries against manufacturer of machine which caused injury to plaintiff during its demonstration, and against owner of factory in which demonstration machine was being operated. The Superior Court of Los Angeles County, A. A. Scott, J., entered judgment of nonsuit as to factory owner and judgment for machine manufacturer and plaintiff appealed. The District Court of Appeal, Parker Wood, J., held that where factory owner allowed manufacturer to use space for demonstration of machine but had no interest in machine and was not charging for use of space or receiving a commission on sales of machines, evidence was not legally sufficient to prove that plaintiff, on premises for purpose of participating in demonstration of machine, was on premises for a purpose which was for the mutual benefit of himself and factory owner, and hence plaintiff was not an invitee of factory owner, but giving of instructions on assumption of risk which had not been pleaded by machine manufacturer constituted prejudicial error.

Judgment affirmed in part and reversed in part.

1. Negligence 🔑32(2.3)

Where factory owner having no interest in machine granted machine manufacturer permission to use space in factory for demonstration of machine to interested members of public and factory owner made no charge for use of space and received no commission from any sales of machines, party going to premises on solicitation of machine manufacturer and injured during participation in machine's demonstration was not an invitee of factory owner, as there was no legally sufficient evidence to show that he was on premises for mutual benefit of both himself and factory owner.

2. Witnesses 🔑236(1)

In personal injury action, there was no error in sustaining objection to compound questions designed to prove that injured plaintiff was on the factory owner's premises as an invitee of such owner.

3. Witnesses 🔑280

In action against defendant factory owner and machine's manufacturer for injuries occurring during demonstration of machine on owner's premises, there was no error in sustaining objection to cross-examination of defendant as to whether he was at present and on date of accident familiar with mechanism of machine, since it was a compound question and it was immaterial whether factory owner at time of trial was familiar with mechanism. West's Ann.Code Civ.Proc. § 2055.

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* Opinion vacated 343 P.2d 643.

4. Appeal and Error ⚷1048(1)

In action against defendant factory owner and manufacturer of machine for personal injuries received during demonstration of machine on owner's premises, under circumstances, the sustaining of objection as to when factory owner first knew that machine guard was removed, was not prejudicially erroneous where plaintiff's counsel, after objections to forms of questions, merely asked if he knew when his employees had first removed guard and thereupon asked no further questions following a negative answer.

5. Appeal and Error ⚷1066
Trial ⚷251(8)

In action for personal injuries to hand which was crushed during demonstration of manufacturer's machine on factory owner's premises, where defendant manufacturer had pleaded contributory negligence and defendant factory owner, granted a nonsuit, had pleaded assumption of risk, trial court committed prejudicial error in instructing jury on doctrine of assumption of risk after defendant factory owner was no longer a participant in trial since his motion for nonsuit had been granted.

◆

Donald C. Kimber, Sandford R. Willford, Frank W. Woodhead, and Robert E. Morrow, Los Angeles, for appellant.

Harry E. Sackett, Raoul Francoeur, and Robert P. Dockeray, Los Angeles, for respondent Arthur Rainville.

Moss, Lyon & Dunn, Sidney A. Moss and Henry F. Walker, Los Angeles, for respondent Woodrow Pearce.

PARKER WOOD, Justice.

In this action for damages for personal injuries, plaintiff appeals from (1) judgment of nonsuit as to defendant Pearce, and (2) judgment, upon a verdict, in favor of defendant Rainville.

As to the judgment of nonsuit, appellant asserts that the evidence was sufficient to support a judgment against Pearce; and that the court erred in rulings as to the admissibility of evidence. As to the other judgment, he asserts error in giving and refusing to give certain instructions.

Defendant Rainville, who was doing business as the Rainville Company, was a sales agent for a plastics molding machine known as "Auto-Vac." Plaintiff was the chief engineer of the Modglin Company, which manufactured plastic articles. Defendant Woodrow Pearce, who was doing business as Pearce's Plastic Models, manufactured plastic articles.

Rainville desired to demonstrate the Auto-Vac machine to persons who were in the business of manufacturing plastic articles. He obtained the permission of Pearce to install one of those machines at Pearce's factory for the purpose of making the demonstration.

One of the machines, which was owned by the Auto-Vac Company (of Fairfield, Connecticut), was installed by Rainville at the Pearce factory about May 1, 1955. Soon thereafter Rainville sent a form letter to several persons, including plaintiff, inviting them to witness a demonstration of the machine at said place. Plaintiff attended that "public" demonstration, where Rainville and Mr. Stratton, another representative of the Auto-Vac Company, operated the machine and made or formed plastic articles, such as toys. (There was no demonstration, at that time, as to whether the machine could wrap articles in cellophane.) A few days thereafter those representatives went to the office of the plaintiff and discussed the merits of the machine and exhibited samples of the work the machine could do. Plaintiff was interested in ascertaining whether the machine could wrap small articles (made by Modglin) in cellophane. Such wrapping is known as "skin packaging."

A few days thereafter, the plaintiff, another employee of Modglin, and Rainville went to the Pearce factory, where Rainville operated the machine in attempting to wrap a small brush in cellophane. After two such attempts, plaintiff concluded that the wrapping was not satisfactory.

Later, Rainville went to plaintiff's office and exhibited another sample of the packaging which was done by the machine. The cellophane on the sample was wrinkled, and plaintiff said that the packaging was not satisfactory. Rainville said that he would try the machine again, and he suggested that plaintiff be present at the next attempt. They agreed to meet at the Pearce factory at 4 p. m. of that same day, June 28, 1955, to see if Rainville could do a better job of skin packaging with the machine.

When plaintiff arrived at the factory, at the appointed time, Rainville was there and the air and power of the machine "were on" and the machine was ready to be operated. They discussed what they intended to accomplish with the machine—to produce a smoothly wrapped package. Then two attempts were made to package the small brush (which had been used in the prior attempts), but the results were not satisfactory. Then plaintiff asked Rainville if the "drape frame method" (a method different from the method used in the prior attempts) could be used for wrapping the brush. Rainville replied that he did not know any reason the machine could not be used in that manner. Rainville, in proceeding to try that method, raised the clamping frame about a foot above the molding base of the machine. The plaintiff put his hand under the clamping frame in order to hold a thin sheet of plastic in position while Rainville proceeded to activate an automatic part of the machine by pressing a button. Rainville pressed the wrong button, and the clamping frame went down on plaintiff's hand, causing severe injuries.

The briefs do not state the dimensions of the machine and do not describe it or its operation except in general terms. The jury went to the Pearce factory, observed the machine, heard an expert witness explain the operation of it, and heard plaintiff and Rainville testify (there) as to the manner it was operated at the time the injury occurred. Photographs of the machine, and also a brochure regarding the machine, were received in evidence.

A description of the machine and its operation (as indicated by the photographs, brochure, and testimony) is as follows: It is a box-like metal structure, about 5 feet wide, 8 feet long (front to back), and 6 feet high. The structure has no wall at the upper half of the front; and it has no covering at the front half of the top. In other words, the front upper one-fourth of the structure is not enclosed. At the bottom of that open part (at a place about half way between the top and bottom of the structure) there is a floor or molding base, about 2 feet wide (front to back) and 3 feet long, where the model of the article (to be made) is placed. Also in that open part of the structure, and above the molding base, there are intricate mechanisms which are referred to as the clamping frame and the heating bars. The clamping frame consists of two frames (a top frame and a bottom frame). Each frame, about 3 feet wide (front to back) and 4 feet long, appears to be made of 2-inch by 4-inch wood. The bottom frame remains in a horizontal position, and the mechanism in connection with the top frame is such that the top frame can be lowered against the bottom frame and thereby clamp a sheet of plastic between the two frames. There are adjustable cross bars on the frames so that various sizes of plastic sheets can be clamped between the frames. The whole clamping frame (two frames) can be raised, from the molding base, so that plastic can be inserted and clamped between the two frames; and the whole clamping frame can be lowered, from the elevated position, so that the plastic (which has been clamped in it) can be draped over the mold or article on the molding base. Also in that open space of the structure, and above the clamping frame, there is a device which contains heating bars for the purpose of heating the plastic sheet after it is in the clamping frame and before the clamping frame is lowered to drape the plastic over the mold. Under the molding base there is a vacuum apparatus which operates, after the heated plastic is on the mold, for the purpose of drawing the plastic smoothly and tightly against the mold. The machine is operated by electricity. Outside and attached to the front of the structure, there is a control panel on which there are 19 control buttons or switches. Each button or switch is labeled as to its function, such as "Clamp Start," "Down," "Up," "Close," etc. The top of the control panel is about a foot below the level of the molding base.

The attempts to skin package articles prior to the accident (and prior to the time plaintiff asked if a different method could be used) were made by the "vacuum method." Under that method the clamping frame is not raised from the molding base, but it remains flat on the base in the "vacuum drawing position," and the plastic or cellophane material is laid on the article and is heated, and then the vacuum apparatus is operated for the purpose of drawing the plastic around the article. As above stated, the method used at the time of the accident was the "drape frame method." Under that method the machine is operated as follows: the clamping frame is raised about a foot above the molding base; the two frames (which comprise the clamping frame) are opened or separated by raising the top frame; a sheet of plastic is placed on the bottom frame; the top frame is closed or clamped against the plastic and the bottom frame; the plastic is heated by the heating device; then the whole clamping frame is lowered so that the heated plastic is draped over the article on the base; and then the vacuum apparatus is operated to finish the packaging process.

With respect to the occurrences at the time of the accident, plaintiff testified that on June 28, after two unsatisfactory attempts on that day to package the brush, he asked Rainville if the drape frame method could be used; Rainville replied that he did not know any reason the machine could not be used in that manner; then Rainville raised the clamping frame, and a thin sheet of plastic (cellophane) was placed between the top and bottom frames; the thin plastic, not having sufficient support under it, fell through the bottom frame; plaintiff looked for a rigid object which could be used to support the plastic (while the top frame was being lowered to clamp the plastic against the bottom frame); the only objects available were two strips of heavier plastic, but those were not satisfactory to eliminate all the wrinkles in the thin plastic; then Rainville suggested that plaintiff hold those plastic strips under the bottom frame, and he (Rainville) would close the top frame and proceed with the packaging (by lowering the whole clamping frame to the molding base); plaintiff proceeded to do that, and he put his hands under the clamping frame (his hands were about 12 inches inside the machine); Rainville placed the thin plastic over the frame under which plaintiff was holding the two heavier strips of plastic; Rainville asked if plaintiff was ready; plaintiff asked if Rainville was sure the machine was set in the proper manner for that operation; he replied in the affirmative; plaintiff said he was ready; then Rainville, who was standing at the right side of plaintiff, pushed the wrong button, and the clamping frame came down on plaintiff's hand; plaintiff called for help; Rainville said, "Oh, my God, what have I done now?"

Mr. Rainville testified that on June 28, when they were about to make the third attempt on that day, the clamping frame was down on the molding base, as "it has to be in order to do skin packaging"; plaintiff had laid the brush on the mold, and either plaintiff or Rainville had placed the plastic on the brush (which was to be packaged); then Rainville pushed the two outside buttons on the control panel and closed the top frame of the clamping (drape) frame; at that time plaintiff asked if the drape frame could be raised without opening the top frame; Rainville replied in the negative, and he said further that every time the drape frame comes up, the top frame opens; plaintiff said, "Do it my way"; Rainville raised the clamping (drape) frame, and the top frame opened and the plastic (which had been clamped in the frame) fell through the lower frame; Rainville said, "There is the proof of it, Al [referring to plaintiff]. It is not supposed to be done that way. It isn't set up. The machine isn't even made for that"; plaintiff picked up two strips of plastic and said that if he held those strips under the clamping frame so that the other plastic would not fall through the lower frame, then they might be able to close the top frame and hold the plastic in the clamp; Rainville replied that that was wrong and that the drape frame process was not used in skin packaging; plaintiff told him to go ahead and put the plastic over the top of plaintiff's hands; plaintiff put his hands under the clamping frame, and then he told Rainville to "be careful and push the two outside buttons." (It was established that it was necessary to push the two outside buttons simultaneously in order to close the top frame. Immediately before the accident, when Rainville was proceeding to push the bottons, Rainville was standing at the right side of plaintiff—as they were facing the machine.) Mr. Rainville testified further that (after plaintiff told him to push the two outside buttons) he put his right hand on the button at the right end of the panel, and he reached (with his left hand) around and past plaintiff in trying to feel for the button at the other end of the panel; he went "from button to button" and when his hand was on the next to the last button, the plaintiff turned his hip and hit Rainville's hand and made pressure on the next to last (wrong) button.

Defendant Pearce, the owner of the factory known as Pearce's Plastic Models, testified (under section 2055 of the Code of Civil Procedure) that he manufactured aircraft windows, and that he also did laboratory work; he had about 15 employees; about February, 1955, Rainville told him that an Auto-Vac machine would be sent to Rainville for demonstration purposes; they had a discussion relative to placing the machine in Pearce's factory; Pearce agreed to allow Rainville to place the machine there under conditions which they discussed; the substance of their discussion was that the machine would be there at no charge or commission or anything like that, and Pearce would get no profit from it, Rainville would "hook it up," would carry his own insurance, that Pearce should have the first option to buy the machine, and that his employees might use it. He testified further that he was present when the machine was placed in his factory about May 1; Rainville handled the transportation of the machine; the first demonstration of the machine was on the day it was installed; Pearce received a letter from Rainville (copy of Exhibit G) relating to a public demonstration of the machine to be held at Pearce's factory; he (Pearce) did not know whether the "safeguard" was on the machine on the day of the accident; he did not remove the safeguard; he did not know when his employees first removed the safeguards; he did not own any interest in the Rainville Company or the Auto-Vac Company.

At the close of plaintiff's case, the motion of defendant Pearce for a nonsuit was granted. Then defendant Rainville rested his case. The jury returned a verdict in his favor, and judgment was entered thereon.

[1] Appellant contends that he was an invitee of Pearce, and that Pearce owed him the duty of keeping the "guard" on the machine when appellant was present, or owed the duty of warning him of the dangerous condition of the machine when the guard was not on it. Appellant's argument, in support of such contention, is to the effect that Pearce consented to the placing of the machine on his premises, he was present when the first public demonstration was made, he permitted his employees to use the machine, and he had the first option to buy it. The complaint alleged that appellant (plaintiff) was a business invitee of Pearce; that Pearce maintained the machine on his premises; that the machine was in a defective and dangerous condition; and that such condition was known to Pearce. The evidence was not legally sufficient to prove that appellant, at the time of the accident, was on the premises for a purpose which was for the mutual benefit of himself and

Pearce. Rainville and appellant had gone to the premises on the day of the accident for the purpose of testing the usability of the machine for wrapping, to the satisfaction of appellant, a small brush which had been manufactured by appellant's employer (the Modglin Company). Pearce was not present while they were operating the machine on that day. There was no evidence that such wrapping of that article would be of any benefit to Pearce. Rainville and appellant were there on that day for purposes which did not pertain to Pearce's business. It is true that Pearce gave Rainville permission to place the machine on the premises, and that, at the time of the accident, Rainville and appellant were on the premises with the permission of Pearce. In Fisher v. General Petroleum Corp., 123 Cal.App.2d 770, at page 778, 267 P.2d 841, at page 845, it was said: "An invitation to use the premises of another is inferred where there is a common interest or mutual advantage, while a license is inferred where the object is the mere pleasure or benefit of the person using the premises. Mere permission of an owner or allowing a person to enter and use a certain portion of the premises is indicative of a license merely and not of an invitation." In Aguilar v. Riverdale Cooperative Creamery Ass'n, 104 Cal.App. 263, 285 P. 889, one Goodrich, who was in the business of drying fruit, obtained defendant's permission to go upon defendant's premises and use defendant's drying machine to dry fruit. While the plaintiff therein, who was Goodrich's employee, was using the machine in performing work for his employer, his hand came in contact with a revolving fan and he was injured. Plaintiff therein contended that he was an invitee. In reversing a judgment for plaintiff, the court said (104 Cal.App. at page 267, 285 P. at page 891): "The application of the foregoing legal principles to the situation in the case before us clearly demonstrates that it possesses none of the elements essential to establish respondent's [plaintiff's] status as an invitee, for admittedly he did not enter appellant's premises on any mission connected with appellant's business, nor in which the latter had any common interest; nor did he go there as a result of any enticement * * * nor in response to any invitation, on appellant's part. * * * His status was therefore clearly that of a bare licensee, and as such he assumed all the ordinary risks and perils attached to the condition of the premises, and the manner in which the same or the business conducted thereon were maintained or operated. * * * Nor does the fact that appellant granted respondent permission to come upon the premises affect respondent's status as a bare licensee, for it is well settled that mere permission of an owner to enter and use a portion of his premises does not of itself amount to an invitation." The evidence was not legally sufficient to prove that appellant, at the time of the accident, was on the premises as an invitee of Pearce.

The court did not err in granting Pearce's motion for a nonsuit.

[2] Appellant contends further that court erred in sustaining Pearce's objections to three questions (asked appellant) which, according to appellant's opinion, were material on the issue as to whether appellant was an invitee of Pearce. The first question was: "Does Pearce Plastics or did Pearce Plastics, at the time of this accident, produce items that your company would be likely to purchase?" The second question was: "[I]s your company in any business, or were they in any business relationship to the Pearce Plastics Company in relation to purchase or vendee or vendor relationship?" Those were compound questions, relating to both present and past time. The part of each question relating to present time (i. e., the time of trial—about two years after the accident) was immaterial. In Board of Trustees of Contra Costa Jr. College Dist. v. Schuyten, 161 Cal.App.2d 50, at page 54, 326 P.2d 223, at page 226, it was said: "The vice of the compound or duplicitous question is generally recognized. [Citations.] Particularly is such a question objectionable when it includes both inadmissible and ad-

missible matters. In such cases the objection to the entire question is properly sustained." The third question was: "Did the Pearce Plastic Company, at the time the loss occurred, at the time you went over to the Pearce Plastic Company, produce any item that your company would be interested in purchasing?" This question was also a compound question, since there was evidence that appellant had gone to the Pearce Company on three occasions. The part of the question relating to times other than the time of the accident was immaterial. After the objections to the first two questions were sustained, appellant's counsel made statements to the effect that the questions were material in that appellant was claiming that he was an invitee of Pearce. The judge replied to the effect that appellant would be permitted to prove that, but would not be permitted to prove it "by the type of question you have just asked" or by "the way you are going about it." It thus appears that the judge directed attention particularly to the form of those questions, and that he did not, by those rulings, foreclose appellant from presenting evidence, by proper questions, on the "invitee" issue. It also appears that appellant did not make an offer of proof. None of the questions indicated that the answer thereto would be favorable to appellant. It cannot be determined from the record whether the answers would have been favorable to appellant. The court did not err in sustaining the objections to those questions.

[3] Appellant also asserts that the court erred in sustaining Pearce's objection to a certain question which appellant asked Pearce on cross-examination (under section 2055 of the Code of Civil Procedure). The question was: "Are you and were you, on that date [date of accident], familiar with the mechanisms of the machine?" That also was a compound question. It was immaterial whether Pearce, at the time of trial, was familiar with the mechanism. The court did not err in sustaining the objection.

[4] Appellant also contends that the court erred in sustaining Pearce's objection to the following question, which appellant asked Pearce: "When did you first know that it [the 'guard' part of the machine] was removed, Mr. Pearce?" The objection was upon the ground that the question was irrelevant. Thereupon the judge said, "I assume you mean prior to the accident." Counsel for appellant replied that he was "just trying to find out when he knew." After the objection was sustained, counsel for appellant asked when it was prior to the accident that Pearce first knew that the guard was removed. Following that question, there was an objection, and also a discussion as to whether the question had been answered. The judge suggested that counsel for appellant "start all over again." Then counsel for appellant asked: "Do you know when your employees first removed the safeguard from the machine? Appellant answered, "No." Thereupon counsel for appellant said that he had no further questions. Under such circumstances, the ruling sustaining the objection to the question (as to when Pearce first knew that the guard was removed) was not prejudicially erroneous.

[5] Appellant also contends that the court erred in instructing the jury on the doctrine of assumption of risk. Defendant Rainville did not plead assumption of risk but did plead contributory negligence. Defendant Pearce pleaded assumption of risk and contributory negligence. Pearce submitted five instructions on assumption of risk. Rainville did not request any instruction on assumption of risk. Pearce, of course, was not a participant in the trial after his motion for a nonsuit was granted. The court, however, gave the five instructions on assumption of risk, which had been requested by Pearce.

In Lein v. Parkin, 49 Cal.2d 397, 318 P.2d 1, an automobile which was being driven by defendant, and in which plaintiff was riding, ran off the road, turned over, and injured plaintiff. The evidence therein was sufficient to support findings that defendant had been driving in a negligent manner; and that plaintiff, despite his knowledge that defendant was driving negligently, continued to ride with him. In that case the defendant did not plead assumption of risk, but the court made a finding, however, that plaintiff assumed the risk of riding with defendant. Judgment therein was for defendant. On appeal, defendant contended that plaintiff had introduced evidence showing assumption of risk, and therefore plaintiff was estopped to assert that assumption of risk was not an issue. In reversing the judgment, the court held that the finding of assumption of risk was improper in that assumption of risk had not been pleaded and that the unpleaded issue of assumption of risk had not been intentionally tried as if it were a pleaded issue. The court therein said, 49 Cal.2d at page 401, 318 P.2d at page 3: "[A]ll evidence upon which defendant relies to justify the consideration by the trial court of the unpleaded defense of assumption of risk was evidence relevant to the pleaded issue of defendant's negligence. We therefore conclude that plaintiff is not estopped to challenge the action of the trial court in making a finding upon assumption of risk, as it cannot be said that the unpleaded issue of assumption of risk was 'actually and intentionally tried' * * as if the issue had been made by the pleadings."

In Miller v. Peters, 37 Cal.2d 89, 230 P.2d 803, a mother and son sought damages for injuries resulting from a collision of automobiles. Defendant therein pleaded contributory negligence as to the son (the driver) but did not plead such negligence as to the mother (the passenger). In that case, the court gave an instruction with reference to contributory negligence on the part of the mother. Judgment was for defendant. The evidence therein was sufficient to prove that both plaintiffs (mother and son) were contributively negligent. In reversing the judgment, it was held that the introduction of evidence by defendant to the effect that both plaintiffs were contributively negligent did not authorize the giving of an instruction indicating that the mother could also be contributively negligent.

In the present case, as above stated, the five given instructions on assumption of risk had been requested by defendant Pearce, who was not a participant in the trial after his motion for a nonsuit had been granted. As above stated, no instruction on that issue was requested by defendant Rainville. The said five instructions were long and detailed (containing about 450 words), and they presented with emphasis, for consideration of the jury, the issue of assumption of risk which had not been pleaded by Rainville.

The first of the five given instructions on assumption of risk was in substance as follows: A person assumes a risk when he voluntarily exposes himself to danger, or when he knows that a danger exists in the operation of property and he voluntarily remains within the area of danger. A person who thus assumes a risk is not entitled to recover for damage caused him without intention, and which damage resulted from the dangerous condition to which he exposed himself.

The second instruction was in substance as follows: Distinction should be noted between assumption of risk which bars recovery and the ordinary acceptance of common risks that lie in the possibility that others will not perform their duties. As to this latter kind, a person will not be barred from recovery for damage by the fact that, while he is exercising ordinary care, he assumes that others will perform their duties.

The third instruction was in substance: To bar recovery, assumption of risk must be voluntary. To be voluntary, the person must have knowledge of the danger and must have freedom of choice. This freedom of choice must come from circumstances that provide him a reasonable opportunity to refuse to expose himself to the danger.

The fourth instruction was in substance: Attention is called to a distinction between contributory negligence and assumption of risk. Contributory negligence must be a proximate cause of the injury, but assumption of risk will bar recovery of damage although it plays no part in causing the accident except merely to expose the person to danger.

The fifth instruction was in substance: In determining whether a person had knowledge of a dangerous situation and whether, with such knowledge, he assumed a risk so as to bar recovery of damages, you may consider his age, experience, capacity, and all the surrounding circumstances as shown by the evidence.

None of said instructions was proper under any issue pleaded by Rainville. It cannot be said that plaintiff, by reason of evidence presented by him as to defendant Rainville, tried an unpleaded issue of assumption of risk as if it were an issue pleaded by Rainville. The evidence presented by plaintiff in describing how the accident occurred was admissible under the allegations of negligence and contributory negligence. It is true that defendant Pearce pleaded assumption of risk, but it is not to be assumed by reason thereof that plaintiff, in presenting his case as to Rainville, was proceeding upon the basis that there was issue as to assumption of risk insofar as Rainville was concerned. After Pearce's motion for a nonsuit had been granted and the defendant Rainville had thereupon rested his case, the plaintiff would have been justified in assuming that the remainder of the trial (wherein Rainville was the only defendant) would not include an issue of assumption of risk. Plaintiff's counsel and Rainville's counsel argued the case before the jury, but the arguments are not included in the record. Since it has not been asserted on appeal that plaintiff's counsel or defendant's counsel argued with respect to assumption of risk, it will be assumed that the issue was not argued before the jury. Under such circumstances, it appears that plaintiff was deprived of the right to argue a matter of vital importance which, although not pleaded by Rainville, was submitted by the court's instruction as an issue for consideration of the jury. Respondent Rainville asserts that his position is "that the evidence so clearly shows contributory negligence on the part of appellant that his claims of error are inconsequential and do not constitute legal grounds for reversal." It cannot be determined, of course, whether the jury based its verdict on a finding of no negligence on the part of Rainville, or on contributory negligence of plaintiff, or on assumption of risk by plaintiff. It is to be noted that the "fourth" instruction on assumption of risk, above referred to, told the jury that there is a distinction between contributory negligence and assumption of risk; and that contributory negligence must be a proximate cause of the injury, but assumption of risk will bar recovery of damage although it plays no part in causing the accident except merely to expose the person to danger. Under that instruction, defendant Rainville was accorded a more favorable position, as to the proof required, than he would have had if the instruction on assumption of risk had not been given. The jury might have interpreted that instruction to mean that since proximate cause is not required to be proved as a basis for a finding of assumption of risk, the amount of proof required for a finding of assumption of risk is less than the amount of proof required for a finding of contributory negligence. Respondent Rainville asserts that there is nothing in the record to indicate that plaintiff objected to the giving of the instructions on assumption of risk, and that the failure of plaintiff to object thereto constituted invited error, and that plaintiff is estopped to contend there was error in giving those instructions. There is nothing in the record to indicate that plaintiff knew that those instructions would be given. During the giving of the instructions or after they were given, plaintiff was not required to object thereto. The giving of the instructions on assumption of risk constituted prejudicial error.

In view of the above conclusion, requiring a reversal of the judgment which was in favor of defendant Rainville, it is not necessary to discuss other contentions of appellant regarding other instructions.

The judgment of nonsuit in favor of defendant Pearce is affirmed. The judgment in favor of defendant Rainville is reversed.

SHINN, P. J., and VALLÉE, J., concur.

169 Cal.App.2d 344

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Alex LOPEZ, Defendant and Appellant.

Cr. 6412.

District Court of Appeal, Second District, Division 1, California.

April 2, 1959.

Defendant was convicted of unlawful possession of narcotics and from the judgment of the Superior Court, Los Angeles County, Thomas L. Ambrose, J., the defendant appealed. The District Court of Appeal, Lillie, J., held, inter alia, that where defendant was charged in first count with possessing heroin, in second count with possessing marijuana and in third count with possessing amidone, all on same day when officers found in defendant's possession three separate narcotics in substantial amounts, the possession of any one of which constituted an offense under statutes, conviction on three counts of possession was not invalid on ground that defendant was punished three times for a single act since the possession of each of the three different and distinct types of narcotics, even at same time, constituted three separate offenses.

Affirmed.

1. Arrest 🔑63(4)
Criminal Law 🔑394.4(9)

That officer did not disclose identity of informer, whose information led to arrest of defendant for unlawful possession of narcotics, did not make the arrest illegal and evidence obtained as result thereof inadmissible, where no motion to strike the officer's testimony was made after identity of informer was refused, and neither in his objection to introduction of narcotics in evidence nor by argument elsewhere in record did defendant indicate that he was relying on refusal to identify informer to establish illegality of arrest and search. West's Ann.Health & Safety Code, § 11500; West's Ann.Code Civ.Proc. § 1881, subd. 5.

2. Poisons 🔑9

To sustain conviction of possession of narcotics there must appear in record sufficient evidence to show defendant knowingly had physical or constructive possession of a narcotic, knowing it to be such, but such elements may be established by circumstantial evidence from which reasonable inferences may be drawn by the trier of fact. West's Ann.Health & Safety Code, § 11500.

3. Criminal Law 🔑260(11)

In prosecution for unlawful possession of narcotics, the weight of evidence and credibility of witnesses were for trial court sitting without jury. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law 🔑1144(13)

In determining sufficiency of evidence to sustain finding that defendant had unlawful possession of narcotics, evidence would be considered in light most favorable to the prosecution. West's Ann.Health & Safety Code, § 11500.

5. Poisons 🔑9

In prosecution for unlawful possession of narcotics, evidence sustained finding that defendant knowingly had in his possession heroin, marijuana and amidone with knowledge of their narcotic nature. West's Ann.Health & Safety Code, § 11500.

6. Criminal Law ⚩29

Where defendant was charged in first count with possessing heroin, in second count with possessing marijuana and in third count with possessing amidone, all on same day when officers found in defendant's possession three separate narcotics in substantial amounts, the possession of any one of which constituted an offense under statutes, conviction on three counts of possession was not invalid on ground that defendant was punished three times for a single act since the possession of each of the three different and distinct types of narcotics, even at same time, constituted three separate offenses. West's Ann.Health & Safety Code, §§ 1100(e, h, j), 11500; West's Ann.Pen.Code, § 654.

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Morris Schachter, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Robert M. Sweet, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

By way of information, defendant was charged in three counts with possession of heroin, marijuana and amidone, in violation of Section 11500, Health & Safety Code; and with three prior felony narcotic convictions. He waived his right to a trial by jury, and by stipulation the matter was submitted to the court on the transcript of the preliminary hearing, subject to the right of each party to offer additional evidence. The trial court found defendant guilty on each count and the three prior felony convictions to be true, denied probation and sentenced him to the state prison on each count, the terms to run concurrently. From the judgment defendant appeals.

Appellant contends that the arrest, search and seizure were without probable cause because the police officer refused to name his informant; that the evidence was insufficient to support any finding he knowingly possessed narcotics; and that by convicting him on all three counts, he was punished three times for a single act in violation of Section 654, Penal Code.

As to appellant's first point, the record discloses that at the preliminary hearing Officer Breckenridge testified that he and another officer, acting on information given to him 30 minutes earlier by an informant that one "Alex" was operating a "shooting gallery" in a place in the rear of a certain address where a "hype" could buy any kind of narcotics, went to the location at approximately 1 a. m.; that the place was an apartment behind a store building; that approaching it, they walked up to a window through which they watched several persons in the kitchen for about a minute; that he saw a man (defendant) sitting at a table and a woman standing at the kitchen stove, and observed their eyes were glassy and they were sniffling; that one of the persons, upon hearing them outside, went to the door in an attempt to leave and as he opened it, he (the officer) stepped inside, identified himself, and arrested all five occupants; that after ascertaining from the defendant it was his apartment they searched the premises and found two cellophane packages—one containing nine marijuana cigarettes and the other amidone tablets; that they then placed defendant in the hands of uniformed police, removed him from the premises and, continuing their search, found 24 capsules of heroin in a rubber container, a plastic package containing a spoon, eyedropper and hypodermic needle, and two paper bags of marijuana.

The informant did not accompany the officers, was not present at the time of arrest and took no part therein than to supply information of defendant's activities and location. The officers had neither an arrest nor search warrant when they went to the premises. At the preliminary hearing, the officer testified the informant had on more than one prior occasion given him information upon which he had made arrests resulting in successful prosecutions, and it was upon the information he gave him concerning defendant he relied in arresting him.

The record discloses that at the preliminary hearing defendant made no objection to the officer's testimony relative to his reliance on the informer's communication to him; on cross-examination defendant asked the officer the name of the informant ("so that the record may show he refused to answer") which he refused to reveal under Section 1881, subd. 5, Code of Civil Procedure and was sustained by the trial judge; thereafter, defendant made no motion to strike the testimony given by the officer relative to the informant and his reliance upon his communication in making the arrest; at the conclusion of the People's case when the narcotics found in defendant's apartment were offered in evidence, defendant made no objection thereto; and although defendant moved to dismiss the charge his motion was based solely on the ground the prosecution had not proved possession, without mention of an illegal arrest, search or seizure.

[1] At the outset of the trial, the prosecution again offered the narcotics into evidence, to which defendant made no objection. Although the officer was present at the trial and testified for the People, defendant made no demand of disclosure of the informer's identity, no motion to strike the officer's testimony relative to the informant and his communication, and no objection concerning this matter. The officer's reliance upon information supplied by the informer was neither mentioned nor discussed by defendant in the court below and at no time until this appeal has he relied upon the officer's refusal to identify the informant to establish the illegality of the arrest and search.

Appellant seeks a reversal on the basis of Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39, but the recent case of Coy v. Superior Court, 51 Cal.2d 471, 334 P.2d 569, 570, is a complete answer to his first contention. In that matter appellant unsuccessfully sought a writ of prohibition to prevent his trial on the ground the officer at the preliminary hearing, upon objection of the People, refused to divulge the name of the informer, which was sustained by the committing magistrate. No motion to strike the officer's testimony was made upon refusal to reveal his identity and defendant neither objected to the introduction of the narcotics in evidence nor argued the legality of the arrest and seizure. Citing Priestly v. Superior Court, 50 Cal.2d 812, at page 819, 330 P.2d 39, at page 43: "When the prosecution seeks to show reasonable cause for a search by testimony as to communications from an informer, either the identity of the informer must be disclosed when the defendant seeks disclosure or such testimony must be struck on proper motion of the defendant," the Supreme Court affirmed the magistrate's ruling and held that the prosecution was entitled to elect between disclosure and having the officer's testimony struck. Said the court at page 473 of 51 Cal.2d, at page 570 of 334 P.2d: "It was incumbent on defendant to compel this election, however, by moving to strike or otherwise making his position clear. The prosecution may have had evidence other than the information of the informer to justify the search or it may have been willing to waive the privilege of nondisclosure if its case would otherwise fail, and it was entitled to an opportunity to produce such evidence or waive nondisclosure. It was not called upon to do so, however, while evidence of reasonable cause stood unchallenged in the record." Commenting further that neither the magistrate nor trial court has the duty to strike the evidence on its own motion, and defendant should not be permitted to gamble on an acquittal at his trial secure in the knowledge the conviction would be reversed on appeal, the court continued: "No undue burden is placed on the defendant by requiring him to make a motion to strike when the basis for excluding evidence theretofore properly admitted becomes apparent, and there is no basis for departing from the settled rule requiring such a motion (City of Venice v. Short Line Beach Land Co., 1919, 180 Cal. 447, 453, 181 P. 658; Ballos v. Natural, 1928, 93 Cal.App. 601, 608, 269 P. 972; Brandt v. Krogh, 1910, 14 Cal.App. 39, 56, 111 P. 275; Fricke

California Criminal Evidence, 444–445 (4th ed. 1957)) in the present situation."

Concerning appellant's second point that there is insufficient evidence in the record to show he had possession of the narcotics, we again refer briefly to the testimony of Officer Breckenridge that defendant and another in the apartment were sniffling and their eyes were glassy (both physical signs of heroin use); that defendant, who had been seated at the table in the kitchen, admitted he was a narcotic user and had a "fix" two weeks before, and numerous puncture wounds appeared on his right arm; that with reference to the apartment defendant said: "Yes, it is my apartment but I am moving," and that he had lived there for approximately two years; that defendant later, again asked if the apartment was his, admitted that it was; that a search in defendant's presence revealed two packages—one containing nine marijuana cigarettes and the other amidone tablets, on the floor behind the refrigerator; and that a further search, after defendant was removed from the premises, disclosed a rubber container of 24 capsules of heroin and a plastic package containing a spoon, eyedropper and a hypodermic needle behind a board nailed to the kitchen window, and two paper bags of marijuana on the floor under the kitchen stove.

Appellant "does not deny that this evidence is sufficient to support an inference it was appellant's apartment at that time" (App. O.B., p. 7), but contends that the evidence was not sufficient to support the implied finding that he knowingly possessed the narcotics found therein. He says he had no knowledge of the presence of the narcotics and since guilty knowledge cannot be presumed, the burden was on the prosecution to prove facts from which it could fairly be inferred.

[2–5] It is, of course, true that to sustain a conviction of possession under Section 11500, there must appear in the record sufficient evidence to show defendant knowingly had physical or constructive possession (People v. Gory, 28 Cal.2d 450, 170 P.2d 433; People v. Martinez, 117 Cal.App.2d 701, 256 P.2d 1028; People v. Batwin, 120 Cal.App.2d 825, 262 P.2d 88) of a narcotic, knowing it to be such (People v. Winston, 46 Cal.2d 151, 293 P.2d 40; People v. Carrasco, 159 Cal.App.2d 63, 323 P.2d 129; People v. White, 50 Cal.2d 428, 325 P.2d 985). However, these elements may be established by circumstantial evidence from which reasonable inferences may be drawn by the trier of fact (People v. Magdaleno, 158 Cal.App.2d 48, 322 P.2d 89; People v. Robarge, 151 Cal.App.2d 660, 312 P.2d 70; People v. Batwin, 120 Cal. App.2d 825, 262 P.2d 88; People v. Gentry, 118 Cal.App.2d 501, 257 P.2d 1012). That there is ample in the record from which a reasonable inference may be drawn that the substances (heroin, marijuana and amidone) found in defendant's apartment were under his dominion and control, and he knew of their presence and that they were of a narcotic nature, is borne out by evidence of the early morning hour defendant was observed, under the circumstances, and his apparent physical condition pointing to narcotics use; the proprietary actions of defendant in the kitchen of the apartment he admitted was his and in which he had lived for two years; defendant's admitted use of narcotics, that he had a "fix" two weeks before and the puncture wounds on his right arm; and the discovery on the premises in defendant's presence of marijuana and amidone, and later, heroin and paraphernalia used by addicts secreted in the kitchen of his apartment in places and under conditions disclosing an obvious intent on the part of someone familiar with the premises to purposely conceal them. Although defendant in his testimony denied possession or knowledge of the narcotics; said that he had moved out but returned two days later in search of his refrigerator, finding unknown people in the apartment, and that while he was there police arrived, searched the premises but found nothing while he was present; and denied telling the officer he was a user; his story only served to create a factual conflict, which the trial judge in the exercise of his duty to weigh the evidence and determine the credibility of the witnesses, resolved against him by rejecting his testimony in favor of the officer's. Since we are concerned only with whether there is sufficient proof in the record, contradicted or uncontradicted, to reasonably justify the finding defendant committed the offense (People v. Newland, 15 Cal.2d 678, 104 P.2d 778); and considering the evidence in a light most favorable to the prosecution, we conclude that it was reasonable for the trial court to infer therefrom that defendant knowingly had in his possession heroin, marijuana and amidone with knowledge of their narcotic nature.

People v. Antista, 129 Cal.App.2d 47, 276 P.2d 177, relied upon by appellant, lends no assistance mainly because of a complete factual dissimilarity. There the evidence consisted solely of the discovery in defendant's absence of marijuana in a cupboard in an unused room in his apartment, and defendant was not shown to be a heroin user or to have any connection with narcotics. In the instant case, defendant was an admitted user of narcotics, bore puncture marks on his right arm and had a "fix" not long before. Part of the narcotics discovered in the kitchen of his apartment were found in his presence and in such places as would indicate a determined concealment by one who well knew the premises.

[6] Appellant's last contention, that having been convicted on three counts of possession, he was punished three times for a single act in violation of Section 654, Penal Code, finds no support in either the law or the facts. People v. Branch, 119 Cal.App.2d 490, 260 P.2d 27, and other similar cases cited by him have no application here. The Branch case, for example, involved a conviction of possession and sale of the *same* narcotic. The court there held that possession and sale were part of the same transaction. The other cases involved possession and transportation of the *same* narcotic in which they were held to constitute only one offense. In the instant case, possession of more than one narcotic is alleged.

In Count 1, defendant was charged with possessing heroin, in Count 2, marijuana and in Count 3, amidone; all on February 8. On that day, the officers found in defendant's possession three separate and distinct narcotics, in substantial amounts—the possession of any one of which under sections 11500 and 11001, Health & Safety Code, constituted an offense. Contrary to his contention that defendant's possession of all three was a single act, the possession of each of the three different and distinct types of narcotics, even at the same time, constituted three separate offenses. In People v. Mandell, 90 Cal.App.2d 93, 202 P.2d 348, the same contention was rejected. Defendants therein were charged in the first three counts with possession of morphine, opium and cocaine, respectively; in the fourth, fifth and sixth, with transportation of each. Holding that, since the only possession shown in the record was that incident to transportation, the possession and transportation must be treated as one offense, the court reversed the three transportation counts but affirmed the three possession counts, on the ground each constituted a single offense because each related to a different type of narcotic. Said the court at page 98 of 90 Cal.App.2d, at page 351 of 202 P.2d: "It is argued that there was but one cigar box containing three different types of narcotics and that the only possession of the narcotics which was shown was that incident to the transportation. Under sections 11500 and 11001 of the Health and Safety code, the possession or transportation of either cocaine, opium or morphine was prohibited. *The possession of each of these prohibited narcotics constitutes a separate criminal offense*, which is also true of their transportation, *and the fact that they were kept* or carried *in one package would make no difference.* (Citations)." (Emphasis added.)

Section 11001 defining "narcotics" as used in Section 11500, Health & Safety Code, includes the substances—"(e) Heroin"; "(h) All parts of the plant Cannabis sativa

L. (commonly known as marijuana)"; and "(j) Amidone."

For the foregoing reasons, the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

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169 Cal.App.2d 571

Application of PARI-MUTUEL EMPLOYEES' GUILD, LOCAL 280, BUILDING SERVICE EMPLOYEES INTERNATIONAL UNION, Petitioner and Appellant,

v.

LOS ANGELES TURF CLUB, INC., Hollywood Turf Club, Operating Company, Del Mar Turf Club, Western Harness Racing Association, Tanforan Company, Ltd., Pacific Turf Club, Inc., California Jockey Club, Inc., Los Alamitos Race Course and California Horse Racing Association, Respondents.

Civ. 23563.

District Court of Appeal, Second District, Division 2, California.

April 13, 1959.

Proceedings on petition for order directing arbitration of dispute as to propriety of assigning machine supervisors to selling tickets. The Superior Court of Los Angeles County, Bayard Rhone, J., denied the relief sought, and the petitioner appealed. The District Court of Appeal, Ashburn, J., held that since collective bargaining agreement expressly provided that supervisors should perform such tasks, there could be no arbitration under contract, which also provided that no arbitration should result in modification, variance, change in, addition to, or removal of any terms or conditions of contract by arbitrators.

Affirmed.

1. Labor Relations 🔑434

Where collective bargaining agreement expressly provided that machine supervisors should sell tickets, there could be no arbitration of dispute over assignment of supervisors to that task, in view of express contract provision that no arbitration should result in modification, variance, change in, addition to, or removal of any terms or conditions of contract by arbitrators.

2. Contracts 🔑292½

As a general rule, question of existence of agreement to arbitrate and of scope of arbitration permissible thereunder are issues which, in the first instance, the Code refers to judicial action. West's Ann.Code Civ.Proc. § 1282.

3. Contracts 🔑285(2)

Question of arbitrability may be submitted to arbitrators if parties so agree. West's Ann.Code Civ.Proc. § 1282.

4. Labor Relations 🔑416

In absence of anything in collective bargaining agreement to suggest an intention that question of arbitrability of alleged dispute should be submitted to arbitrators, that question was one for court, on petition for order directing arbitration.

5. Arbitration and Award 🔑3

Not every synthetic grievance or dispute is arbitrable, and there must be substantiality in controversy.

6. Motions 🔑37

Motions are heard exclusively upon affidavits unless court, in its discretion, orders or permits taking of additional evidence.

7. Labor Relations 🔑416

In proceedings on petition for order directing arbitration of dispute as to propriety of assigning machine supervisors to selling tickets, oral evidence, even if adduced and favorable to union's contention that, at time of execution of agreement expressly providing that machine supervisors should sell tickets, it had been agreed that further negotiations would be had with respect to provision for assignment of machine supervisors to selling task, would not authorize arbitrators to inject themselves into role of negotiators, and it was not an abuse of discretion to refuse to hear oral evidence.

◆

David Sokol, Los Angeles, for appellant.

O'Melveny & Myers, Freston & Files, Los Angeles, Oakes & Horton, San Diego, for respondents.

ASHBURN, Justice.

Petitioner Pari-Mutuel Employees' Guild, Local 280, Building Service Employees International Union, appeals from a judgment entered pursuant to the court's denial of its petition for an order directing arbitration under a collective bargaining agreement between petitioner and Los Angeles Turf Club, Inc., Hollywood Turf Club and several other Turf Clubs operating in this State. The judgment provides that the petition be denied and petitioner recover nothing.

Appellant is a labor union which, for collective bargaining purposes, represents those employees of the respondents who work in the pari-mutuel department. Their duties are to sell pari-mutuel tickets, cash the same, assist in calculating wagering odds and perform related activities. The parties have had a collective bargaining agreement for many years. The one now before us became effective on September 16, 1957, and extends to September 16, 1960.

Certain employees of respondents, members of the union, work in jobs classified as "Machine Supervisor A" and "Machine Supervisor B." Their duties, as set forth in the job descriptions of the bargaining agreement, are to supervise machines, distribute paper to machines and sell tickets on each race.

The collective bargaining agreement describes these jobs as follows:

"Machine Supervisor B: This supervisor comes in early, generally in the morning, and, supervises machines. He shall be assigned to a selling window each day and sell tickets each race.

"Machine Supervisor A: This employee has control of a cabinet in charge of line, distributes paper to machines and codes. He is general supervisor over other supervisors. He shall be assigned to a selling window each day and sell tickets each race.

"The job descriptions described herein are not all inclusive. They set forth only the primary duties of the employees listed and are to be used as a guide in classifying said employees. The parties agree that variations may arise as determined and directed by the Mutuel Manager."

The rates of daily pay are specified as follows:

	"Aug. 1 '57 to July 31, '58	Aug. 1 '58 to July 31, '59	Aug. 1 '59 to End of Cont.
* * * *	* *	*	* *
"Machine Supervisor A	29.60	30.60	31.60
"Machine Supervisor B	27.60	28.60	29.60
* * * *	* *	*	* *

Section 1 of Article VI of the agreement says: "The rates of pay and job descriptions attached to this Agreement are incorporated herein and made a part of this Agreement. It is agreed that the rates of pay set forth in the wage schedule and classifications attached hereto and made a part hereof shall be the agreed compensation for work performed in one (1) working day during the racing season regardless of the hours required to perform such work, and that employees working in classifications set forth therein are entitled to no overtime payment, 'One Day' as used herein means a racing day of eight (8) races or fewer."

Section 6 of Article II says: "It is the intention of the parties that all employees shall do a reasonable day's work. Any question of undue burden on any individual shall be referred for review and decision to the Labor-Management Committee established in Article IV of this Agreement."

Under Article IV the Labor-Management Committee has the duty of reviewing and rendering a decision, within ten days, of all matters submitted to it and its decision is declared to be binding upon the

Union, its members, and the employer. In case of disagreement the matter must be submitted to arbitration as provided in Article V. That article contains familiar provisions for processing grievances submitted to arbitration; also the following: "The arbitrator shall not modify, vary, change, add to, or remove any terms or conditions of this Agreement."

In November, 1957, appellant Union notified respondents that it felt an undue burden was being imposed on machine supervisors by their assignment to ticket selling windows. The Labor-Management Committee held a meeting to consider the alleged grievance but no decision was reached. Appellant then made a written request for arbitration.

This having failed to eventuate the Union filed its petition for an order directing arbitration which alleges: "That a dispute between the parties arose over the assignment of machine supervisors to selling windows, and on February 25, 1958 the parties agreed to submit the same to David Ziskind, selected as the arbitrator; a copy of said agreement to so submit is attached as Exhibit 'B' and made a part hereof." Said proposed agreement, Exhibit "B" states: "Now, therefore, it is mutually agreed by the parties that the issue to be submitted to arbitration is as follows: Does the assignment of machine supervisors to selling windows to sell tickets constitute an undue burden on such supervisors?" In response to this allegation of the petition respondents alleged that the parties "tentatively agreed orally that said dispute could be submitted to David Ziskind, as Arbitrator, provided the parties were unable to settle such dispute by negotiation, and provided further that petitioner could and did present a grievance that was arbitrable under said Agreement." Also that the purported agreement, Exhibit "B", "was withdrawn by respondents before it was accepted by Petitioner." To this was added: "And respondents particularly deny that there could be an arbitrable dispute between the parties over the assignment of Machine Supervisors to selling windows as alleged in Paragraph IV of said Petition in that said Collective Bargaining Agreement specifically provides that a Machine Supervisor 'shall be assigned to a selling window each day and sell tickets each race.'"

The trial court found that said dispute did arise; that none of respondents was in default under the arbitration provisions of the Collective Bargaining Agreement; that that agreement specifically provides "that a Machine Supervisor shall be assigned to a selling window and sell tickets each race"; that Article V, covering arbitration, provides "that the arbitrator shall not modify, vary, change, add to or remove any terms or conditions of said Collective Bargaining Agreement"; that the proposed submission agreement attached to the petition as Exhibit "B" was withdrawn and revoked by respondents before its acceptance by petitioner and before any notice of acceptance was mailed to respondents; that the Collective Bargaining Agreement is the only written agreement between the parties for arbitration of disputes. Among its conclusions of law the court stated: "4. Petitioner is not entitled to an order directing arbitration under said Collective Bargaining Agreement concerning the assignment of Machine Supervisors to selling windows. 5. Petitioner's petition for an order directing arbitration should be denied because none of the Respondents are in default under any written agreement to arbitrate." Appellant's counsel construes this to be a ruling "that there was no arbitrable issue before the Court and that the submission agreement had been withdrawn." We think this a correct interpretation of the ruling,—that absence of arbitrability is an implied subsidiary finding.

[1] It should be noted at the outset that no undue burden upon any individual machine supervisor is asserted. The claim, raised just two months after the bargaining agreement was consummated, is that assigning machine supervisors to selling tickets was an undue burden upon them as a class. The contract expressly provides that they shall perform such services and that no arbitration shall result in a modification,

variance, change in, addition to or removal of any terms or conditions of the contract by the arbitrators. The following observations of Texoma Natural Gas Co. v. Oil Workers I. U., etc., D.C., 58 F.Supp. 132, 148,[1] are pertinent: "I am firm in the view that Article XI, dealing with *complaints*, relates wholly to *individual* complaints and grievances, to the right of each individual to *the protection accorded him by the provisions of the contract.* It has no relation whatever to the possible desire of one or many employees for *changes in the contract.* * * *

* * * * * *

"These are all appropriate measures for securing to the individual employee his *rights under* the contract, but wholly inappropriate steps for obtaining *amendments to*, or *modifications of*, the contract—that would be a matter for collective bargaining. * * * Many other examples could be cited reflecting the distinction between the protection through complaint machinery of the *rights of the individual employee*, granted by the contract, and the amendment of the contract through negotiation. [Emphasis by the Court.]

"The contract between the parties was evidently made for the purpose of being followed. Doubtless in the course of bargaining each gave and each took. At any rate, it was entered into, and must be followed. I cannot believe that it was intended that if some or all of the employees became dissatisfied with some provision, the contract would be subject to amendment by a third party or three third parties acting as 'arbitrators.' Arbitration under an existing contract and negotiations for the amendment of a contract are entirely different functions. The Company cannot be forced, through intervention of arbitrators, into an amendment of the contract. If, therefore, the subject matter of the differences between the parties is fully covered by the contract, those differences are not within the complaint and grievance provisions of the contract, and are not arbitrable under the arbitration provisions; and if they are not arbitrable it is obvious that in attempting to arbitrate non-arbitrable matters the arbitrators have exceeded their jurisdiction, and their award is void."

Had there been an arbitration in this instance it must have resulted adversely to appellant for the jurisdiction of arbitrators is limited by the Collective Bargaining Agreement to action which does not change the terms of the agreement. Any order that machine supervisors be not assigned to selling windows each day, or be not required to sell tickets each race, would be directly opposed to the terms of the agreement and hence in excess of the jurisdiction of the arbitrators. Drake v. Stein, 116 Cal.App.2d 779, 785, 254 P.2d 613; Crofoot v. Blair Holdings Corp., 119 Cal.App. 2d 156, 184, 260 P.2d 156; Flores v. Barman, 130 Cal.App.2d 282, 287, 279 P.2d 81; O'Malley v. Petroleum Maintenance Co., 48 Cal.2d 107, 110, 308 P.2d 9.

Section 1282, Code of Civil Procedure,[2] under which this proceeding was brought, requires the court to determine initially whether the existence of a written agreement for arbitration is in issue and whether respondent is in default with respect to performance: "If the finding be that no agreement in writing providing for arbitration was made, or that there is no default in proceeding thereunder, the proceeding shall be dismissed."

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[1] Affirmed on other grounds 5 Cir., 146 F.2d 62, certiorari denied 324 U.S. 872, 65 S.Ct. 1017, 89 L.Ed. 1426.

[2] Code Civ.Proc. § 1282: "A party aggrieved by the failure, neglect or refusal of another to perform under an agreement in writing providing for arbitration may petition any superior court of the county or city and county where either party resides, for an order directing that such arbitration proceed in the manner provided for in such agreement. Five days' notice in writing of the hearing of such application shall be served personally upon the party in default. The court shall hear the parties, and upon being satisfied that the making of the agreement or such failure to comply therewith is not in issue, shall make an order directing the parties to proceed to arbitration in accordance with the terms of the agreement. If the making of the agreement or the default be in issue an order shall be made directing a summary trial thereof. Where such an issue is raised, the party alleged to be in default, may, on or before the return day of the notice of application, demand a jury trial of such issue, and if such demand be made, said court shall make an order referring the issue or issues to a jury called and im-

Appellant does not argue that the evidence is insufficient to support the finding that the proposed arbitration agreement (Exhibit B) never became effective because the minds of the parties did not meet thereon. On the contrary, the opening brief says: "There is a basic conflict in the affidavits on file on the issue of whether or not Respondents did in fact revoke the submission agreement before it was accepted by the Union."

The real contention of appellant is that the question of arbitrability should have been determined by arbitrators appointed pursuant to the Collective Bargaining Agreement in view of the contract provision requiring arbitration of all grievances. Reliance is placed upon this language of Section 1 of Article V: "All grievances hereunder, except as provided elsewhere herein, shall be processed in the following manner."

[2] As a general rule, the question of the existence of an agreement to arbitrate and of the scope of the arbitration permissible thereunder are issues which, in the first instance, the code refers to judicial action. Code Civ.Proc. § 1282; Wetsel v. Garibaldi, 159 Cal.App.2d 4, 7, 8, 323 P.2d 524. See also, Fischer v. Superior Court, 105 Cal.App. 466, 470, 287 P. 556; Doyle v. Hunt Construction Co., 123 Cal.App.2d 51, 54, 266 P.2d 152; Southside Theatres, Inc., v. Moving Picture Local, 131 Cal.App.2d 798, 802, 281 P.2d 31; Local 659, I. A. T. S. E. v. Color Corp. Amer., 47 Cal.2d 189, 195, 302 P.2d 294.

[3] In this State it is held that the question of arbitrability may be submitted to the arbitrators if the parties so agree. O'Malley v. Petroleum Maintenance Co., supra, 48 Cal.2d 107, 110, 308 P.2d 9; McCarroll v. Los Angeles County, etc., Carpenters, 49 Cal.2d 45, 65, 315 P.2d 322. In the McCarroll case, the court said: "Of course, even when the parties have conferred upon the arbiter the unusual power of determining his own jurisdiction, the court cannot avoid the necessity of making a certain threshhold determination of arbitrability, namely, whether the parties have in fact conferred this power on the arbiter. There is no indication in the present contract that the parties intended any such result. * * Whatever the merits of the procedure, we think it sufficiently outside the usual understanding of the relations of court and arbiter and their respective functions to assume that the parties expected a court determination of arbitrability unless they have clearly stated otherwise. * * * As with all problems of contract interpretation, the answer must reflect the intention of the parties." 49 Cal.2d at pages 65–66, 315 P.2d at page 333. "The contract, however, must be read as a whole and the grievance and arbitration procedure viewed in the light of its purpose." 49 Cal.2d at page 67, 315 P.2d at page 335. "As Mr. Justice Cardozo pointed out in Marchant v. Mead-Morrison Mfg. Co., 252 N.Y. 284 [169 N.E. 386, 391, 393], 'Courts are not at liberty to shirk the process of construction under the empire of a belief that arbitration is beneficent, any more than they may shirk it if their belief happens to be the contrary. No one is under a duty to resort to these conventional tribunals, however helpful their

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paneled in the manner provided for the trial of actions at law. If no jury trial be demanded said court shall hear and determine such issue. If the finding be that no agreement in writing providing for arbitration was made, or that there is no default in proceeding thereunder, the proceeding shall be dismissed. If the finding be that a written provision for arbitration and was made and there is a default in proceeding thereunder, an order shall be made summarily directing the parties to proceed with the arbitration in accordance with the terms thereof."

processes, except to the extent he has signified his willingness. * * *' '[The contracting parties] * * * are not to be trapped by a strained and unnatural construction of words of doubtful import into an abandonment of legal remedies, unwilled and unforeseen.'" 49 Cal.2d at page 69, 315 P.2d at page 335.

[4] There is nothing in the Collective Bargaining Agreement before us to suggest an intention that the question of arbitrability of the alleged dispute should be submitted to the arbitrators. In the absence of a clear showing of such intent that question continues in its normal abiding place, the court forum.

[5] Not every synthetic grievance or dispute is arbitrable. There must be substantiality in the controversy. Cf. Gonzalez v. Gonzalez, 174 Cal. 588, 593, 163 P. 993; Doyle v. Hunt Construction Co., supra, 123 Cal.App.2d 51, 54, 266 P.2d 152; 5 Cor.Jur., § 25, p. 27; 6 C.J.S. Arbitration and Award § 10, p. 158. In International Ass'n of Machinists, Dist. No. 15, Local No. 402 v. Cutler-Hammer, 271 App.Div. 917, 67 N.Y.S.2d 317, 318, the court said: "The clause of the agreement that 'the Company agrees to meet with the Union early in July 1946 to discuss payment of a bonus for the first six months of 1946' can only mean what it says, that the parties will *discuss* the subject. While the contract provides for arbitration of disputes as to the 'meaning, performance, non-performance or application' of its provisions, the mere assertion by a party of a meaning of a provision which is clearly contrary to the plain meaning of the words cannot make an arbitrable issue. It is for the Court to determine whether the contract contains a provision for arbitration of the dispute tendered, and in the exercise of that jurisdiction the Court must determine whether there is such a dispute. If the meaning of the provision of the contract sought to be arbitrated is beyond dispute, there cannot be anything to arbitrate and the contract cannot be said to provide for arbitration." This ruling was affirmed in 297 N.Y. 519, 74 N.E.2d 464. Most of the foregoing language is quoted with approval in Textile Workers' Union of America, etc. v. Firestone Plastics Division, 6 N.J.Super. 235, 70 A.2d 880, 881; General Electric Co. v. United Elec. R. & M. Workers, 196 Misc. 143, 91 N.Y.S.2d 724, 727; Application of Berger, 191 Misc. 870, 79 N.Y.S.2d 490, 492; Strauss Stores Corp. v. Local 830 R. & W. Employees Un., 189 Misc. 428, 71 N.Y.S.2d 315, 319.

General Electric Co. v. United Electrical Radio & Machine-Workers of America, C.I.O., 300 N.Y. 262, 90 N.E.2d 181, 182: "If, under the unambiguous terms of an agreement calling for arbitration, there has been no default, the court may not make an order compelling a party to proceed to arbitration. * * * If there is no real ground of claim, the court may refuse to allow arbitration, although the alleged dispute may fall within the literal language of the arbitration agreement. Such is the situation here. The anti-discrimination clause of the collective bargaining agreement cannot be invoked, in the circumstances of this case, to compel a change in the second collective agreement. Neither compensation nor pension credits are given by the company for time spent in union activity beyond the maximum number of hours per week for which the company has agreed to pay. To do so would be to discriminate in favor of union representatives. The company has no such obligation. The pension plan is administered on the basis of compensation paid to all of its employees. There is no possible basis for a charge of discrimination, and by that token, no possible ground for arbitration."

There is no room for difference of opinion at bar. The sole objective of appellant's application for an order directing arbitration was to relieve it and its members of the express agreement that each machine supervisor "shall be assigned to a selling window each day and sell tickets each race." This could not be accomplished without violation of the plain provision limiting the power of the arbitrators with respect to making modifications of the contract. See:

Simons v. Publishers' Ass'n of New York City, Sup., 94 N.Y.S.2d 362, 370; In re Buffalo & E. Ry. Co., 250 N.Y. 275, 165 N. E. 291, 292; In re Amsterdam Dispatch, Inc., 254 App.Div. 233, 4 N.Y.S.2d 908; M. P. Berglas Mfg. Co. v. Shadel, Sup., 75 N.Y.S.2d 425, 427; Gould Storage Battery Corp. v. United Electrical, Radio & Mach. Wkrs., 137 N.J.L. 522, 61 A.2d 50, 52; Western Union Tel. Co. v. American Communications Ass'n, 299 N.Y. 177, 86 N.E.2d 162, 166; United Electrical, Radio & Machine Workers, etc. v. Walter Kidde & Co., 136 N.J.L. 544, 57 A.2d 54, 55–56.

The court correctly ruled that the alleged grievance was not an arbitrable matter.

[6, 7] Appellant asserts error in refusal of the trial judge to hear oral evidence. The original petition was filed in April, 1958, and the hearing finally took place on July 7, 1958. During the interval 12 affidavits were filed by the contesting parties. At the time of the hearing the following occurred, according to the minutes: "Petitioner, by its attorney David Sokol, requests that the minutes show that petitioner wanted to put on oral testimony and that the witnesses are present, and that the request to put on oral testimony is denied and the matter is tried upon the affidavits and pleadings." No request was made for leave to file additional affidavits and no showing proferred with respect to the oral evidence petitioner desired to produce or how, if at all, it would or could help petitioner's cause. The suggestion is made in the opening brief that "Union contends that at the time of the execution of the agreement it was agreed that further negotiations would be had with respect to the requirement that machine supervisors be assigned to a selling window each day and sell tickets each race; the Respondents contend that there was no such understanding;" also that it was an abuse of discretion for the court to refuse to resolve this conflict in the evidence through consideration of oral testimony. Who the witnesses were or what their testimony would be does not appear. But it is plain that the subject matter of machine supervisors acting as ticket sellers was expressly covered by the agreement and it was specified that no arbitration could result in a modification of that agreement. Oral evidence, if adduced and if favorable to the contention that there was an agreement to further negotiate with respect to that clause of the contract, would not authorize the arbitrators to inject themselves into the role of negotiators, especially when the parties had merely agreed to negotiate, not to agree further. The language quoted from International Ass'n of Machinists, Dist. No. 15, Local No. 402 v. Cutler-Hammer, supra, 271 App.Div. 917, 67 N.Y.S.2d 317, 318, is apposite here.

In support of the abstract right to produce oral evidence upon a hearing under § 1282, Code of Civil Procedure, counsel for appellant relies upon that portion of the section which provides for a jury trial upon demand of the party alleged to be in default (not the applicant) upon the issue of the making of an agreement to arbitrate or the issue of respondent's alleged default in performance of such agreement. But there was no such demand here, petitioner had no right to make one, and the section provides that in the absence of such demand the court shall hear and determine the issue after a summary trial thereof. Section 1285, Code of Civil Procedure, provides: "Any application made under the authority of this act shall be heard in a summary way in the manner provided by law for the making and hearing of motions, except as otherwise herein expressly provided."

Cases cited from other jurisdictions are not controlling, for it is settled law in California that motions are heard exclusively upon affidavits (People v. Tucker, 117 Cal. 229, 230–231, 49 P. 134; Guardianship of Van Loan, 142 Cal. 423, 426, 76 P. 37; Fuller v. Lindenbaum, 29 Cal.App.2d 227, 230, 84 P.2d 155; Beckett v. Kaynar Mfg. Co., Inc., 49 Cal.2d 695, 698, 321 P.2d 749, footnote 3) unless the court in its discretion orders or permits the taking of additional evidence (Muller v. Muller, 141 Cal.App. 2d 722, 731, 297 P.2d 789; 34 Cal.Jur.2d § 12, p. 514).

Upon the facts presented by the instant record there was no abuse of discretion in the refusal to hear oral evidence.

The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.

169 Cal.App.2d 404

COUNTY OF SANTA CLARA, a public corporation and a political subdivision of the State of California, for itself and for Charles Curtis, a minor, Plaintiff and Appellant,

v.

Jacob DOLL, Defendant and Respondent.

Civ. 18125.

District Court of Appeal, First District, Division 1, California.

April 7, 1959.

Action by county against alleged natural father of a child to recover moneys laid out, and to be laid out by it, for the support of the child. The Superior Court, Santa Cruz County, Gilbert B. Perry, J., sustained defendant's demurrer and county appealed. The District Court of Appeal, Hanson, J. pro tem., held that county could not maintain an action against alleged natural father to recover moneys laid out, and to be laid out by it, for support of a minor child where county was required to prove that the child, conceived during wedlock of mother and her legal husband, was, in fact, the illegitimate child of the alleged natural father.

Judgment affirmed.

1. Bastards 🔑16

County could not maintain an action against alleged natural father to recover moneys laid out and to be laid out by it for support of a minor child, where county was required to allege and prove that the child, conceived during wedlock of mother and her legal husband, was, in fact, the illegitimate child of the alleged natural father. West's Ann.Civ.Code, §§ 195, 241–254, 242, 248.

2. Bastards 🔑16

Until illegitimacy is established, a child born in wedlock could not be an obligee of alleged natural father within section of Civil Code providing that an obligee may enforce his right of support against the obligor and the county may proceed on behalf of the obligee to enforce his right of support against the obligor, and, until illegitimacy is shown, the child remains the obligee of the one whom the law presumes to be his natural father. West's Ann.Civ. Code, §§ 195, 241–254, 242, 248.

◆

Spencer M. Williams, County Counsel, Robert S. Sturges, Deputy County Counsel, San Jose, for appellant.

David Henry Gill, Pacific Grove, for respondent.

HANSON, Justice pro tem.

The question here at issue is whether a county can maintain an action against an alleged natural father to recover moneys laid out, and to be laid out by it, for the support of a minor child where it must allege and prove that the child conceived during the wedlock of the mother and her legal husband is, in fact, the illegitimate child of the defendant—the alleged natural father.

If the county is not a proper party or cannot prove by competent evidence the basic fact as issue, the judgment below, sustaining the defendant's demurrer to the second amended complaint without leave to amend, was proper.

Civil Code, section 193, provides that "All children born in wedlock are presumed to be legitimate" and Code of Civil Procedure, section 1962(5), provides: "Notwithstanding *any* other provision of law, the issue of a wife cohabiting with her husband, who is not impotent, is *indisputably* presumed to be legitimate." (Emphasis added.) By Code of Civil Procedure, section 1963, it is stated that "All other presumptions are satisfactory, if uncontradicted. They are denominated disputable presumptions, and may be controverted by other evidence. The following are of that kind: * * *

"31. That a child born in lawful wedlock, there being no divorce from bed or board, is legitimate."

Civil Code, section 195, reads as follows: "The presumption of legitimacy can be disputed only by *the people of the State of California in a criminal action brought under the provisions of Section 270 of the Penal Code,* or the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact." (Emphasis added.) This section was originally enacted in 1872 and the italicized part was added by amendment in 1955, the same year that the Uniform Civil Liability for Support Act was enacted. It is to be noted that nowhere in the above section is the state or any of its subdivisions granted power to dispute the presumption of legitimacy except in a criminal case.

We think it is very clear that, were the County of Santa Clara, the appellant here, relying solely on the above quoted statutes, it would have no standing to maintain this suit.

The county, however, contends that the suit is brought, as it appears to be, under and by virtue of the Uniform Civil Liability for Support Act. Civil Code, §§ 241–254. Section 241 defines the word "obligor" as used in the Act as meaning "any person owing a duty of support" and "obligee" as meaning "any person to whom a duty of support is owed" and that "'parent' includes either a natural parent or an adoptive parent." Section 242 of the Act provides: "Every man shall support his wife, and his child; * * *." Next, by section 248, it is provided as follows: "The obligee may enforce his right of support against the obligor and the county may proceed on behalf of the obligee to enforce his right of support against the obligor. Whenever the county furnishes support to an obligee, it has the same right as the obligee to whom the support was furnished, for the purpose of securing reimbursement and of obtaining continuing support. *The right of the county to reimbursement shall be subject to any limitation otherwise imposed by the law of this State.*" (Emphasis added.)

It is the plaintiff's argument that the minor child Charles has the right to challenge his own presumed legitimacy and, that being true, the county under the provisions of Civil Code, section 248, supra, may proceed on behalf of Charles to enforce his right of support; that is, the county, has the same right as Charles to secure reimbursement and continuing support and that the county therefore succeeds to this right of Charles. But this is a nonsequitur.

The plaintiff's argument would be valid were there no question of illegitimacy involved. That is, were this a simple case where the father, about whose identity and fatherhood there is no dispute, failed or refused to support his minor child, then, under the provisions of section 248 the county could enforce the child's right to receive such support.

Even in the absence of acknowledgment or adoption, once illegitimacy is properly established and the father identified, the father would be liable for the support of the child (Civil Code, § 196a); although there might be some question as to who could enforce the right. That is, the action would have to be brought on behalf of the illegitimate minor either by the mother or guardian, or by a guardian ad litem appointed upon the written application or with the consent of the mother, "provided, that such application or consent shall not be necessary if the mother is dead or incompetent." Civil Code, § 196a.

But, in any case, illegitimacy must first be established before anyone could enforce any right against the alleged father. Appellant's second amended complaint alleges that, at the time of conception and birth of

Charles Curtis, the mother, Donna Hoofman, was married to Edgar W. Hoofman but was not separated. The presumption of section 1963(31) of the Code of Civil Procedure will control until it has been rebutted, and that raises the question presented on this appeal, to wit: whether or not the county is a proper party to rebut it. As said above, plaintiff relies heavily upon section 248 of the Civil Code as authorizing it to establish the illegitimacy of the child and then to enforce the support obligation provided for by the Act. But said section certainly does not expressly grant such power to the state or to any of its subdivisions, nor does a reading of the entire Act raise any implications that such power or right was being granted. These statutes purport to be support statutes and so Charles would not be an "obligee" within the meaning of section 241 so long as he is classed by law as being the legitimate child of Edgar W. Hoofman whose child he is presumed to be.

Militating against any such construction as contended for by the appellant is section 195 of the Civil Code, upon which the respondent, both in his demurrers and on this appeal, and, likewise, the lower court in dismissing the action, relied. As stated above, said section reads: "The presumption of legitimacy can be disputed only by *the people of the State of California in a criminal action brought under the provisions of Section 270 of the Penal Code,* or the husband or wife, or the descendant of one or both of them. Illegitimacy, in such case, may be proved like any other fact." (Emphasis added.)

Section 270 of the Penal Code provides that the father of either a legitimate or illegitimate minor who willfully omits without lawful excuse to furnish necessaries to his minor child is subject to fine or imprisonment or both and, if he fails to comply with a court order requiring him to make such provision, he is guilty of a felony.

It thus appears clear from section 195 of the Civil Code that appellant, an arm of the state, can dispute the legitimacy only under Penal Code, section 270 (and only then since the 1955 amendment), in criminal proceedings, *where the state would have the additional evidentiary burden of proving paternity beyond a reasonable doubt.*

A case very much in point is In re Madalina, 1917, 174 Cal. 693, 164 P. 348, 1 A.L.R. 1629, which involved a petition for a writ of habeas corpus directed to the sheriff of Sonoma County. Petitioner had been held in custody under a commitment by a magistrate to answer before the superior court of Sonoma County for failure to provide for his alleged illegitimate child. Petitioner had been prosecuted under section 270 of the Penal Code. The facts as stipulated were that the child in question had been born in lawful wedlock to a woman whose husband was alive when said child was born to her, and between whom there had been no judgment of divorce. At the preliminary examination, the mother testified to the non-access of her husband, or of any person other than the petitioner, for a period of two years next prior to the birth of the child. It was further stipulated that no action had ever been begun by the said mother or by any other person under section 196a of the Civil Code to determine the parentage of said child or to obtain a judgment against the petitioner or any other person for the support of the child. In granting the writ, the court at page 695 of 174 Cal., at page 350 of 164 P. said: "* * * it being conceded that this child, of which the petitioner is alleged to be the father, was born in wedlock, the presumption is that it is legitimate; that the declared policy of this state as expressed in its legislation is that the presumption of such legitimacy can be disputed only by the husband or wife or the descendants of one of them; that no one else may do so; that the state having thus by express legislation inhibited any question as to the legitimacy of a child born in wedlock being raised except as above indicated *cannot itself raise it in a criminal prosecution or other proceeding.*" (Emphasis added.)

On pages 695 and 696 of 174 Cal., at page 350 of 164 P. the court continued: "It is, of course, to be understood that, when it is said that the state cannot itself raise the question of the legitimacy of a child born in wedlock, it is not meant that it has no power to enact legislation authorizing such inquiry in a proceeding in its name, but only that it has not so far done so; that, on the contrary, it has denied itself this right by expressly declaring who of others alone may do so."

At page 697 of 174 Cal., at page 350 of 164 P., the court stated: "Public policy and common decency are opposed to the bastardizing of children born in wedlock against the wishes and perhaps against the protest of their putative parents. If neither the husband nor the wife to an existing marriage desires to raise any question of the legitimacy of a child born during its existence, the best interests and welfare of society will be promoted if the state likewise declines to intervene in raising that question."

To the same effect are In re Estate of Lee, 1927, 200 Cal. 310, 253 P. 145; Gonzales v. Pacific Greyhound Lines, 1950, 34 Cal.2d 749, 214 P.2d 809; Buckley v. Chadwick, 1955, 45 Cal.2d 183, 288 P.2d 12, 289 P.2d 242; Daniels v. Daniels, 1956, 143 Cal.App.2d 430, 300 P.2d 335.

[1, 2] In Buckley v. Chadwick, supra, 45 Cal.2d at page 200, 288 P.2d at page 22, the court said: "It is a generally accepted principle that in adopting legislation the Legislature is presumed to have had knowledge of existing domestic judicial decisions and to have enacted and amended statutes in the light of such decisions as have a direct bearing on them. [Citations.]" It must therefore be presumed that the Legislature was aware of the Madalina decision as well as the canon of interpretation implied in that case, and intentionally failed to provide for further extension of persons entitled to dispute the presumption of legitimacy. See State of California, Subsequent Injuries Fund v. Ind. Acc. Comm., 1957, 48 Cal.2d 355, 364, 310 P.2d 1, for a statement to this effect. Also, this presumption would seem reinforced by the fact that the Uniform Civil Liability for Support Act *and* the amendment to section 195 of the Civil Code were both enacted in 1955; therefore, it may be logically inferred from the Legislature's failure to provide that a state may contest legitimacy for purposes of the Support Act and its expressly limiting the extension of persons who may dispute the presumption of legitimacy to include the state in criminal actions prosecuted under section 270 of the Penal Code, which takes care of the In re Madalina fact situation, that was just as far as the Legislature intended to go. Consequently, until illegitimacy is established, the child could not be an obligee under the definition given in section 241 of the Civil Code. Until such status is shown, the child remains the obligee of the one whom the law presumes to be his natural father.

For the reasons stated the judgment should be and it is affirmed.

BRAY, Acting P. J., and FRED B. WOOD, J., concur.

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169 Cal.App.2d 540

ESTATE OF John S. LILLEY, Deceased.

Lloyd C. OTTOSEN, as Administrator of the Estate of Rose Ottosen, Deceased, and Lila Mosna, Appellants,

v.

Mary P. LILLEY, Respondent.

Civ. 9564.

District Court of Appeal, Third District, California.

April 10, 1959.

Rehearing Denied May 4, 1959.

Hearing Denied June 3, 1959.

Proceeding by widow as residuary legatee for modification of decree of distribution by deletion of clause to effect that after-discovered property should be distributed in specified percentages to husband's sister, niece, and two stepchildren, and that widow should get none of such property. The Superior Court, Placer County, Lowell L. Sparks, J., rendered decree modifying the decree of distribution by deleting the clause, and sister's administrator and the niece appealed. The District Court of Appeal, Warne, J. pro tem., held that where husband devised to his sister, niece, and two stepchildren specific sums of money and bequeathed residue of estate to wife, but at time of rendering of decree of distribution, estate was not sufficient to fully pay the devisees, inclusion of the clause in decree of distribution indicated clerical error, which judge who rendered decree of distribution could correct by decree of modification, rather than judicial error which judge would have no power to correct.

Affirmed.

1. Judgment ⚷304, 306

Trial court has jurisdiction to correct mistakes in its orders and records which are not actually result of exercise of judgment, but where error is inherently judicial rather than clerical or inadvertent, trial court has no power to amend its decisions.

2. Executors and Administrators ⚷315(3)

In proceeding by residuary legatee for modification of decree of distribution by deletion of clause which purported to distribute after-discovered property exclusively to each of four legatees, who were to receive specific amounts under the will, and to distribute none of such property to residuary legatee, judge's solemn declaration, in findings and order which modified decree by making requested deletion, that inclusion of the clause in decree of distribution was result of mistake and inadvertence on his part could not be wholly disregarded or lightly brushed aside.

3. Judgment ⚷325

In proceeding for modification of judgment, order, or decree, judge may consider facts within his personal knowledge and in vacating or correcting clerical error or mistake, he may give effect to his own recollection.

4. Executors and Administrators ⚷315(3)

Where husband devised to his sister, niece, and two stepchildren specific sums of money and bequeathed residue of estate to his widow, but at time of rendering of decree of distribution, estate was not sufficient to fully pay the devisees, inclusion in decree of clause to effect that after-discovered property should be distributed in specific percentages to the devisees exclusively and that widow should get none of such property, indicated clerical error, which judge who rendered decree could correct by modifying decree rather than judicial error which judge would have no power to correct.

5. Executors and Administrators ⚷315(3)

On appeal from order of judge modifying his decree of distribution, will may be referred to to determine nature of corrected error.

◆

James E. Busch and Burke & Rawles, Ukiah, for appellants.

Bowers & Sinclair, Roseville, for respondent.

WARNE, Justice pro tem.

This is an appeal from a decree modifying a decree of final distribution by striking therefrom a portion relating to after-discovered property.

On April 9, 1954, the Bank of America National Trust and Savings Association, as executor of the estate of John S. Lilley, deceased, filed its final account and petition for final distribution, wherein it appears that by the terms of decedent's last will he gave, devised, and bequeathed to his sister, Rose Ottosen (spelled in the will "Otteson"), $10,000; to his niece, Lila Mosna (daughter of Rose), $500; to his stepson, Jack McGuigin, $500; to his stepdaughter, Dorothy Bell, $500. All the rest, residue, and remainder of his estate was bequeathed to his wife, Mary P. Lilley.

The court incorporated in the "Decree Settling Final Account of Executor and Final Distribution" the provision of the will above-mentioned as to specific bequests and also the residuary clause, and then found in said decree as follows:

> "That the net amount before award for any extraordinary compensation is $3,767.01, as appears from the first and final account of said executor, therefore the specific bequests in the will of said decedent must be abated; the abatement of these bequests shall be in the following percentages:
>
> | | |
> |---|---|
> | "Rose Otteson | 0.86956 |
> | "Lila Mosna | 0.04348 |
> | "Jack McGuigin | 0.04348 |
> | "Dorothy Bell | 0.04348" |

The court further stated:

> "That there will be no balance left after payment on the distribution to the above named persons of the percentages set forth, of the net remainder, which are specific bequests, therefore there can be no payment of any amount to the residuary legatee."

After reciting the above facts, the court ordered that "the residue of said estate hereinafter particularly described, *and any other property not now known or discovered, which may belong to the said estate or which said estate may have an interest in*, be and the same is hereby, distributed as follows:

> "To Rose Otteson, 0.86956 thereof
> "To Lila Mosna, 0.04348 thereof
> "To Jack McGuigin, 0.04348 thereof
> "To Dorothy Bell, 0.04348 thereof
>
> "The following is the particular description of the said residue of said estate referred to in this decree, and of which distribution is now ordered as aforesaid:
>
> "Savings Acct. No. 50 ....$3,767.01" (Emphasis added.)

It now appears that at the time of the death of decedent he was the owner of certain real property situated in the County of Mendocino, alleged to be of a value in excess of $20,000, which was not inventoried in the assets of the estate nor was it discovered until after said estate had been distributed.

On February 17, 1958, the widow of the decedent, as residuary legatee under his will, filed a petition for modification of the decree of distribution on the ground that the inclusion of said reference to after-discovered property purported to distribute the after-discovered Mendocino real property contrary to the provisions of the will to the specific legatees, and that said reference to after-discovered property in said decree of distribution was the result of clerical error, inadvertence, and mistake on the part of the probate judge in signing said decree.

The court's order modifying said decree recites: "the Court finds that the inclusion of said reference to said after-discovered property was the result of mistake and inadvertence of the part of the scrivener who prepared the written order, and thereafter on the part of the Judge of the Probate Court who signed said Decree of Distribution, said Judge being the same Judge before whom this petition was heard, that it was not the intent of said Judge who signed said Decree of Distribution to distribute after-discovered property contrary to the provisions of the will, nor was it the result of judicial reasoning and determination, * * *" The court therefore ordered that the decree of distribution be modified by deleting therefrom the clause "* * * any other property not now known or discovered which may belong to said estate or which said estate may have an interest in * * *"

The only issue on appeal is whether the challenged clause in the decree of distribution which distributed to the specific legatees the after-discovered property was made inadvertently, i. e., was a clerical error, or was a judicial error.

[1] In the Estate of Burnett, 11 Cal.2d 259, at page 262, 79 P.2d 89, at page 90, the court said: "* * * [A] trial court * * *, has jurisdiction to correct mistakes in its orders and records which are not actually the result of the exercise of judgment. [Citing cases.] But where the er-

ror is inherently judicial rather than clerical or inadvertent, the court has no power to amend its decision. * * *" The test is simply whether the challenged judgment was made or entered inadvertently (clerical error) or advertently (judicial error). Nathanson v. Murphy, 147 Cal.App.2d 462, 469, 305 P.2d 710.

[2, 3] The judge's solemn declaration contained in the findings and the order modifying the decree of distribution cannot, as stated in Bastajian v. Brown, 19 Cal.2d 209, 214, 120 P.2d 9, 12, "* * * be wholly disregarded nor lightly brushed aside. It was a declaration of a fact that was concealed in the mind of the judge, and no one was in a better position than he to state his true intent. He may have failed to read the findings and judgment before signing them. He may have supposed they were in favor of defendants. His declaration may be construed to so indicate. Under such circumstances it is obvious that the findings and judgment would not *in fact* be the decision actually intended to be rendered by him, or that he in the exercise of judicial authority arrived at. * * * The facts within the personal knowledge of the judge may be considered, and in vacating or correcting a clerical error or mistake he may give effect to his own recollection. The declaration in the order vacating the judgment has a direct bearing on the existence of such error. [Citing cases.]"

[4, 5] It is apparent from the findings that the judge did not intend to give decedent's sister, his niece, and his two stepchildren amounts in excess of their specific legacies and thereby disinherit his widow. Such a result would be contrary to the clear provisions of the will which were incorporated in the decree of distribution and of itself indicates clerical error. The will may be referred to to determine the nature of the corrected error. Clark v. Capital National Bank, 91 Cal.App.2d 865, 870, 206 P.2d 16. Here the terms of the will are clear and certain that the testator bequeathed the residue of his estate to his widow (respondent). We conclude that upon the record the error was shown to be clerical and not judicial.

The order is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

169 Cal.App.2d 651

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Myrtle Emmer FILCHER, Defendant and Appellant.

Cr. 1253.

District Court of Appeal, Fourth District, California.

April 15, 1959.

Prosecution for assault with a deadly weapon. The Superior Court, Tulare County, W. G. Machetanz, J., entered judgment of conviction, and defendant appealed. The District Court of Appeal, Mussell, J., held that evidence, including testimony that defendant aimed a loaded gun at victim of her alleged assault, pulled the trigger, and bullet discharged from the gun hit victim when he was standing 10 to 15 feet away and making no motion toward defendant, sustained conviction.

Judgment affirmed.

1. Assault and Battery 🔑56

Action of a defendant in aiming a loaded gun at a victim and shooting victim while he was standing 10 to 15 feet away from defendant and making no motion toward defendant constituted assault with a deadly and dangerous weapon.

2. Assault and Battery 🔑92

In prosecution for assault with a deadly weapon, evidence, including testimony that defendant aimed a loaded gun at victim of her alleged assault, pulled the trigger, and bullet discharged from the gun hit victim when he was standing 10 to 15 feet away and making no motion toward defendant, sustained conviction.

3. Criminal Law ⚷1159(5)

In prosecution for assault with a deadly weapon, where issue of self-defense involved a factual determination by the jury, and its determination was supported by sufficient substantial evidence it could not be disturbed on appeal.

4. Criminal Law ⚷1130(2, 5)

Where defendant made no reference to any specific ruling of the court in connection with admissibility of evidence, and cited no authority, her failure to specify the prejudicial effect of the evidence had to be taken to mean that there was none.

5. Criminal Law ⚷1171(1)

Where, in prosecution for assault with a deadly weapon, no objection was made by defendant's counsel to introduction of a statement defendant made to police officers after the shooting, and the statement was made by defendant freely and voluntarily and contained an admission that she fired a gun at and hit a certain man, under such circumstances, there was no prejudicial misconduct on the part of the district attorney in offering such statement in evidence.

6. Criminal Law ⚷1037(1)

District attorney would not be deemed guilty of prejudicial misconduct in cross-examination of a defense witness in asking him if he had been recently picked up and charged with being a convict in possession of a gun, where witnesses were called to show defendant had posted one of the property bonds upon which defense witness was released on bail, and where no objection was made to questions asked or to admissibility of the evidence.

7. Criminal Law ⚷1036(1)

Objection to admissibility of evidence may not be made for the first time on appeal.

8. Criminal Law ⚷814(20)

Where evidence in prosecution for assault with a deadly weapon showed that if defendant was guilty at all she was guilty of assault with a deadly weapon, rather than simple assault, it was not error to fail to instruct on simple assault.

◆

J. M. Lopes, Visalia, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and David B. Allen, Deputy Atty. Gen., for the People.

MUSSELL, Justice.

Appellant was charged with having assaulted one J. D. Miller with a deadly weapon in Tulare county on or about June 1, 1958. A jury trial resulted in a verdict of finding her guilty as charged. Her application for probation was denied and she was remanded and committed to the custody of the sheriff of Tulare county for the term of six months.

Appellant, Myrtle Emmer Filcher, and her husband owned and operated a cafe and tavern near Tulare. On June 1, 1958, at about 8:00 p. m., one J. D. Miller entered the bar, ordered a beer, took it back to the card room and played poker for about forty-five minutes. When he returned to the bar, appellant was seated at a table nearby with Troy Miller, Joanne Miller, Troy Tuggle and Mr. and Mrs. Homer Miller. J. D. Miller bought drinks for all of them and paid for them with a $20 bill. When he had not received his change he asked appellant when he was going to get it and she went to see about it. When she returned to the table and started to sit down, someone pulled the chair out from under her and she sat on the floor. Troy Miller helped her up and Homer Miller said it was Troy Miller who had pulled the chair out from under her. Appellant replied, "No, it wasn't Troy. It was J. D. Miller." J. D. Miller laughed and said nothing and appellant then said, "That low down son-of-a-bitch pulled the chair out from under me." Appellant then went behind the bar and picked up a plastic water pitcher, which she threw at J. D. Miller. He ducked out of the way and grinned about it and said, "If you were a man, I would take you outside and work you over." Appellant then said to the bartender, "Give me the gun and I will shoot him." She then walked over to a drawer near the cash register, took out a gun which she laid across the bar and aimed at J. D. Miller, ordering him to leave. Miller at that time was standing by a pool table. Troy Tuggle had hold of his right arm and Joanne got between J. D. Miller and appellant and said, "If you want to shoot somebody, shoot me." J. D. Miller shoved her out of the way and stood leaning up against the pool table with his hands at his side and said, "Go ahead and shoot." Appellant then pulled the trigger and shot J. D. Miller in the right side. Miller then walked over to a pay phone and called the police department.

At the trial appellant testified that she did not know who pulled the chair out from under her but she thought it was J. D. Miller; that when she went behind the bar to get a drink, Miller followed her on the outside of the bar, using vile language and calling her names; that she asked him to leave several times; that she picked up the gun because Miller made a dash to the bar as if he were coming across it and that she did not intend to kill him when she shot but only to scare him. In her statement to the officers shortly after the shooting, she made no claim that Miller was moving toward her when the shot was fired.

[1–3] Appellant first argues that the evidence does not sustain the judgment. We find no merit in this argument. While there was some conflict in the testimony, the jury chose to believe the witnesses for the prosecution and there was ample evidence to sustain the charge. Appellant aimed a loaded gun at Miller, pulled the trigger and the bullet hit him when he was standing ten to fifteen feet away and making no motion toward the appellant. These acts clearly constitute assault with a deadly and dangerous weapon. People v. McCaffrey, 118 Cal.App.2d 611, 618, 258 P.2d 557; People v. Thomas, 103 Cal.App.2d 669, 672, 229 P.2d 836. While there was evidence of name calling and vile language being exchanged between appellant and Miller, this did not justify the shooting. People v. Mueller, 147 Cal.App.2d 233, 239, 305 P.2d 178. The issue of self-defense involved a factual determination by the jury and its determination cannot be disturbed on appeal since there is sufficient substantial evidence to support it. People v. Walker, 99 Cal.App.2d 238, 243, 221 P.2d 287.

[4] Appellant next argues that the court erred in its ruling on the admissibility of evidence. However, she made no reference to any specific ruling of the court in this connection and cites no authority. Her failure to specify the prejudicial feature of the evidence must be taken to mean that there is none. People v. Shafer, 101 Cal.App.2d 54, 61, 224 P.2d 778.

[5] Appellant claims there was prejudicial misconduct on the part of the district attorney in offering in evidence appellant's statement made to the officers after the shooting. No objection was made by appellant's counsel to the introduction of the statement and no assignment of misconduct or request that the jury be instructed to disregard it was made. The statement was made by appellant freely and voluntarily and contained an admission that she fired a gun at and hit Miller. Under these circumstances there was no prejudicial misconduct on the part of the district attorney. People v. Hurst, 36 Cal.App.2d 63, 65, 96 P.2d 1003.

[6, 7] Appellant contends that the district attorney was guilty of prejudicial misconduct in the cross-examination of witness Wilson, a defense witness. Wilson was asked if he had been recently picked up in Tulare and charged with being a convict in possession of a gun capable of being concealed and if he had been released on bail and who put up the property bond. Witnesses were called to show that appellant had posted one of the property bonds.

No objection was made to the questions asked or to the admissibility of the evidence and the objection to the admissibility may not be made for the first time on appeal. People v. Willis, 30 Cal.App.2d 419, 421, 86 P.2d 670. No prejudicial error appears in this connection.

[8] Appellant contends that certain instructions given by the court constituted error. However, no authorities are cited in this connection and no argument is made to support this contention. It is argued that the jury should have been instructed that it could return a verdict of simple assault. However, since appellant made no request for such an instruction she cannot now complain. People v. Arguilida, 85 Cal.App.2d 623, 625, 193 P.2d 478. Moreover, where, as here, the evidence shows that if appellant was guilty at all she was guilty of the higher offense, it was not error to fail to instruct the jury on simple assault. People v. McCoy, 25 Cal.2d 177, 187, 153 P.2d 315.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

51 Cal.2d 857

Julius RUBEN et al., Plaintiffs and Respondents,
v.
CITY OF LOS ANGELES et al., Appellants.

Louis KIRSHBAUM, Plaintiff and Appellant,
v.
HOUSING AUTHORITY OF THE CITY OF LOS ANGELES et al., Defendants and Respondents,

City of Los Angeles et al., Defendants and Appellants.
L. A. 25238, 25239.

Supreme Court of California.
April 21, 1959.
Rehearing Denied May 20, 1959.

Actions brought to prevent execution and enforcement of contract. The Superior Court, Los Angeles County, Arnold Praeger and Kenneth C. Newell, JJ., entered a decree that plaintiff take nothing against Housing Authority and its Commissioners, and rendered a judgment in each case enjoining execution of contract and carrying out of provisions of ordinance, and cross-appeals were taken. The Supreme Court, Gibson, C. J., held that holding in prior case, wherein Supreme Court had granted writ of prohibition restraining Superior Court from enforcing preliminary injunction or taking further action in suit to enjoin certification of result of referendum election in which majority of voters had favored adoption of ordinance authorizing contract by which city agreed to convey to baseball club land for erection of stadium, had necessarily included determination that deed from Housing Authority to city had not operated as a dedication to public use or as creation of trust binding upon city, and had likewise included determination that Housing Authority could properly release any interest which it had retained under deed and that such release could be effective to permit city to proceed with contemplated sale to baseball club; and held that even though Housing Authority had not been party to prohibition proceeding, it was entitled to rely thereon in this subsequent action, brought by plaintiff who had appeared in prohibition proceeding.

Judgment in favor of Housing Authority and its Commissioners affirmed. Judgments against other defendants reversed with directions. Plaintiff's cross-appeal dismissed.

1. Appeal and Error 🔑173(9)
Judgment 🔑950

Binding effect of prior judgment is defense that must ordinarily be pleaded and proved, but where judgment in one suit becomes final while appeal is pending from judgment in another action, first final judgment may be brought to attention of court in which appeal is still pending and may be relied on as res judicata. West's Ann. Code Civ.Proc. § 1962, subd. 6.

2. Judgment 🔑632, 725(4)

Holding in prior case, wherein Supreme Court granted writ of prohibition restraining Superior Court from enforcing preliminary injunction or taking further action in suit to enjoin certification of result of referendum election in which majority of voters had favored adoption of ordinance authorizing contract by which city agreed to convey to baseball club land for erection of stadium, necessarily included determination that deed from housing authority to city did not operate as a dedication to public use or as creation of trust binding upon city, and likewise included determination that housing authority could properly release any interest which it retained under deed and that such release would be effective to permit city to proceed with contemplated sale to baseball club; and even though housing authority was not party to prohibition proceeding, it was entitled to rely thereon in subsequent action, to enjoin housing authority from extinguishing restriction contained in deed, brought by plaintiff who had appeared in prohibition proceeding. West's Ann.Code Civ.Proc. § 1962, subd. 6.

3. Municipal Corporations ⚷225(1)

Health and Safety Code provision that housing authority could sell, lease, exchange, transfer, assign, pledge, or dispose of any real property "or any interest in it" gave housing authority power to release to city any interest which authority had retained under deed to city. West's Ann. Health & Safety Code, § 34315(e).

4. Appeal and Error ⚷151(5)

As a general rule, party cannot appeal from judgment in his favor.

◆

Phill Silver, Hollywood, for plaintiff and appellant.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Weldon L. Weber, Deputy City Atty., Joe Crider, Jr., O'Melveny & Myers and Pierce Works, Los Angeles, for defendants and appellants.

Julius Ruben, Beverly Hills, in pro. per., for plaintiffs and respondents.

James J. Arditto, Los Angeles, for defendants and respondents.

GIBSON, Chief Justice.

These two action were brought by taxpayers of the City of Los Angeles to prevent execution and enforcement of the contract between the city and the Brooklyn National League Baseball Club, Inc., which was considered by this court in City of Los Angeles v. Superior Court, 51 Cal.2d 423, 333 P.2d 745. Plaintiffs seek a declaration that the contract and the ordinance authorizing it are invalid and an injunction against the doing of any acts to carry out the ordinance and the contract. Kirshbaum also seeks an injunction restraining the Housing Authority from extinguishing a restriction contained in a deed by the Authority to the city of certain land involved in the contract.

A general demurrer of the Housing Authority and its commissioners was sustained in the Kirshbaum case, and a judgment was entered decreeing that Kirshbaum take nothing against them. After trial with respect to the remaining defendants a judgment was rendered in each case enjoining the execution of the contract and the carrying out of the provisions of the ordinance. These defendants, including the city and the baseball club, have appealed from the judgments against them. Kirshbaum has taken a cross-appeal from the judgment in his favor, and, in addition, he has appealed from the judgment in favor of the Housing Authority.

Kirshbaum's complaint, insofar as concerns the relief sought against the Housing Authority, alleges that in 1955 the Housing Authority conveyed to the city the fee to 169.62 acres of land in Chavez Ravine, that this land is a portion of the land to be transferred to the baseball club by the city under the contract referred to above, and that the deed provided that the property was granted to the city "to be used for public purposes only." It is alleged that the Housing Authority is about to take steps to eliminate the public purpose limitation, and the complaint seeks to enjoin removal of the restriction.

The deed from the Housing Authority to the city, in addition to providing that the land was to be used for public purposes only, declared that the property was not to be used directly or indirectly by the city or its "grantees, successors in interest, assigns, or any other person or persons whatsoever" claiming under the city for a period of 20 years for residential development. This language clearly shows that the city may make transfers to "grantees" and "assigns" as well as to its successors. The deed also implies that after the 20-year period the property may be used by the city's grantees for private residential purposes, that the city's grantees could at any time use the property for private purposes other than residential, and that the general restriction to public purposes, if not mere surplusage, was intended to apply only while the city retained the land.

[1, 2] Any doubt as to the proper construction of the instrument and the rights of the city and the Housing Authority thereunder was resolved in City of Los

Angeles v. Superior Court, 51 Cal.2d 423, 333 P.2d 745, where both Ruben and Kirshbaum appeared. In that case we granted a writ of prohibition restraining the superior court from enforcing a preliminary injunction or taking further action in a suit to enjoin certification of the result of a referendum election in which a majority of the voters favored adoption of the ordinance authorizing the contract.[1] We held that the grantor did not intend by the restriction to prohibit the city from selling the property and that the city could sell it pursuant to section 393 of the charter which, with certain exceptions not pertinent to this question, permits property no longer required by the city to be sold upon such terms and conditions as the council prescribes by ordinance. We further held, in determining the validity of the city's promise to use its best efforts to have the deed restriction removed, that any possibility that the Housing Authority may have a right to complain of a termination of the public use will disappear if the city is able to obtain the Housing Authority's consent to eliminate the restriction.

Our decision in City of Los Angeles v. Superior Court, 51 Cal.2d 423, 333 P.2d 745, forecloses Kirshbaum's contentions that as a result of the deed restriction the property was dedicated to a public use, that the land is held in trust by the city for the public, that the city has no power to abandon or sell it to a private corporation, and that the Housing Authority cannot qualify the terms of the conveyance by any subsequent act or declaration. The holding in that case necessarily included a determination that the deed did not operate as a dedication to a public use or as the creation of a trust binding upon grantees of the property, and it likewise included a determination, insofar as concerns the character of the instrument, that the Housing Authority may properly release any interest which it retains under the deed and that such a release will be effective to permit the city to proceed with the contemplated sale to the baseball club.

The Housing Authority, although not a party to the prohibition proceeding, is entitled in the present action by Kirshbaum to rely upon the prior determination, because the issue of whether the deed amounted to a dedication was decided there and, in view of the fact that Kirshbaum had his day in court, he cannot now reargue the matter. Bernhard v. Bank of America Nat. Trust & Savings Ass'n, 19 Cal.2d 807, 811 et seq., 122 P.2d 892.

Since we have decided in City of Los Angeles v. Superior Court, 51 Cal.2d 423, 333 P.2d 745, that the provisions of the deed permitted the city to sell the conveyed property free from any public use or trust and that the deed did not preclude the Housing Authority from releasing any interest which it may have retained, we are not governed here by cases which hold that a conveyance of property to a city for a specific purpose, i. e., for a park or a street, may by reason of the language in the deed amount to a dedication to a public use irrevocable by either the grantor or the city. See Wattson v. Eldridge, 207 Cal. 314, 318–320, 278 P. 236; Slavich v. Hamilton, 201 Cal. 299, 302 et seq., 257 P. 60; Archer v. Salinas City, 93 Cal. 43, 49 et seq., 28 P. 839, 16 L.R.A. 145; Washington Boulevard Beach Co. v. City of Los Angeles, 38 Cal.App.2d 135, 136–138, 100 P.2d 828; Lowell v. City of Boston, 322 Mass. 709, 79 N.E.2d 713, 725–726.[2]

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[1] Although the binding effect of a prior judgment is a defense that must ordinarily be pleaded and proved (Code Civ. Proc. § 1962, subd. 6), where the judgment in one suit becomes final while an appeal is pending from the judgment in another action, the first final judgment may be brought to the attention of the court in which the appeal is still pending and may be relied on as res judicata (see Domestic & Foreign Petroleum Co. v. Long, 4 Cal.2d 547, 562, 51 P.2d 73; 3 Witkin, California Procedure (1954) 1935).

[2] It may be noted, however, that in these cases property was transferred to a municipal corporation for a single, specified public purpose, unlike the transfer generally, for all "public purposes," made by the Housing Authority's deed, and that

[3] In our prior decision we expressly withheld consideration of the question whether or not the Housing Authority has power, i. e., the legal capacity under applicable statutes regulating its powers and duties, to execute a release of its rights under the deed restriction. 51 Cal.2d at page 436, 333 P.2d at page 752. Kirshbaum's complaint, however, contains no allegations that would permit a conclusion that the Housing Authority lacks such power. On the other hand, subdivision (e) of section 34315 of the Health and Saftey Code provides that a housing authority may sell, lease, exchange, transfer, assign, pledge, or dispose of any real property "or any interest in it." This legislation is ample to permit the Housing Authority to release to the city any interest retained under the deed.

It follows from what we have said that no cause of action has been stated against the Housing Authority and that the trial court properly sustained the general demurrer.

With one exception all of the questions relating to the judgments in the Ruben and Kirshbaum cases which enjoined execution and enforcement of the contract were resolved against the taxpayers by our decision in City of Los Angeles v. Superior Court, 51 Cal.2d 423, 333 P.2d 745. Kirshbaum contends that a parcel of land in Elysian Park to be conveyed to the baseball club pursuant to the contract is subject to the control of the city's Department of Recreation and Parks, that under section 393 of the city charter[3] such land may be sold only with the approval of the board or officer having the management of that department, and that no such approval has been obtained. The contention, not determined in the prohibition case, is premature, because it does not appear that any actual sales or transfers of property to the baseball club have yet been made, and the city still has the opportunity to comply with these requirements of the charter. Moreover, at the time of trial herein, proceedings were pending before the city council to transfer the parcel in question from the jurisdiction of the park department on the ground that freeway construction cut off the property from the balance of Elysian Park, and, if such a transfer is accomplished, consent of the department to a sale will no longer be necessary. See Los Angeles City Charter, § 170, subs. (d), prescribing procedure for such transfers.

[4] It follows from the foregoing that the judgments enjoining execution and enforcement of the contract must be reversed. Kirshbaum's notice of cross-appeal from the judgment which he obtained against the city and the baseball club states, without any explanation or specification of error, that he thereby cross-appeals to this court from the whole of that judgment. In view of our conclusion that he is not entitled to any relief, his cross-appeal has become moot and should be dismissed, even if we assume that he could have brought himself within some exception to the general rule that a party cannot appeal from a judgment in his favor. See, for the general rule, Maxwell Hardware Co. v. Foster, 207 Cal. 167, 170, 277 P. 327; 3 Witkin, California Procedure (1954), 2182.

The judgment in favor of the Housing Authority and its commissioners is affirmed. The judgments against the other defendants are reversed with directions to enter judgments in their favor in accordance with this opinion and the decision in City of Los Angeles v. Superior Court, 51 Cal.2d

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none of the conveyances in these cases contained language like that in the deed involved here which shows that the city may dispose of the property to "grantees" or "assigns."

[3] Section 393 of the charter provides, in part, that "any real property proposed to be sold that is under the control of any board or commission authorized by this charter or by law to acquire, hold or control real property shall not be sold except at the request or with the approval of the board, commission or officer having the management of such department. * * *"

423, 333 P.2d 745. The cross-appeal of plaintiff Kirshbaum is dismissed.

SHENK, TRAYNOR, SCHAUER, SPENCE, McCOMB and PETERS, JJ., concur.

51 Cal.2d 853

Claude F. CASIDA, Appellant,

v.

Hollis B. ROBERTS, Respondent.

L. A. 24771.

Supreme Court of California,
In Bank.
April 21, 1959.

Action by former member of dissolved mining partnership for an accounting by former copartner. The Superior Court, Kern County, William L. Bradshaw, J., entered judgment awarding plaintiff one-half of profits from mining operations and plaintiff appealed. The Supreme Court, Gibson, C. J., held that since defendant had continued operation of partnership business after dissolution of partnership without any accounting to former member of dissolved partnership, under West's Ann.Corp.Code, § 15042, former partner was entitled to receive the value of his interest in partnership business at time of dissolution in addition to either interest on such value or, at his option, the profits attributable to use of his right in property of dissolved partnership.

Judgment reversed.

Opinion, 324 P.2d 731, vacated.

1. Mines and Minerals 🔑100

Where one member of dissolved mining partnership continued to operate partnership business after dissolution of partnership without any accounting to former copartner, under statute, copartner was entitled to receive as an ordinary creditor the value of his interest in partnership at date of dissolution in addition to either interest on such value or, at his option, the profits attributable to use of his right in property of dissolved partnership. West's Ann. Corp.Code, §§ 15038, 15041, 15042.

2. Appeal and Error 🔑499(1)

Where former member of dissolved mining partnership pleaded a cause of action for an accounting by former copartner, who continued operation of partnership business after dissolution, and plaintiff expressly relied in opening statement on statute providing for recovery of value of his interest in partnership as of date of dissolution and introduced evidence as to such value, record did not support contention that he had neglected to seek such valuation at trial and therefore could not complain on appeal of failure of trial court to make such determination. West's Ann. Corp.Code, § 15042.

3. Mines and Minerals 🔑100

The risk of operating partnership business after dissolution of gypsum mining partnership was placed by statute on former partner who continued operation of business without any accounting to copartner, and the profits ultimately realized from mining operations did not necessarily reflect the value of partnership at time of dissolution or limit the amount which under statute, copartner was entitled to receive as his share of value of partnership business at time of dissolution, which must be measured in the light of facts existing at such time, including estimated amount of gypsum remaining in land leased by partnership and prevailing market price, even if salable gypsum was exhausted when continuing partner ceased operations. West's Ann.Corp.Code, § 15042.

4. Mines and Minerals 🔑100

In action by member of dissolved gypsum mining partnership for an accounting by former copartner, who continued operation of partnership business after dissolution of partnership, court was required under statute to determine whether and to what extent plaintiff had rights in partnership property as of date of dissolution and to calculate the amount of any subsequent profits attributable to the use of such rights, taking into consideration the lessening of value of partnership's mining lease due to depletion of gypsum deposits. West's Ann.Corp.Code, § 15042.

5. Mines and Minerals 🔑100

Where member of dissolved mining partnership continued operation of partnership business after dissolution of partnership, former copartner was entitled under statute to have accounting made to determine value of his interest in partnership at time of dissolution before being required to choose between interest thereon and profits attributable to use of his rights in property of dissolved partnership. West's Ann.Corp.Code, § 15042.

6. Mines and Minerals 🔑100

In action by member of dissolved mining partnership for an accounting by former copartner, who continued operation of business after dissolution of partnership, failure of trial court to determine value of plaintiff's interest in partnership business as of date of dissolution required re-trial of entire accounting issue. West's Ann. Corp.Code, § 15042.

Morris B. Chain and William E. Swiney, Bakersfield, for appellant.

Baker, Palmer, Wall & Raymond and Claude F. Baker, Bakersfield, for respondent.

GIBSON, Chief Justice.

This action, in which plaintiff seeks an accounting, arose out of an oral partnership agreement by plaintiff and defendant to mine gypsum on leased land known as section 13 and to share equally in any profits. On February 20, 1952, after operating for five days, the partnership was dissolved. Defendant continued to carry on the business for at least two months, and he made no accounting to plaintiff prior to the commencement of this action. The trial court, without determining the value of plaintiff's partnership interest as of the date of dissolution, found that the amount of profits from the mining operations was $3,509.10, of which plaintiff was entitled to half, and judgment was entered accordingly. Plaintiff has taken this appeal, contending that he should have been allowed the value of his partnership interest as of the time of dissolution and that errors were made in determining the amount of profits.[1]

[1] Section 15042 of the Corporations Code governs the rights of the parties here. That section provides two ways of calculating the amount of plaintiff's recovery, and, under both, he is entitled to the value of his share of the business as of the time of dissolution, together with an additional allowance consisting, at his option, of either interest on that value or the profits attributable to the use of his right in the property of the dissolved partnership.[2] The two methods differ only with

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[1] This is the second appeal in this matter. On the first appeal a judgment establishing the existence of the partnership agreement was affirmed, and a judgment following an accounting was reversed for a retrial of the entire accounting issue. Casida v. Roberts, 132 Cal. App.2d 228, 281 P.2d 901.

[2] Section 15042 of the Corporations Code provides: "When any partner retires or dies, and the business is continued under any of the conditions set forth in Section 15041 (1, 2, 3, 5, 6), or Section 15038(2b) without any settlement of accounts as between him * * * and the person * * * continuing the business, unless otherwise agreed, he * * * may have the value of his interest at the date of dissolution ascertained, and shall receive as an ordinary creditor an amount equal to the value of his interest in the dissolved partnership with interest, or, at his option * * *, in lieu of interest, the profits attributable to the use of his right in the property of the dissolved partnership; * * *".

The provisions of section 15041 and 15038 referred to relate to continuance f the business upon the happening of rtain events such as assignment of a rtner's interest or his death, retire- ent or expulsion from the partnership.

respect to the additional allowance which plaintiff has the option of claiming; under either he has a right to his share of the partnership property as of the date of dissolution. See Vangel v. Vangel, 51 Cal.2d 510, 334 P.2d 863; Vangel v. Vangel, 45 Cal.2d 804, 808, 291 P.2d 25, 55 A.L.R.2d 1385. The court thus erred in failing to determine the value of plaintiff's share of the business as of the time the partnership was dissolved.

[2] There is no merit in the argument that plaintiff neglected at the trial to seek a valuation of his share of the property and may not now complain of the failure to make a finding on this issue. He pleaded a cause of action for an accounting, and section 15042 provided that recovery from the continuing partner should include an allowance for his former partner's share of the business. Moreover, plaintiff expressly relied on the statute in his opening statement, referring to the lease under which the mining was done and stressing that the statute required a determination of the value of the lease as of the date of dissolution, and he introduced evidence regarding that value.

[3] If the trial court had determined the value of plaintiff's share of the partnership business, the amount of his recovery might have been significantly changed. In this connection plaintiff claims that he had a half interest in the mining lease at the time of dissolution, and there was evidence which would have supported a finding that the lease was of considerable value. Defendant argues that the salable gypsum was exhausted when he ceased operations, that the lease at no time had a value over and above the profits ultimately realized from the mining operations, and that, therefore, plaintiff was entitled only to his share of the profits. Obviously, however, the statute was intended to put the risk of operating the business after dissolution on the continuing partner, and the value of the share to which plaintiff is entitled must be measured in the light of facts existing when the partnership was dissolved, including the estimated amount of gypsum remaining in the ground and the prevailing market price. The amount of profit finally realized would not necessarily reflect the value of the partnership at the time of dissolution, since the business could have been affected in the intervening period by a number of factors unconnected with the value on that date, such as changes in the market price of gypsum or in anticipated expenses.

[4–6] In order to give effect to section 15042, the court was required not only to determine whether and to what extent plaintiff had rights in the partnership property as of the time of dissolution, but also to calculate the amount of subsequent profits, if any, attributable to the use of such rights, taking into consideration the lessening of the value of the lease due to depletion of the gypsum deposits. The judgment should have awarded plaintiff the value of whatever share of the business he owned when the partnership was dissolved, and, in addition, depending upon his election, either (a) subsequent profits attributable to the use of his share of the business or (b) interest on the value of his share. It should be noted in this connection that plaintiff was entitled to have the accounting made before being compelled to choose between profits and interest. See American Pacific Dairy Products, Inc. v. Siciliano, 9 Cir., 235 F.2d 74, 84; Moseley v. Moseley, 9 Cir., 196 F.2d 663, 666–667 (applying California law); Wikstrom v. Davis, 211 Ore. 254, 315 P.2d 597, 607. Under the circumstances the entire accounting issue must be retried, and it is unnecessary to consider other claims of error made by plaintiff.

The judgment is reversed.

SHENK, TRAYNOR, SCHAUER, SPENCE, and McCOMB, JJ., concur.

169 Cal.App.2d 531

Application of Ira HARRIS, doing business as B & H Electric, for an Order Directing Arbitration.

Ira HARRIS, doing business as B & H Electric, Plaintiff and Respondent,

v.

R. C. HAVENAR, as executrix of the will of Jo G. Cantrall, deceased, and Jean R. Cantrall, doing business as J. R. Cantrall Co., R. C. Havenar and J. R. Cantrall, Defendants and Appellants.

Civ. 23476.

District Court of Appeal, Second District, Division 2, California.

April 10, 1959.

Arbitration proceeding. The Superior Court of Los Angeles County, Bayard Rhone, J., entered judgment pursuant to an order affirming arbitrators' award and denying opponents' motion to vacate, modify or correct the award, and opponents appealed. The District Court of Appeal, Ashburn, J., held that the record failed to show that arbitrators exceeded their jurisdiction.

Affirmed.

1. Arbitration and Award ⚷57, 73

Arbitrators are bound to act within the limits imposed by the arbitration agreement, and when they do so the merits of their awards are not open to court review.

2. Arbitration and Award ⚷48

Arbitrators are not required to make findings, or give reasons for their conclusion, and faulty reasoning if disclosed does not vitiate their award.

3. Arbitration and Award ⚷72

In proceeding for affirmance of arbitrators' award, record failed to show that arbitrators exceeded their jurisdiction.

4. Arbitration and Award ⚷63

An error of law on the part of arbitrators does not give rise to a right in the court to correct the error.

Boller, Suttner & Boller, Arcadia, for appellants.

William Katz, Los Angeles, for respondent.

ASHBURN, Justice.

Appellants Havenar and Cantrall challenge a judgment for $2,000 in favor of respondent Ira Harris, doing business as B & H Electric, which was entered pursuant to an order affirming an arbitrators' award and denying appellants' motion to vacate, modify or correct the same.

J. R. Cantrall Company, a partnership, had a prime contract with Eleventh Naval District of the United States for the relocation of six steel frame buildings at the Long Beach naval shipyard. On June 11, 1956, Cantrall Company made a subcontract with respondent Ira Harris, doing business as B & H Electric, under which respondent undertook to furnish all labor, materials and other things necessary to complete in accordance with the plans and specifications all electrical work, including the removal of all electrical conduits and fixtures from the buildings which were to be moved. The prime contractor Cantrall agreed to "excavate, backfill, furnish and place concrete for the underground conduit under the supervision of the Subcontractor." Paragraph Eighth of the subcontract provides: "If at any time any controversy should arise between the Contractor and the Subcontractor regarding anything pertaining to this agreement and which the parties hereto do not promptly adjust and determine, or which the Architect cannot decide to the satisfaction of both parties, then the written orders of the Contractor shall be followed and said controversy shall be decided by arbitration upon completion of the work."

The subcontractor soon ran into trouble in pulling a certain cable through an underground conduit. This resulted in controversy with the prime contractor. Respondent's petition for an order directing arbitration alleged, and the court found to be true, "that a controversy has arisen out of said contract and now exists between Petitioner and said Jean R. Cantrall and Joe G. Cantrall which said controversy is as follows, to wit: whether or not Petitioner is entitled to be paid an extra for the performance of all work subsequent to the finding of a broken duct through which Petitioner was required to pull a cable and is entitled to all damages sustained by him in the furnishing of additional material and labor, including extra cable splicing, necessitated by or resulting from concrete left in such duct and the amount Petitioner is entitled to receive in payment therefor, if payment is an extra."

Before that application was presented the parties made a further written agreement, saying: "The existing dispute as to whether or not you [Harris] are entitled to be paid an extra for performance of all work subsequent to the finding of the broken duct through which you were to pull cable; and all damages sustained by you in material and labor (including extra cable splicing) resulting from concrete left in this duct, and the amount of payment you may be entitled to receive therefor, if same is an extra, will be arbitrated at the end of the job by three arbitrators, one chosen by each of us and a third being selected by these two."

But Cantralls refused to proceed, hence the motion and order directing an arbitration of "the controversy now existing between them [Cantralls] and petitioner Ira Harris in accordance with the terms of said contracts." This order was obeyed and the arbitrators, with one member dissenting, made an award directing the Cantralls to pay to Harris the sum of $2,000 and declaring: "This Award shall constitute the full and complete satisfaction of any and all claims of either party against the other party."

In varying forms appellants attack the award upon the merits. The basic argument is that the arbitrators were wrong because the prime contract provided that the decisions of the Contracting Officer (of the Navy) should be final and this provision was incorporated by the specifications into the subcontract. It is asserted that twice the problem was submitted by Cantralls to the naval district by way of application for an allowance of an extra for the additional work done by Harris and both times the Contracting Officer rejected the claim and ruled that the work in question was necessitated by improper work of the subcontractor Harris, that improper pulling methods were employed; that this occurred before the hearing upon the application for an order directing arbitration and again after that order was made and before the arbitrators' hearings began. The argument of appellants is that these rulings were conclusively binding upon them and also upon the subcontractor. It is also said that any controversy between the general contractor and the subcontractor had ceased to exist before the arbitration hearings were had and hence the arbitrators acted upon a matter which was not submitted to them.

[1, 2] Of course, arbitrators are bound to act within the limits imposed by the arbitration agreement (Drake v. Stein, 116 Cal.App.2d 779, 785, 254 P.2d 613; Crofoot v. Blair Holdings Corp., 119 Cal.App.2d 156, 184, 260 P.2d 156; Flores v. Barman, 130 Cal.App.2d 282, 287, 279 P.2d 81), but if they do so the merits of their awards are not open to court review (Pacific Vegetable Oil Corp. v. C.S.T., Ltd., 29 Cal.2d 228, 233, 174 P.2d 441; Crofoot v. Blair Holdings Corp., supra, 119 Cal.App.2d at page 186, 260 P.2d at page 172; Downer Corp. v. Union Paving Co., 146 Cal.App.2d 708, 715, 304 P.2d 756; United States Plywood Corp. v. Hudson Lumber Co., 124 Cal.App.2d 527, 530, 269 P.2d 93); they are not required to make findings, or give reasons for their conclusion, and faulty reasoning if disclosed does not vitiate (Sapp v. Barenfeld, 34 Cal.2d 515, 522, 212 P.2d 233; Crofoot v. Blair Holdings Corp., supra, 119 Cal.App.2d at page 185, 260 P.2d at page 171; Drake v. Stein, supra, 116 Cal.App.2d at page 785, 254 P.2d at page 618). In Crofoot, supra, 119 Cal.App.2d at page 186, 260 P.2d at page 172, it is said: "Under these cases it must be held

that in the absence of some limiting clause in the arbitration agreement, the merits of the award, either on questions of fact or of law, may not be reviewed except as provided in the statute." In Sapp v. Barenfeld, supra, 34 Cal.2d at page 523, 212 P.2d at page 239: "Even though a party expressly asserts a lawful claim in the submission or raises it by the presentation of evidence to the arbitrators, the law does not guarantee that the claim will be allowed. Arbitrators, unless specifically required to act in conformity with rules of law, may base their decision upon broad principles of justice and equity, and in doing so may expressly or impliedly reject a claim that a party might successfully have asserted in a judicial action."

[3] The attempt to show that the arbitrators exceeded their jurisdiction in the present instance is predicated upon the claim that the controversy had disappeared before the arbitrators' hearings began and indeed before the court ordered an arbitration. The claim is that final authority to determine the dispute at bar rested in the Contracting Officer of the Navy and when he decided the matter there could not be any remaining controversy. However, the record shows that appellants were represented by counsel at the hearing of the application for an order directing arbitration, apparently opposing the same, and the court found that there was an arbitrable controversy as set forth in the petition and that appellants were in default with respect thereto. Surely respondent and the court did not agree that the controversy had ceased to exist.

[4] The affidavit of Murray Merrin, the dissenting arbitrator, says: "The other arbitrators, Palmer and Friedman, based their decision upon the grounds that (1) the Navy was totally at fault and that the General Contractor in such a situation owed a duty to the subcontractor to take the entire responsibility; (2) the contract did not specifically require the subcontractor to inspect the conduit." Assuming this affidavit to be properly before the court as a showing of "what matters were submitted for decision and were considered by the arbitrators" (Sapp v. Barenfeld, supra, 34 Cal.2d at page 523, 212 P.2d at page 233), it creates nothing more than a difference of opinion between the appellants and the arbitrators upon a question of law, a matter falling within the scope of the arbitration. At best, appellants show an error of law on the part of the arbitrators, but that does not give rise to a right in the court to correct the error.

Moreover, the record is in such shape that the court, were it in position to review errors of the arbitrators in matters of law, could not actually determine the matter in this instance. The prime contract and the specifications are not in the record, nor were they before the lower court, hence the basis for the claim of error is not present. Conclusional averments such as found in the J. R. Cantrall affidavit that "the evidence before the Board showed that" established no facts and must be disregarded.

Appellants' argument that there was "an evident miscalculation of figures" also fails of evidential support.

The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.

169 Cal.App.2d 731

Clive H. CLARK, Plaintiff and Appellant,
v.
Maurice HENDERSON and Josephine Henderson, Defendants and Respondents.

Civ. 5689.

District Court of Appeal, Fourth District, California.

April 20, 1959.

Action by rider against owners of horse for injuries sustained in fall from horse. The Superior Court, Tulare County, Robert K. Myers, J., rendered judgment for owners of horse, and rider appealed. The District Court of Appeal, Mussell, J., held that where rider, during year following fall from horse, had not emotionally deteriorated or suffered a complete mental breakdown causing him to have an inordinate inability to motivate and rendering him especially susceptible to any alleged promise made by owners of horse, and owners had not made any promise or representations to rider inducing him to refrain from filing complaint within year following accident, owners were not estopped from relying on one year statute of limitations as bar to action.

Affirmed.

1. Limitation of Actions ⚷197(1, 3)

In action for personal injuries sustained by plaintiff when he fell from a horse owned by defendants, evidence sustained finding that during year following accident plaintiff had not emotionally deteriorated or suffered a complete mental breakdown causing him to have an inordinate inability to motivate and rendering him especially susceptible to any alleged promise made by defendants, and that defendants had not made any promise to plaintiff which induced him to refrain from filing a complaint within year following accident. West's Ann.Code Civ.Proc. § 340, subd. 3.

2. Limitation of Actions ⚷13

Where rider, during year following fall from horse, had not emotionally deteriorated or suffered a complete mental breakdown causing him to have an inordinate inability to motivate and rendering him especially susceptible to any alleged promise made by owners of horse, and owners had not made any promise or representations to rider inducing him to refrain from filing complaint within year following accident, owners were not estopped from relying on one year statute of limitations as bar to action for injuries sustained by rider and action was barred by statute. West's Ann. Code Civ.Proc. § 340, subd. 3.

3. Limitation of Actions ⚷199(1)

Whether an estoppel exists, that is whether acts, representations, or conduct lulled a party into sense of security preventing him from instituting proceedings before running of statute of limitations, and whether party relied thereon to his prejudice, is question of fact not of law.

4. Appeal and Error ⚷996, 1011(1)

While there is some conflict in evidence, weight and sufficiency of evidence, construction to be put upon it and inferences to be drawn therefrom are matters for trier of facts.

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Charles E. Ogle, Morro Bay, for appellant.

Maddox, Abercrombie, Kloster & Jacobus, Visalia, for respondents.

MUSSELL, Justice.

This is an action for damages for personal injuries sustained by plaintiff when he fell from a horse owned by the defendants. The accident occurred on March 18, 1956, and the complaint was filed on June 20, 1957. It is alleged in the complaint, among other things, that a confidential relationship existed between plaintiff and defendants; that after plaintiff's injury the defendants admitted liability therefor and represented to plaintiff and his wife that defendants were abundantly insured and "that their insurance protected the defendants from claims arising from injuries of the type and nature suffered by plaintiff, and that the defendants would see that the plaintiff was adequately recompensed for both his general and special damages caused by plaintiff's injury"; that defendants assured plaintiff on five different dates that "an adequate settlement would be forthcoming"; that because of the confidential relationship of the parties and because of plaintiff's mental condition, plaintiff relied upon the defendants' promise of a settlement until immediately before the institution of this suit, and for that reason did not commence this suit within one year from the date of plaintiff's injury. That the purpose of the defendants' assurances of a settlement made to plaintiff and to plaintiff's wife was to lull the plaintiff into a false sense of security so as to cause the plaintiff to postpone the commencement of this action until after one year after the date of plaintiff's injury. Defendants in their answer denied generally the allegations of the complaint, alleged contributory negligence, unavoidable accident, assumption of risk and the statute of limitations. A jury was selected to try the cause but upon motion of plaintiff's counsel it was excused and the issue of estoppel and the defense of the statute of limitations was tried before the court.

Plaintiff within a few days after falling from the horse owned by the defendants was examined by a physician who took x-rays and reported that plaintiff had a fracture of the third vertebra, chronic cervical sprain, and that his tendons and nerves were probably bruised from the fall. Plaintiff testified that for the first few days after the accident he did not think much about it because he "figured" that it was mostly soreness and that he would get over it; that for approximately three weeks he did nothing and then worked with his men building a house; that he continued his activities up until September and shortly thereafter began to deteriorate both mentally and physically.

In May, 1956, Mr. McCullough, an insurance adjuster for the State Farm Mutual Insurance Company, defendants' insurance carrier, visited plaintiff and his wife and explained the medical coverage and public liability provisions of the policy issued to defendants. He told plaintiff and his wife that the insurance company would pay up to $500 on the medical bills of plaintiff incurred within one year following the accident; that the insurance company, on behalf of the Hendersons, was denying liability for the accident and would not pay anything but the medical bills. He prepared a statement relating to the accident, which plaintiff read and signed. In December, 1956, following a letter from plaintiff to the insurance company, Mr. Celse, a claims representative of the company, talked on the telephone to Mrs. Clark. She demanded consideration for lost wages and other damages and Celse told her that the insurance company had always denied liability and continued to deny liability for the accident; that the company would pay the medical bills up to $500 but no more, and that if they were not satisfied with this they should obtain counsel.

Plaintiff's wife and defendant Josephine Henderson are sisters and plaintiff testified that the relationship between the two families was very close. There is testimony in the record that plaintiff and his wife lived in Arroyo Grande and the defendants in Porterville and that they visited every two or three months; that following the accident they did not visit and get together as before and within the year following the accident they visited two or three times.

Plaintiff testified that in October, 1956, there was a conversation at the Hendersons relating to the accident at which several people were present, including defendant Josephine Henderson; that in this conversation the accident to plaintiff was discussed and that Mrs. Henderson "made a statement to the effect that this is the reason that they carried insurance and she certainly would see that something was done about it"; that in March, 1957, he had another conversation with Mrs. Henderson in which "she assured me again that they were adequately insured and she felt due to the fact that the situation had deteriorated to the extent that it was, certainly something should be done and she would see that something was done." In this connection Mrs. Henderson testified that she made a statement to plaintiff at one time that she knew that everything would be taken care of because they carried a large amount of insurance and that she promised to see the insurance agent to see that something was done; that in January, 1957, she was present at a discussion between her husband and plaintiff in which her husband stated that if Mr. Clark didn't like the way things were going he could sue him (Henderson) as far as he was concerned.

Defendant Maurice Henderson testified that he did not at any time during the year following the accident tell the Clarks or either of them that they would be taken care of; that in January, 1957, he told the Clarks "that they might just as well get an attorney and go ahead because it didn't seem like there was going to be anything done at the time"; that he did not tell the Clarks or either of them that his insurance would take care of everything regardless of legal fault.

The record shows that plaintiff was a general contractor and carried several insurance policies; that he knew the difference between medical pay provisions and liability provisions of an insurance policy; that he had a personal accident policy upon which he made claims and collected for the accident here involved during the year following it and knew about statutes of limitation. The record further shows that the insurance company never promised to pay anything except the medical bills and denied liability for the accident; that plaintiff was never at any time unconscious following the accident; that he returned to work in a supervisory capacity approximately six weeks after the accident and his net earnings in 1956 were slightly less than in 1955. The record further shows that plaintiff was examined by a psychiatrist on March 6 and March 13, 1957; that the psychiatrist stated that on March 6 plaintiff was in such a state as to evidence a disinclination concerning his business affairs and that he was apathetic and phlegmatic.

[1, 2] The trial court found that during the year following the accident plaintiff had not emotionally deteriorated or suffered a complete mental breakdown causing him to have an inordinate inability to motivate and rendering him especially susceptible to any alleged promise made by defendants or either of them; that it is not true that defendants or either of them made any promise or representations to plaintiff which induced him to refrain from filing a complaint within the year following the accident; that it was not true that the defendants induced plaintiff to refrain from filing a complaint within said year. The court concluded that the action was barred by the provisions of section 340, subdivision 3, of the Code of Civil Procedure and that defendants are not estopped from relying on the said statute as a bar to the action. These findings and conclusions are supported by substantial evidence and cannot be here disturbed.

[3, 4] Whether an estoppel exists—whether the acts, representations, or conduct lulled a party into a sense of security preventing him from instituting proceedings before the running of the statute, and whether the party relied thereon to his prejudice—is a question of fact, not of law. Industrial Indemnity Co. v. Industrial Acc. Com., 115 Cal.App.2d 684, 690, 252 P.2d 649. While there is some conflict in the evidence, the weight and sufficiency of the evidence, the construction to be put upon it and the inferences to be drawn therefrom are matters for the trier of the facts. Dillard v. McKnight, 34 Cal.2d 209, 223, 209 P.2d 387, 11 A.L.R.2d 835.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

169 Cal.App.2d 758

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Daniel William ALESI, Defendant and Appellant.

Cr. 6372.

District Court of Appeal, Second District, Division 2, California.

April 21, 1959.

Prosecution for unlawful possession of heroin. The Superior Court, Los Angeles County, entered judgment of conviction and defendant appealed from judgment, sentence, and order denying motion for new trial. The District Court of Appeal, Fox, P. J., held that where police officers, acting upon informant's tip found defendant in automobile and physical condition and appearance of defendant was sufficient to suggest that he was under the influence of narcotics, officers were justified in making arrest without a warrant and it was not necessary to divulge name of informant, and no appeal lies from sentence.

Judgment and order affirmed, and appeal from sentence dismissed.

1. Arrest 🔑63(3)

Where police officers found defendant in automobile as result of tip by informant and defendant's speech, appearance and behavior were such as to warrant a good faith belief on part of officers that defendant was under influence of narcotics, officers were justified in arresting defendant without a warrant. West's Ann.Health & Safety Code, § 11721; West's Ann.Pen.Code, § 836, subd. 1.

2. Witnesses 🔑216

It is not necessary to reveal identity of an informant who merely points finger of suspicion at defendant who is subsequently arrested solely on basis of observations made by law officers who are reasonably led to believe a public offense was being committed in their presence.

3. Witnesses 🔑216

Where defendant's arrest without a warrant was valid apart from information provided by informant, informant's identity was not required to be revealed.

4. Poisons 🔑9

Evidence sustained conviction of unlawful possession of heroin. West's Ann. Health & Safety Code, § 11500.

5. Criminal Law 🔑1023(10)

No appeal lies from a sentence. West's Ann.Pen.Code, § 1237.

◆

Al Matthews, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Philip C. Griffin, Deputy Atty. Gen., for respondent.

FOX, Presiding Justice.

Defendant was convicted of violating section 11500, Health and Safety Code, in that he, on or about January 7, 1958, was in the unlawful possession of heroin. He was also charged with a prior misdemeanor conviction, which was found to be true, of the same section. He has appealed from the judgment and sentence and the denial of his motion for a new trial.

In the evening of January 5, 1958, Officer LeBrun, of the Glendale Police Department, received information from an informant indicating that defendant was under the influence of narcotics. The informant also gave LeBrun the description and license number of a Mercury automobile which, presumably, the defendant was driving at the time. The officer knew the identity of the informant but had not previously acted on any information from her. Officer Hartley, of the Glendale Police Department, as a result of an all-car broadcast seeking information on the above automobile, observed it in the parking lot at a drive-in with the defendant sitting behind the steering wheel. Upon the arrival of Officer LeBrun, the defendant was asked to step out of the car. Defendant's speech seemed to be slurred but there was no alcoholic odor on his breath. Defendant's eyes were examined by the officers by shining a flashlight into them. They noticed that the pupils of his eyes were pinpointed and their reaction to light very poor. The officers compared this with the reaction to light of another officer's eyes. Defendant was placed under arrest on suspicion of narcotics. At the station defendant's arms were examined and Officer LeBrun noticed small red holes in his biceps and small blue scars on the inside arms at the elbow.

On January 7, 1958, Officer Moen received information from unnamed persons that when defendant was brought into the station he had an orange balloon, in which there was heroin, pinned to the inside of the cuff of his trousers; that while in the booking room he ripped the balloon off and flipped it into a corner under a cardboard; that he contacted three trusties in an effort to have them retrieve it for him. Thereafter the officers found the balloon and heroin. They thereupon bored a small hole through a door to the booking room so that they could observe what went on inside. There was also an open widow through which like observations could be made. Officer Moen brought defendant into the booking room, ostensibly for further questioning. Officer Colton was stationed at the small hole in the door while Officer Broom looked through the window. Arrangements had been made to page Moen for a telephone call immediately so that defendant would be left alone to see if he would attempt to retrieve the heroin. Defendant was seated on a bench some four or five feet from the contraband. Upon Officer Moen's leaving the room Broom observed defendant get up and take a couple of steps toward an open closet, reach down and pick up an orange colored object, place it in his right hand pocket, and then sit down on the bench. Broom then entered the booking room. Defendant was sitting on the bench with both hands to his sides resting on the bench. As Broom stepped toward defendant to grab his hands, defendant took the bindle out of his pocket and placed it in his mouth. Broom grabbed defendant by the throat and, as they fell to the floor, Officers Colton and Moen entered the room. A moment later the bindle fell out of defendant's mouth into Moen's hand.

As grounds for reversal, defendant argues it was error not to dismiss the case after the refusal of the officers to disclose the identity of the informant and that the testimony of the officers concerning defendant's possession of the balloon is unworthy of belief.

[1] In the instant case, defendant's speech, appearance and behavior would warrant a good faith belief on the part of the officers that defendant was under the influence of narcotics in violation of section 11721, Health and Safety Code, a misdemeanor. See People v. Holland, 148 Cal.App.2d 933, 936, 307 P.2d 703. If a peace officer has "reasonable cause to believe that the person to be arrested has committed a public offense in his presence," he may, without a warrant, arrest such a person. Pen.Code, § 836, subd. 1.

[2] It is not necessary to reveal the identity of an informant who merely points the finger of suspicion at a defendant and an arrest thereafter follows which is based solely upon observations made by law enforcement officers which reasonably led them to believe a public offense was being committed in their presence. Scher v. United States, 305 U.S. 251, 254, 59 S.Ct. 174, 83 L.Ed. 151; People v. Williams, 51 Cal.2d 355, 333 P.2d 19; People v. Amado, 167 Cal.App.2d 345, 334 P.2d 254; People v. Smith, 166 Cal.App.2d 616, 333 P.2d 440.

[3] Since the defendant's arrest was valid apart from the information provided by the informant, the latter's identity need not be revealed under Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39. The following quotation from People v. Amado, supra, 167 Cal.App.2d at page 154, 334 P.2d at page 256 is apposite to the instant case: "The informers were neither participants in nor eyewitnesses to defendant's arrest. Disclosure of the identity of an informer has not been required where there was reasonable cause for a search and seizure apart from the informer's com-

munication which led the police to suspect the defendant. (Citation.) Disclosure is not required where the informer is not a material witness on the issue of guilt. (Citation.) There is nothing in the record to indicate that any information might have been elicited from either informer which would be relevant or helpful to the defense of the defendant."

Defendant next argues that the testimony that he brought heroin into the booking office, unfastened the balloon from the inside of the cuff of his trousers and threw it so that it landed under a piece of cardboard in a secluded alcove and that it went undetected for two nights and two days is not worthy of belief.

[4] The testimony in this regard is not inherently improbable. At best, from defendant's viewpoint, it merely discloses unusual circumstances, and this will not warrant its rejection by an appellate court. The applicable rule in this regard is stated in People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758, 759, as follows: "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. (Citation.) To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. (Citations.) Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (Citation.)" See also People v. Webb, 158 Cal.App.2d 537, 540, 323 P.2d 141.

Therefore, as the identity of the informer need not have been revealed and the testimony of the officers regarding defendant's possession of the heroin is not inherently improbable, his appeal must fail.

[5] Since no appeal lies from the sentence, the purported appeal therefrom is dismissed. Pen.Code, § 1237; People v. Gallardo, 41 Cal.2d 57, 60, 257 P.2d 29. The judgment and order denying the motion for a new trial are affirmed.

ASHBURN and HERNDON, JJ., concur.

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169 Cal.App.2d 735

COUNTY OF SAN MATEO, a political subdivision of the State of California, Plaintiffs and Appellants,

v.

CONSOLIDATED FARMS, INC., a corporation, Alvin Arata, Evelyn Arata, David Arata, Linda Arata, Josephine Cilia, Alex Dalbesio, Giovanna Dalbesio, Ray Giorgi, Thelma Giorgi, Joe Lunghi, Jean Lunghi, Ernest Martini, Rita Martini, Evo Martini, Rizieri Martini, Ester Martini, Mary Colter, Armando Palla, Josephine Palla, Joe Pardini, Lena Pardini, David Petroni, Adele Petroni, John Petroni, Assunta Petroni, Ray Valente and Josephine Valente, Defendants and Respondents.

No. 18209.

District Court of Appeal, First District, Division 1, California.

April 21, 1959.

Action wherein the Superior Court, San Mateo County, A. R. Cotton, J., rendered judgment for defendants, and plaintiff appealed. The District Court of Appeal, Bray, P. J., held that where corporation leased separate portions of tract to its stockholders, and the lessees in turn entered into an oral agreement under which president of corporation was to act as trustee for them in conducting hog raising activities on leased parcels, the entire tract, rather than the separately leased portions thereof, constituted the "premises", for purposes of ordinance prohibiting commercial hog ranching in area and defining a commercial hog ranch as "premises" where more than 40 head of swine were maintained.

Reversed.

1. Appeal and Error 🔑996, 1011(1)

Reviewing court is bound by findings of trial court if there is any substantial conflict in evidence or in reasonable inferences to be drawn therefrom.

2. Equity 🔑56

Equity regards substance rather than form.

3. Corporations 🔑1.4(2, 3)

Acts of individuals will be recognized as being those of corporations to prevent fraud, protect rights of third persons and accomplish justice.

4. Statutes 🔑206

In interpreting particular words, entire substance of statute must be examined to determine scope and purpose of provision of which words formed part.

5. Municipal Corporations 🔑622

The word "premises" has various legal meanings, depending on context and situation; and land need not be separately fenced or separately leased to constitute "premises"; and where corporation leased separate portions of its tract to its stockholders, and the lessees in turn entered into an oral agreement under which president of corporation was to act as trustee for them in conducting hog raising activities on leased parcels, the entire tract, rather than the separately leased portions thereof, constitute the "premises", for purposes of ordinance prohibiting commercial hog ranching in area and defining a commercial hog ranch as "premises" where more than 40 head of swine were maintained.

See publication Words and Phrases, for other judicial constructions and definitions of "Premises".

Keith C. Sorenson, Dist. Atty. of County of San Mateo, Howard E. Gawthrop, Deputy Dist. Atty., Redwood City, for appellant.

Wagstaffe, Daba & Hulse, Redwood City, for respondents.

BRAY, Presiding Justice.

Plaintiff appeals from a judgment in favor of defendants.

Question Presented.

Were defendants operating a commercial hog ranch within the meaning of an ordinance defining such ranch?

Facts.

San Mateo County Ordinance No. 568 (codified in Ch. 7 of Part Two, Div. V of the San Mateo County Ordinance Code, § 5560.1) provides: "Commercial hog ranch shall mean any premises where more than forty (40) head of swine are maintained, raised, fed or fattened, or where two or more head of swine are maintained, raised, fed or fattened upon commercial garbage."

Consolidated Farms, a California corporation, owns a 2,500 acre ranch in San Gregorio, San Mateo County. Farms is in the farming and stock raising business, including the raising of hogs, in California and Nevada. In December, 1954, Farms had a 100 acre portion of the San Gregorio ranch surveyed, which was later divided into one acre plots. Farms paid for the surveying and fencing of the parcels and for supplying waterlines, roads and feeding troughs.

On June 15, 1955, Farms leased for fifteen years the 100 acre portion to the individual named defendants as tenants in common. With one exception, the lessees were the stockholders in Farms and their wives. By a judgment of partition of the lease the leased property was divided among the lessees into 100 one acre plots. In June or July, the lessees entered into an oral agreement with David Arata, president of Farms, a stockholder and named defendant, whereby Arata would act as trustee for each lessee in conducting hog raising on the parcels.

The individual lessees advanced no cash for purchase of hogs or feed from Farms. Arata kept separate accounts for each lessee showing expenses and credits for hogs sold. An accounting was made each year. Between July, 1955, and December 1955, the maximum number of hogs on the 100 acres was 1554 at any one time; from then to the time of filing of the complaint, 137; and in June, 1957, the number was 150. No more than forty hogs have even been on any one parcel, no commercial garbage was used as feed and no commercial hog ranch license was obtained by the lessees or by Farms.

The trial court found that defendants were not conducting a commercial hog ranch and that each of said parcels is a separate premise under the ordinance.

The Ordinance Is Violated.

[1] Under the well known rule this court is bound by the findings of the trial court if there is any substantial conflict in the evidence or in the reasonable inferences to be drawn therefrom. See Dickey v. Pattison, 92 Cal.App.2d 659, 207 P.2d 1081; McIntyre v. Doe & Roe, 125 Cal.App.2d 285, 270 P.2d 21. There is no conflict in the evidence nor is there more than one reasonable inference to be drawn therefrom, and that inference is contrary to the one drawn by the court. The evidence clearly shows that the operation conducted by defendants is in essence one commercial hog ranch operation under a rather ingenious scheme devised to attempt to get away from the effect of the ordinance.

[2, 3] This is an equitable proceeding. Equity regards substance rather than form. Acts of individuals will be recognized as being those of corporations to prevent fraud, protect the rights of third persons and accomplish justice. In re Clear Lake Beach Co., D.C., 12 F.Supp. 250; see also Lencioni v. Fidelity Trust & Sav. Bank, 1928, 95 Cal.App. 490, 497, 273 P. 103, 274 P. 75.

In addition to the facts hereinbefore stated, there are the additional ones bearing on the true relations of the defendants and the operations. Farms' stockholders are lessees in proportion to their interests in the corporation. Each stockholder received 6 of the 100 parcels. In the case of married stockholders the 6 parcels were divided equally between husband and wife. One nonstockholder received 12 parcels, the equivalent of what 2 stockholders, the only ones who received none of the parcels, would have received. In substance, the corporation managed all the operations. Its president, Arata, was trustee under an oral agreement. No specific compensation for him or the corporation was set and none paid by the lessees. The latter furnished no capital. Arata bought the hogs on credit from Farms. He used his discretion in placing the hogs on the parcels. The individual lessees did not know how many hogs were on their respective parcels.

[4, 5] The ordinance defines a commercial hog ranch as "any premises where more than forty (40) head of swine are maintained * * *" Defendants contend that "premises" as applied here means the one acre parcels. "Premises" has various legal meanings depending on the context and the situation. Gibbons v. Brandt, 7 Cir. 1947, 170 F.2d 385, 387. Thus, it is necessary to examine the legislative intent. "Premises" need not be separately fenced or separately leased property. An office building leased to various tenants could be considered a single premise. In Porter v. Tureen, D.C.1946, 68 F. Supp. 214, "premises" within the meaning of rent regulations was held to include two buildings rented by the defendant. In the cases defining "premises" including those cited by defendants, it appears that the legal concept of the word is a very fluid one depending upon the situation and the purpose of the statutory enactment using the word. (See Ballsun v. Star Petroleum Co., 1930, 105 Cal.App. 679, 288 P. 437, where the court reversed the determination of the trial court that "premises" in a lease meant only land and held that it meant either land or buildings or both.)

In interpreting particular words, the entire substance of the statute must be examined to determine the scope and purpose of the provision of which the words form a part. Wallace v. Payne, 1925, 197 Cal. 539, 544, 241 P. 879.

Applying these rules to the ordinance, it is clear that "premises" does not have a rigid meaning, and that the board of supervisors in adopting it intended that commercial hog ranches be not located in the area where Farms has its ranch, and that the maintenance of a certain number of hogs in proximity be not allowed. The supervisors could not have anticipated every method by which a commercial hog ranch would be operated, nor that a corporation intending to operate a commercial hog ranch would divide its land among its stockholders and then operate with a common manager. Under this arrangement 4,000 hogs (40 to each one acre) could be raised and sold and yet defendants would claim that there is no violation because while operated practically as one business, it is by a group carrying on hog raising over 100 parcels. If this scheme does not violate the ordinance, then it would be possible to divide one acre into 17 parts upon the whole of which 400 hogs could be maintained by a "trustee" without violating the ordinance. Here we have a definite area. Farms leased 100 acres for 15 years to be devoted to hog raising. The "premises" are the leased 100 acres despite the partition. The partition merely gave a physical location to each lessee; it did not alter the nature, area or intended use of the area. The net overall activity must be said to constitute a commercial hog ranch on "premises" prohibited by the ordinance.

The only reasonable interpretation of the evidence is (a) that the hog raising activities were one operation and (b) were conducted on one "premise."

The judgment is reversed.

FRED B. WOOD, J., and HANSON, J. pro tem., concur.

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169 Cal.App.2d 753

Baby Girl BONSALL, a minor, by Steve J. Tabor, her guardian ad litem, Steve J. Tabor and Jean G. Tabor, Plaintiffs and Appellants,

v.

Levi BONSALL, Defendant and Respondent.

Civ. 23608.

District Court of Appeal, Second District,
Division 2, California.
April 21, 1959.

Plaintiffs, whose petition for adoption of a child was pending, brought an action to obtain an adjudication that respondent was not the father and thereby to avoid the necessity of obtaining his consent to the adoption. Summary judgment for the respondent in the Superior Court of Los Angeles County, Walter C. Allen, J., and the plaintiffs appealed. The District Court of Appeal, Herndon, J., held that a former adjudication conclusively establishing the paternity of the child was not void on the ground that it was obtained by fraud and conclusion and hence it was res judicata with respect to the paternity of the child.

Affirmed.

1. Judgment 🔑181(2)

A summary judgment cannot properly be granted where any triable issue of fact is presented.

2. Bastards 🔑3

Where child was born less than seven months after dissolution of marriage of putative parents, there was a presumption that the child was a legitimate child of such parents, and strangers to the blood of the child seeking an adoption thereof had no right nor capacity to dispute her presumed legitimacy. West's Ann.Civ.Code, §§ 194, 195.

3. Bastards 🔑3

There is a conclusive presumption that a child is legitimate when it appears that the mother was cohabiting with a lawful husband during the period when conception would normally occur. West's Ann. Code Civ.Proc. § 1962, subd. 5.

4. Judgment ⟹181(15)

In action for adoption of a child and to obtain an adjudication that respondent was not the father and thereby avoid the necessity of obtaining his consent to the adoption, plaintiffs' conclusional averment that a former judgment establishing the conclusive presumption of legitimacy of the child was obtained by fraud presented no triable issue precluding a summary judgment, since alleged perjury of respondent in former action could not be classified as extrinsic fraud.

5. Judgment ⟹675(1)

In action for adoption of a child and an adjudication that respondent was not the father so as to avoid the necessity of obtaining his consent to the adoption, where the plaintiffs had actual knowledge of the pendency of the former action adjudicating the child's paternity and they attempted to intervene therein, they could not claim they had no opportunity to litigate whatever rights they desired to assert, and if there was any basis for a claim of error in denial of their right to intervene, it could have been asserted on appeal from the judgment therein.

6. Judgment ⟹470, 742

In action for adoption of a child and to obtain an adjudication that respondent was not the father and thereby to avoid the necessity of obtaining his consent, where there was nothing to rebut the presumption of regularity of a prior judgment conclusively establishing the legitimacy of the child, such presumption must prevail and the child was bound by the judgment in such former action where there was nothing to show any irregularity in appointment of the guardian ad litem for the child in the former action. West's Ann.Civ. Code, §§ 194, 195; West's Ann.Code Civ. Proc. § 1962, subd. 5.

◆

Herman Wildman, Los Angeles, for appellant.

Samuel V. Cornell, Compton, for respondent.

HERNDON, Justice.

The judgment here presented for reveiw determines that defendant and respondent Levi Bonsall is the natural father of Deborah Bonsall, a minor. Plaintiffs and appellants, Steve and Jean Tabor, whose petition for the adoption of the child was then pending, brought the action to obtain an adjudication that respondent was not the father and thereby to avoid the necessity of obtaining his consent to the adoption. The child was joined as a party plaintiff and was represented by Steve Tabor as guardian ad litem. The judgment under review was entered after the granting of respondent's motion for summary judgment.

In their complaint filed January 28, 1958, appellants alleged: that the child was born on May 26, 1956, and that her parents were Beverly Bonsall and Jack Cox Hiner; that since June 1, 1956, the child had been living continuously in the home of appellants Tabor; that on or about June 1, 1956, the Tabors filed a petition for her adoption and that said proceedings were still pending; that Beverly Bonsall, the natural mother, after first consenting to the adoption, had filed a petition for the withdrawal of such consent, and that the judge presiding in the adoption proceedings had made an order withholding approval of the mother's attempted withdrawal of consent, and leaving the child in the custody of the Tabors pending further order of court.

In his answer, respondent Levi Bonsall denied that Jack Cox Hiner was the father of the child, and alleged that he, himself, was the father. By his affidavit in support of his motion for summary judgment, respondent alleged a former adjudication of the child's paternity in an action brought pursuant to the provisions of section 231 of the Civil Code. He alleged that in the month of October, 1957, the former action was commenced in the Compton branch of the Los Angeles Superior Court, the plaintiff therein being designated as Deborah

Dianne Bonsall by Beverly Bonsall, her guardian ad litem, and respondent being named as the sole defendant. A copy of the judgment rendered in the former action is incorporated into the affidavit. This former judgment appears to have been entered on March 4, 1958, and recites the following findings: "That Beverly Bonsall is the mother of said minor; that the said Beverly Bonsall and the defendant Levi Bonsall were married on January 5th, 1947, and thereafter by final decree of this Court said marriage was dissolved on November 8th, 1955; that the birth of said minor occurred within ten (10) months of the date of said dissolution of said marriage; that thereafter the said Beverly Bonsall and Levi Bonsall, the defendant herein, remarried on July 29, 1956 and it further appearing that the said Beverly Bonsall and the defendant Levi Bonsall had cohabited with each other at various times prior to the birth of said child and particularly during a period of two (2) weeks in the month of September 1955, * * *." Upon the foregoing findings, the judgment declares that respondent is the natural father of the child.

It is alleged in respondent's affidavit that said former judgment "has not been vacated, modified or reversed and ever since the date of its rendition has remained and now is a valid and subsisting judgment." It is agreed that said judgment had become final at the time of the hearing on the motion for summary judgment herein. It appears from appellants' brief that the Tabors sought to intervene in the former action, but were denied that right; that they took no appeal from the judgment in the former action, but that immediately after having been denied the right to intervene therein, they commenced the instant action.

The affidavit of Steve Tabor filed in opposition to the motion for summary judgment recites various comments purportedly made by the judge presiding in the adoption proceedings on February 8, 1957, when he withheld approval of the mother's petition to withdraw her consent to the adoption. Among other things, the judge suggested that the institution of filiation proceedings under section 231 of the Civil Code would be the appropriate method by which to determine the paternity of the child. Appellant's affidavit also recites the various proceedings taken in the Compton action and avers "[t]hat the decree referred to in the affidavit of Levi Bonsall was obtained by fraud. That a reading of the decree reveals that Levi Bonsall defaulted in the action brought by his wife and that Levi Bonsall was sworn and examined as a witness for the plaintiff Beverly Bonsall."

[1] Apart from the unquestioned proposition that a summary judgment cannot properly be granted where any triable issue of fact is presented, appellants submit only one contention, namely: that the former adjudication was obtained by the fraud and collusion of Beverly and Levi Bonsall, and, therefore, is not *res adjudicata* with respect to the paternity of the child.

[2, 3] The Tabors are met at the threshold with insuperable obstacles. They do not deny that Beverly and Levi Bonsall were husband and wife until November 8, 1955, and that the child was born less than seven months after the dissolution of the marriage. Thus there is a presumption that the child is the legitimate child of the Bonsalls. Civil Code, § 194; cf. In re Estate of McNamara, 181 Cal. 82, 91–92, 183 P. 552, 7 A.L.R. 313. And since the Tabors are strangers to the blood of the child, they have neither right nor capacity to dispute her presumed legitimacy. Civil Code, § 195; cf. Winsette v. Winsette, 47 Cal.App.2d 308, 309, 117 P.2d 897; Serway v. Galentine, 75 Cal.App.2d 86, 89, 170 P.2d 32. The facts as found in the former action invoked the conclusive presumption that a child is legitimate when it appears that the mother was cohabiting with a lawful husband during the period when conception would normally occur. Code of Civ.Proc. § 1962, subd. 5; Williams v. Moon, 98 Cal.App.2d 214, 219, 219 P.2d 902; Estate of Marshall, 120 Cal.App.2d 747, 754, 262 P.2d 42.

[4–6] In these circumstances, appellants' conclusional averment that the former judgment was obtained by fraud tendered no triable issue. Hammell v. Britton, 19 Cal.2d 72, 81–82, 119 P.2d 333. Appellants have neither alleged nor suggested the existence of any fact that would furnish any element of extrinsic fraud. They place much emphasis upon the fact that Levi Bonsall defaulted in the former action and the fact that he later testified therein that he had cohabited with the mother during the period when the child's conception normally would have occurred. But these facts furnish no basis upon which to avoid the former judgment. Even if it be assumed that Levi Bonsall testified falsely, such perjury could not be classified as extrinsic fraud. Jorgensen v. Jorgensen, 32 Cal.2d 13, 18, 193 P.2d 728; Hammell v. Britton, supra, 19 Cal.2d 72, 82, 119 P.2d 333. Since the Tabors had actual knowledge of the pendency of the former action and attempted to intervene therein, they cannot now be heard to say that they had no opportunity to litigate whatever rights they desired to assert. If there was any basis for a claim of error in the denial of their right to intervene in the former action, it could have been asserted on appeal from the judgment therein. See Muller v. Reagh, 148 Cal.App.2d 157, 159–160, 306 P.2d 593. There is nothing in the record to show any irregularity in the appointment of the guardian ad litem in the former action. There is no indication that the Tabors at any time questioned the propriety of the appointment of the natural mother to act as the child's guardian ad litem. In these circumstances, there is nothing to rebut the presumption of regularity. Such presumption must. therefore, prevail on this appeal. In re Estate of Marshall, supra, 120 Cal.App.2d 747, 752, 262 P.2d 42; Neilson v. Walker, 105 Cal.App. 23, 27, 286 P. 1091; Jones v. Alameda, 85 Cal.App. 607, 612, 259 P. 976. The minor child is therefore bound by the judgment in the former action. Bernhard v. Bank of America, 19 Cal.2d 807, 813, 122 P.2d 892; see 2 Armstrong, California Family Law, 917.

Affirmed.

FOX, P. J., and ASHBURN, J., concur.

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169 Cal.App.2d 703

Marie STRZELCZYK and Alfons Strzelczyk, Plaintiffs and Appellants,

v.

Gustav MARKI and Martha Markl, Defendants and Respondents.

Civ. 17957.

District Court of Appeal, First District, Division 1, California.

April 20, 1959.

Personal injury action. The Superior Court, San Mateo County, A. R. Cotton, J., rendered judgment on an order sustaining demurrer to second amended complaint without leave to amend, and plaintiffs appealed. The District Court of Appeal, Bray, P. J., held that one year statute of limitations began to run not later than date when plaintiff allegedly became sick by reason of defendants' acts, and that there could be no recovery on complaint filed more than one year thereafter, for harm allegedly resulting to plaintiff by reason of her exposure to open, sump-type sewer maintained by defendants directly subjacent to bedroom of apartment which he rented to plaintiffs.

Affirmed.

1. Limitation of Actions 🔑55(4, 6)

Nuisance which presumably will continue indefinitely is considered a permanent one, and limitations period on action for damage to real property caused by such nuisance runs from time nuisance is created, but nuisance which may be discontinued at any time is considered a continuing one, and every repetition of continuing nuisance is separate wrong for which successive actions for damage to real property may be brought until such time as nuisance is abated, even though action based on original wrong may be barred; but the rule of continuing nuisance involving damage to land has no application to personal injuries caused by nuisance.

2. Limitation of Actions ⟹31, 55(4)

The one year statute applies to actions for personal injuries, no matter in what manner plaintiff alleges his cause of action; and statute begins to run upon commission of wrongful act, even though some or most of resulting damage does not occur until later. West's Ann.Code Civ.Proc. § 340, subd. 3.

3. Limitation of Actions ⟹55(4)

One year statute of limitations began to run not later than date when plaintiff allegedly became sick by reason of defendants' acts, and there could be no recovery, on complaint filed more than one year thereafter, for harm allegedly resulting to plaintiff by reason of her exposure to open, sump-type sewer maintained by defendants directly subjacent to bedroom of apartment which he rented to plaintiffs. West's Ann.Civ.Code, § 3479; West's Ann.Health & Safety Code, §§ 15024, 17821.

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Edward L. Cragen, San Francisco, for appellants.

Ropers & Majeski, Redwood City, for respondents.

BRAY, Presiding Justice.

Plaintiffs appeal from a judgment on an order sustaining demurrer to second amended complaint without leave to amend.

Question Presented.

Does section 340, subdivision 3, Code of Civil Procedure (the one year statute of limitations), apply? This in turn primarily depends upon whether the rule of a continuing nuisance involving damage to land applies to personal injuries.

Record.

The complaint alleges that from June 15, 1951, to July 31, 1955, plaintiffs rented from defendants a four room furnished apartment under a month to month tenancy. Defendants agreed to assume the obligations of ordinary upkeep, maintenance and care of the premises, and appliances therein, including the plumbing, all of which was warranted to be in good working condition and not injurious to health or life. During the tenancy, defendants operated, maintained, permitted and supervised an open sump-type sewer directly subjacent to the bedroom of the apartment, in a dangerous, defective and unlawful condition. Said sewer was open and received discharges of human waste from a toilet in another apartment. The discharges into the sewer emitted noxious and toxic gases and fumes which plaintiff Marie inhaled "during the said period of time, or for a long time during the said tenancy, in sufficient quantities to cause her to be sick, ill and become injured * * *." The exact date of the installation of the sewer is unknown to plaintiffs. In 1953, defendants installed a gas stove and oven in the kitchen of plaintiffs' apartment. It was so carelessly, negligently and unlawfully maintained, repaired and connected that it caused certain noxious and toxic gases and fumes to escape which were inhaled by plaintiff Marie after its installation to and including the 31st day of July, 1955, causing her to be sick, ill and injured. There follows detail of plaintiff Marie's illness alleged to have been caused as above. Plaintiffs allege general damages in the sum of $75,000 and special damages of $1,834.64. A general demurrer and one stating that the alleged cause of action is barred by section 340, subdivision 3, Code of Civil Procedure, was sustained without leave to amend.

Statutes of Limitation.

[1-3] Plaintiffs, citing Civil Code, § 3479 and Health and Safety Code, §§ 15024

and 17821, contend they have alleged both a common law nuisance and a nuisance per se. They then contend that they have alleged a continuing nuisance, citing Phillips v. City of Pasadena, 27 Cal.2d 104, 162 P.2d 625, and Kafka v. Bozio, 191 Cal. 746, 218 P. 753, 29 A.L.R. 833, to the effect that a nuisance which presumably will continue indefinitely is considered a permanent one, and the limitations period runs from the time the nuisance is created, but a nuisance which may be discontinued at any time is considered a continuing one, and that every repetition of a continuing nuisance is a separate wrong for which the person injured may bring successive actions for damages until the nuisance is abated, even though an action based on the original wrong may be barred. Those are unquestionably the rules as to damage to real property from a nuisance. But plaintiffs have not cited and we have not found any authority for applying in the field of personal injuries (and plaintiffs claim only personal injury) the distinction between a continuing and a permanent nuisance. It seems that the one year statute applies to actions for personal injuries, no matter in which manner the plaintiff alleges his cause of action. See Rubino v. Utah Canning Co., 123 Cal.App.2d 18, 266 P.2d 163, where the court applied the one year statute to a cause of action for personal injuries based on an alleged breach of warranty. The statute begins to run upon the commission of the wrongful act even though some or most of the resulting damage does not occur until later. See Sonbergh v. MacQuarrie, 112 Cal.App.2d 771, 247 P.2d 133 (hearing denied by Supreme Court).

Nowhere in the complaint do plaintiffs allege the commission of separate wrongful acts. The complaint shows that the wrongful acts occurred not later than January 15, 1953, the date when plaintiff Marie is alleged to have become sick by reason of defendants' acts. (The original complaint was filed May 25, 1956.)

There may be some question as to whether plaintiffs have alleged a continuing nuisance even under the land nuisance cases. As before stated, the complaint alleges that her illness from the alleged acts of defendants occurred on or about January 15, 1953, more than three years before the action was filed. At that time plaintiffs could have maintained an action. In any event, the authorities concerning damage to real property from nuisances do not establish any precedent in the field of personal injuries even though the proximate cause amounts to a nuisance. Nor do they seem applicable by way of analogy. This action is for personal injuries and governed by a specific statute of limitations (Code Civ.Proc. § 340, subd. 3). Language in cases like Phillips v. City of Pasadena, supra, 27 Cal.2d 104, 162 P.2d 625, dealing with real property situations, therefore, cannot apply here.

The judgment is affirmed.

FRED B. WOOD, J., and HANSON, J. pro tem., concur.

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169 Cal.App.2d 602

Lucille N. FULLER and William Minor Fuller, Plaintiffs and Respondents,

v.

Bob Quentin CHAMBERS and California Electric Supply Co., a corporation, Defendants and Appellants.

Civ. 18214.

District Court of Appeal, First District, Division 1, California.

April 14, 1959.

Action for wrongful death of plaintiff's son who was killed while riding as a guest in an automobile owned by corporate defendant, and driven by host. The Superior Court, San Mateo County, Frank B. Blum, J., entered judgment for plaintiff and defendants appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence, including testimony that host while driving on a two-way highway at night, entered a curve in the road close to the rear of a truck-trailer, passed the trailer on the curve by veering into the left lane, and went off the road to the left through a barrier, making skid marks for 90 feet from their starting point to the barrier, and that odor of liquor was detected on host's breath shortly after the accident, was sufficient to present a question for the jury as to whether host was guilty of wilful misconduct.

Judgment affirmed.

1. Appeal and Error ⚿1002

Reconciliation of inconsistencies in the evidence is the work of the triers of facts, not the function of a reviewing court.

2. Automobiles ⚿245(50)

Imbibing of alcohol by a host-driver was a proper factor for the jury to consider and weigh when deciding whether or not a guest's death proximately resulted from wilful misconduct of host. West's Ann.Vehicle Code, § 403.

3. Automobiles ⚿245(24)

In action for wrongful death of plaintiff's son who was killed while riding as a guest in automobile owned by corporate defendant, and driven by host, evidence, including testimony that host while driving on a two-way highway at night, entered a curve in the road close to the rear of a truck-trailer, passed the trailer on the curve by veering into the left lane, and went off the road to the left through a barrier, making skid marks for 90 feet from their starting point to the barrier, and that odor of liquor was detected on host's breath shortly after the accident, was sufficient to present a question for the jury as to whether host was guilty of wilful misconduct. West's Ann.Vehicle Code, § 403.

4. Automobiles ⚿246(3)

In action for wrongful death of plaintiff's son who was killed while riding as a guest passenger in an automobile, trial court did not err in striking from an instruction language to the effect that host-driver's misconduct must have been something more than intentional and wrongful, and must have been done under circumstances which would show either knowledge that serious injury to the guest probably would result, or wanton and reckless disregard of the possible results, and in substituting language to the effect that wilful misconduct is the intentional doing of something either with the knowledge that it is likely to result in serious injury, or with a wanton and reckless disregard of its possible consequence. West's Ann.Vehicle Code, § 403.

5. Trial ⚿296(3)

In action for wrongful death of plaintiff's son, who was killed while riding as a guest passenger in an automobile driven by host, it was not error to instruct that it is unlawful for any person under the influence of intoxicating liquor to drive a vehicle upon any highway, in view of instruction that sole ground on which plaintiff sought recovery was for wilful misconduct and that question of liquor being consumed by host was to be considered by the jury in their determination of whether there was wilful misconduct on his part. West's Ann. Vehicle Code, § 403.

6. Automobiles ⚿246(54)

In action for wrongful death of plaintiff's son who was killed while riding as a guest passenger in an automobile, trial court did not err in instructing that host drove into the lane set for opposite traffic, at night, while negotiating a curve, in view of fact such language was preceded by the statement that jury in determining whether host was guilty of wilful misconduct in the operation of his automobile might consider certain special circumstances "allegedly" connected with host's driving, since word "allegedly" characterized circumstances as issues, not as established facts. West's Ann.Vehicle Code, § 403.

7. Trial ⚿295(6)

In action for wrongful death of plaintiff's son who was killed while riding as a guest passenger in automobile, instruction that intent to injure is not a necessary ingredient of wilful misconduct, viewed in context in which given the jury, in midst of adequate definitions of wilful misconduct, was not error. West's Ann.Vehicle Code, § 403.

8. Master and Servant ⚿302(6)

Where a servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured, but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master.

9. Automobiles ⚿245(30)

In action for wrongful death of plaintiff's son who was killed while riding as a guest passenger in automobile driven by host, and owned by his employer, evidence, including testimony that host was en route to a city to call upon one of his employer's customers that evening, presented a question for the jury as to whether host was acting in the course and scope of his employment, even though host at the time of the accident was not taking the most direct route to the city in question.

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Norman S. Menifee, Redwood City, for appellants.

Gregory S. Stout, San Francisco, for respondents.

FRED B. WOOD, Justice.

Plaintiffs brought this action for the wrongful death of their son who was killed while riding as a guest in a car owned by defendant California Electric Supply Company and driven by defendant Chambers.

The first trial resulted in a nonsuit which was reversed in Fuller v. Chambers, 142 Cal.App.2d 377, 298 P.2d 125, to which reference is made for a summary of the evidence. In its essential features the evidence was substantially the same upon the second trial as upon the first. The second judgment awards plaintiff damages in the sum of $20,000.

Defendants claim (1) the verdict is not supported by substantial evidence, (2) errors occurred in the giving and refusing of instructions, and (3) failure of proof that Chambers was operating the company's car with its permission.

(1) *Defendants predicate their claim of insufficiency of the evidence* upon evidence adduced at the second trial to the effect that none of Chambers' guest riders protested the manner in which he had been driving, nor observed anything unusual about his driving. That was for the jury to appraise. One of the guests was asleep part of the time and the decedent may have been. The absence of protests and the failure of some of the guests to note anything unusual about the manner of driving did not preclude the jury from believing the evidence, which was substantial, that Chambers, driving on a two-lane highway at night, entered a curve in the road close on the heels of a truck-trailer, passed the trailer on the curve by veering into the left lane and then went off the road to the left through a barrier, making skid marks for 90 feet from their starting point to the barrier and extending to a point about 165 feet beyond the barrier. The driver had been drinking whiskey en route and a witness smelled the odor of liquor on his breath shortly after the accident.

[1] Defendants claim there were inconsistencies in the testimony of plaintiffs' witnesses. We have examined the evidence and find there is no substance to this claim. Moreover, reconciliation of inconsistencies in the evidence is the work of the triers of the facts, not the function of a reviewing court.

[2] Defendants also claim that the imbibing of alcohol was a quite irrelevant factor because this action is based upon "wilful misconduct," not "intoxication," of the driver, as those words are used in section 403 of the Vehicle Code. Such a criticism is wide of the mark. The imbibing

of alcohol by Chambers while driving the automobile upon this very occasion was one of a number of factors proper for the jury to consider and weigh when ascertaining and deciding whether or not the decedent's death "proximately resulted from the * * wilful misconduct" of Chambers as such driver (Veh.Code, § 403).

[3] The parties have cited and discussed a number of decisions bearing upon the sufficiency of the evidence. We see no purpose to be served by an extended discussion of the case law. In regard to sufficiency of the evidence, each case must be decided upon its own facts. The applicable principles of law were adequately expounded upon the former appeal. We concur therein and adopt that exposition for the purpose of this appeal.

(2) *Did prejudicial error occur in the giving and refusing of instructions?*

Defendants claim that the court emasculated their instructions defining "wilful misconduct."

A sentence* which the court deleted from defendants' instruction No. 1 was in substance contained in defendants' Nos. 3, 4, and 5, as given by the court in modified form.**

[4] Defendants complain of the deletion of the following from their instruction No. 4: "* * * the misconduct must be something more than intentional and wrongful; it must be done under circumstances which show either knowledge that serious injury to the guest probably will result, or wanton and reckless disregard of the possible results," and substitution of the following: "But in order to be a basis for liability to a guest under our law it [wilful misconduct] is the intentional doing of something either with the knowledge that it is likely to result in serious injury or with a wanton and reckless disregard of its possible consequence * * *" We see no substantial change. As given, it had the sanction of Meek v. Fowler, 3 Cal.2d 420, 426, 45 P.2d 194; and Mercer-Fraser Co. v. Industrial Acc. Com., 40 Cal.2d 102, 118, 251 P.2d 955.

[5] It was not error to instruct that "[i]t is unlawful for any person who is under the influence of intoxicating liquor to drive a vehicle upon any highway," (Veh.Code, § 502(a)) particularly in view of the following instruction given: "* * the pleadings made by the plaintiffs are no based on the ground that the driver of th automobile was intoxicated. Therefore, the sole ground on which plaintiffs seek recovery is for wilful misconduct; however, the question of liquor being consumed by the driver of the automobile can be considered in your determination of whether there was wilful misconduct on the part of the driver under the definitions of wilful misconduct as the Court has defined," showing that the use of intoxicating liquor was only one of the factors to be considered.

[6] Defendants mistakenly declare that the court gave an instruction which flatly declared that defendant Chambers was "driving into the lane set aside for opposite traffic at night while negotiating a curve allegedly in order to pass a large vehicle

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* "This section has abolished recovery by guests for injuries caused by negligence, whether ordinary negligence or gross negligence, and hence no matter how negligent you may find the defendant Bob Quentin Chambers to have been, negligence alone will not warrant a recovery by these plaintiffs."

** Defendants' Nos 3, 4 and 5 as given by the court read in part as follows:

No. 3. "* * * Wilful misconduct means something different from and more than negligence, however, gross."

No. 4. "* * * The mere failure to perform a statutory duty is not, alone, wilful misconduct as that failure amounts to simple negligence only and, no matter how gross, that negligence is not sufficient to justify a verdict in favor of the plaintiff in this case."

No. 5. "The court instructs you that even though you might find that defendant * * * drove the automobile negligently and carelessly, and even though you might find that he was guilty of gross negligence in the operation thereof, such finding in itself would not be sufficient to bring in a verdict against the defendant in this case on a charge of wilful misconduct."

* * *" This phrase was preceded by the statement that "you may consider certain special circumstances *allegedly* [emphasis added] connected with his driving. These special circumstances * * * are * * *" We think the word "allegedly" characterized each set of circumstances as issues, not as established facts.

[7] Finally, defendants complain of the following: "You are instructed that an intent to injure anyone is not a necessary ingredient of wilful misconduct." Viewed by itself this does not give a helpful explanation of the element of "intent" involved. Viewed in the context in which given the jury, in the midst of adequate definitions of "wilful misconduct," we find no error in it.

(3) *Was there a failure of proof that the owner of the car was responsible for the driver's conduct in this case?*

Defendant Chambers was in the employ of the defendant company and with its permission used its car in that capacity. He was its field service representative in all of California north of the northern boundary of Kern County. He had a considerable degree of freedom of decision in performing his duties. His time was pretty much his own in calling upon his employer's customers. On this particular occasion he was en route from the company's San Francisco office (where he had been until noon) to Fresno, to call upon one of the company's customers that evening. His most direct route would have been through Gilroy and Pacheco Pass. This time he went via Camp Roberts to pick up a cousin who wished to be taken to San Francisco airport. Three of the cousin's friends came along. From Camp Roberts he drove north along route 101 to San Lucas, thence through the coast range to Lemore, thence along route 41 toward Fresno. The accident occurred about 16 miles out from Lemore.

The facts that Chambers was an employee of the defendant company and was driving a company car with the company's permission give rise to an inference that he was acting in the course and scope of his employment (Westberg v. Willde, 14 Cal.2d 360, 371, 94 P.2d 590; Rosenberg v. Berry, 101 Cal.App.2d 526, 529–531, 225 P. 2d 620; Halbert v. Berlinger, 127 Cal.App. 2d 6, 17–18, 273 P.2d 274; Smith v. Johe, 154 Cal.App.2d 508, 510, 316 P.2d 688.)

[8] But for the detour to Camp Roberts, en route to Fresno, we would have no hesitancy in concluding that the evidence supports the jury's implied finding that upon this occasion Chambers was acting in the course and scope of his employment. The applicable legal principles we find well expressed in Ryan v. Farrell, 208 Cal. 200, 204, 280 P. 945, 946: "It is the established rule in this jurisdiction that where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged in when a third person was injured; but the master will be held responsible, unless it clearly appears that the servant could not have been directly or indirectly serving his master."

These principles were expressed in these words in Westberg v. Willde, supra, 14 Cal. 2d 360, 372–373, 94 P.2d 590, 597, quoting from Kruse v. White Bros., 81 Cal.App. 86, 92, 253 P. 178: "'A mere deviation from the strict course of his duty does not release the master from liability. In order to have that effect it must be so substantial as to amount to an entire departure. 39 Cor.Jur., p. 1297, Master and Servant, § 1493. As the rule has been stated, "One does not cease to be acting within the course of the master's employment because his most direct and immediate pursuit of the master's business is subject to necessary, usual or incidental personal acts, nor even by slight and immaterial delays or deflections from the most direct route for a personal or private purpose, the pursuit of the master's business continuing to be the controlling purpose. Such acts, not amounting to a turning aside completely from the master's business so as to be inconsistent with its pursuit, are often only what might be reasonably expected, to which, therefore, the master's assent may be fairly assumed; or they are in many instances the mingling with the pursuit of the master's business some purpose of the servant's own." Shearman and Redfield on Negligence, (6th Ed.) [p. 362], § 147a.

" 'Whether there has been a deviation so material or substantial as to constitute a complete departure is usually a question of fact. In some cases the deviation may be so marked, and in others so slight relatively, that the court can say that no conclusion other than that the act was or was not a departure could reasonably be supported; while in still others the deviation may be so uncertain in extent and degree in view of the facts and circumstances as to make the question of what inferences should be drawn from the evidence properly one for the jury. * * *' "

These same principles are further expounded in the more recent case of Loper v. Morrison, 23 Cal.2d 600, 604–607, 145 P.2d 1. Particularly significant is the statement that in "deciding the case before us the results reached in other decisions are helpful but not necessarily controlling * * In each case involving scope of employment all of the relevant circumstances must be considered and weighed in relation to one another." (At page 605 of 23 Cal.2d at page 3 of 145 P.2d.)

[9] In the light of these principles, the facts in evidence and the inferences which reasonably may be drawn from those facts support the implied finding that Chambers was acting within the course and scope of his employment. We cannot say as a matter of law that he was not so acting.

The defendant criticizes an instruction given concerning the legal basis for its liability, if any, upon the ground that the court used the words, "acting within the scope of his authority" instead of the words "acting within the course and scope of his employment." Technically, the latter is the more precise term to use, but it is not conceivable that the jury was misled. Indeed, defendants say that "standing alone this error may not have been prejudicial." We see in it no basis for reversal.

The judgment is affirmed.

BRAY, P. J., and HANSON, J. pro tem., concur.

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169 Cal.App.2d 808

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Jesse Fred DEERMAN, Defendant and Appellant.

Cr. 1389.

District Court of Appeal, Fourth District, California.

April 22, 1959.

Prosecution for assault with deadly weapon. The Superior Court of San Diego County, William A. Glen, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Stone, J. pro tem., held that where information charged defendant with armed robbery in one count and assault with a deadly weapon in the second count and force used took place after robbery had been accomplished, and he was acquitted on charge of armed robbery but jury could not agree on assault charge, retrial on assault charge did not place appellant in double jeopardy, and evidence was sufficient to sustain conviction.

Affirmed.

1. Criminal Law 🔑200(2)

Where original information charged defendant in count one with armed robbery and in count two with assault with a deadly weapon and the force used which constituted basis for assault charge occurred after the robbery had been accomplished, and defendant was acquitted of armed robbery charge but jury could not agree on assault charge, retrial of assault charge subsequent to acquittal on robbery charge did not place defendant in double jeopardy.

2. Criminal Law ⚷185

There is no double jeopardy by reason of a retrial on the same charge after discharge of a jury which has failed to agree.

3. Assault and Battery ⚷92

Evidence sustained conviction of assault with a deadly weapon.

4. Criminal Law ⚷260(11)

District Court of Appeal will not undertake to weigh evidence, since that is the province of the trial court.

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Jesse Fred Deerman, in pro. per.

Johnson & Johnson, by Charles M. Snell, San Diego, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

STONE, Justice pro tem.

The appellant and a codefendant by an information were charged in Count One with armed robbery, a violation of Penal Code, Section 211; and in Count Two with assault with a deadly weapon, a violation of Penal Code, Section 245. Both defendants pleaded not guilty to each count and were tried by a jury. They were acquitted as to Count One, but the jury failed to agree on Count Two. This appeal is from the judgment pursuant to a verdict of guilty on a retrial of Count No. Two.

The facts disclose that appellant, his codefendant, and one Joseph V. Bradley had met on the afternoon of December 22, 1957. They did some drinking and decided to drive to a tavern several miles distant, where dancing was permitted. The wife of appellant accompanied them. After considerable drinking, talking, and some dancing the four started home. Appellant drove the car and his wife sat beside him on the front seat. The codefendant sat in the back seat with Bradley. The evidence concerning what happened when the car reached a secluded spot a short distance from the tavern is conflicting to say the least. There is no question but that a knife was drawn and Bradley gave his wallet to appellant who returned it without removing any of the contents. Then as Bradley was about to step out the rear door of the car appellant hit him on the side of the head with a beer bottle. Appellant justified his actions on the ground of self-defense.

Appellant filed this appeal in propria persona, and then petitioned the court for the appointment of an attorney. The attorney who had represented appellant during the trial was appointed to represent him on this appeal. Appellant's counsel filed a statement in lieu of a brief, advising the court that he could find no error in the record which would be a ground of appeal.

[1] The appellant raised the plea of double jeopardy in the trial court, but the record discloses that the offense of which he was acquitted, armed robbery, was a separate offense from the charge of assault with a deadly weapon. The episode involving the wallet had been completed before Bradley opened the door of the car to get out. The striking with a beer bottle was a separate offense. The second trial on Count No. Two subsequent to an acquittal on Count No. One did not place appellant in double jeopardy. Ruling upon the question of double jeopardy in a comparable situation, the Supreme Court said in the case of In re Chapman, 43 Cal.2d 385, at page 388, 273 P.2d 817, at page 819: "If the force relied upon to establish the robbery is the same which is required to prove the assault, then petitioner is being punished twice for the same act contrary to section 654 of the Penal Code, but if it is not the same then the two convictions and sentences can stand."

[2] It is also well settled that there is no double jeopardy by reason of a retrial on the same charge after the discharge of a jury which has failed to agree. The discharge of the first jury in no wise affects the retrial. People v. Agnew, 77 Cal.App.2d 748, 760, 176 P.2d 724.

[3, 4] The jury rejected defendant's theory of self-defense. This court will not undertake to weigh the evidence, that being the province of the trial court. We have reviewed the record to determine whether or not there is substantial evidence to support the verdict of the jury. Suffice it to say that there is ample substantial evidence which supports the verdict. People v. Mazza, 135 Cal.App.2d 587, 596, 287 P.2d 798.

The judgment is affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

Mary STODDART and Mark Stoddart, a Minor, by his Guardian, Charles Stoddart, Plaintiffs and Respondents,

v.

James William MAINES et al., Defendants, William G. Pierce (sued as Doe I), Nance Chevrolet Company (sued as Doe II), Defendants and Appellants.*

Civ. 23402.

District Court of Appeal, Second District, Division 2, California.

April 10, 1959.

Hearing Granted June 3, 1959.

Action against former automobile owner, automobile dealer, and subsequent purchaser of automobile, for injuries sustained by plaintiff in an accident arising out of negligent operation of vehicle by subsequent owner. From adverse judgment of the Superior Court, Los Angeles County, Joseph M. Maltby, J., the former owner and automobile dealer appealed. The District Court of Appeal, Ashburn, J., held that where owner of automobile endorsed certificate of ownership when he turned automobile over to dealer as trade-in on a new automobile but he left date blank and he delivered certificate of registration along with automobile, failure of owner to date certificate of ownership did not deprive him of exoneration from liability given to an owner who has made a bona fide sale or transfer of vehicle and delivered possession thereof to a purchaser, and owner was not liable for negligence of subsequent owner of automobile in the operation thereof.

Judgment affirmed as to dealer and reversed as to former owner with instructions.

1. Automobiles 🔑19

Section of Vehicle Code making it unlawful for any person to fail or neglect properly to endorse, date and deliver certificate of ownership to a transferee who is lawfully entitled to a transfer of registration of vehicle does not operate upon title or validity or effect of its transfer. West's Ann.Vehicle Code, § 176.

2. Automobiles 🔑19, 192(1)

Where owner of automobile endorsed the certificate of ownership when he turned automobile over to dealer as trade-in on a new automobile but he left the date blank and he delivered certificate of registration along with automobile, failure of owner to date transfer did not deprive him of exoneration from liability given to an owner who has made a bona fide sale or transfer of vehicle and delivered possession thereof to a purchaser, and owner was not liable for negligence of subsequent owner of automobile in operation thereof. West's Ann.Vehicle Code, §§ 175, 176, 177 and subd. (b), 178, 186, 402.

3. Automobiles 🔑145

Operation of an unregistered vehicle does not constitute evidence of negligence nor impose civil liability upon any ground. West's Ann.Vehicle Code, §§ 140, 176, 230, 250, 450, 760.

4. Automobiles 🔑192(1)

Statute which imposes upon owner of automobile liability for negligence of one who drives it with express or implied permission of the owner is in derogation of common law and is to be construed strictly in favor of one who seeks to be brought within its operation. West's Ann.Vehicle Code, § 402.

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* Opinion vacated 346 P.2d 774.

5. Statutes ⚿240, 243

A statute creating a new liability or increasing an existing liability, or even a remedial statute giving remedy against a party who would not otherwise be liable, must be strictly construed in favor of persons sought to be subjected to the operation of such statutes.

6. Automobiles ⚿192(8)

Where automobile dealer failed to give notice to Motor Vehicle Department of sale of an automobile under a conditional sale contract not later than the date of the next business day of the dealer, such failure deprived dealer of exemption from liability and dealer was liable for negligence of conditional vendee in operation of vehicle, which had not been previously registered in conditional vendee's name. West's Ann.Vehicle Code, §§ 177 and subd. (d), 178(a) (1), 402(f).

◆

Fitzgerald, Cozy, Gyger & Nelson, W. Walter Livingston, Jr., Los Angeles, for appellant William G. Pierce.

Smith & Wilson, Andrew V. Smith, Beverly Hills, for appellant Nance Chevrolet Co.

Pray & Price, William C. Price, Long Beach, for respondents.

ASHBURN, Justice.

Defendants William G. Pierce and Nance Chevrolet Company appeal from a judgment for plaintiffs in this personal injury action. Their codefendant James W. Maines defaulted and does not appeal from the judgment against him.

At the time of the accident giving rise to the litigation, Maines was in possession of a certain Chevrolet sedan and was driving the same. The court left to the jury only the question of damages, instructing that as matter of law Maines was negligent, plaintiffs not guilty of contributory negligence, and defendants Pierce and Nance Chevrolet Company were responsible as owners for the negligence of the driver Maines at the time of the accident.

At the beginning of the pertinent series of events Pierce was the owner of a 1952 Chevrolet sedan which was involved in the accident and was registered in his sole name. On January 28, 1956, he traded that car to Nance Chevrolet Company, a dealer, as part payment upon a new Chevrolet which he received at that time. When he turned the trade-in car over to Nance he endorsed the certificate of ownership (pink slip) on the reverse side, but left the date blank; in this condition he delivered it to Nance together with the certificate of registration (white slip) and the car itself. This ended his connection with the vehicle which he had traded in, the one involved in the accident. The court held that his failure to date the pink slip when endorsing it deprived him of the immunity to personal liability which would otherwise have been available to him under § 178(a) (1), Vehicle Code.

On February 7, 1956, Nance Chevrolet Company sold said automobile to Maines upon a conditional sale contract and delivered possession to him. A dealer's notice of sale was received by the Motor Vehicle Department on February 14, 1956. The date of mailing same to the department is not shown in the record but it is clear that it was "later than the end of the next business day of the dealer," the time limit prescribed by § 177(b), Vehicle Code. For this reason the court ruled that Nance Chevrolet Company did not gain the immunity of § 178(a) (2) of the code.

Re Liability of Pierce

[1, 2] The basic statutory provision is § 402, Vehicle Code, which imposes upon the owner of an automobile liability for negligence of one who drives it with the express or implied permission of the owner. But the subject of who is owner within the purview of the statute when a transfer has been or is in process of being made is covered by §§ 175, 177, 178 and 186 of the code. Section 176, which provides, "it is

unlawful for any person to fail or neglect properly to endorse, date and deliver the certificate of ownership * * * to a transferee who is lawfully entitled to a transfer of registration" does not operate upon title or the validity or effect of its transfer, as will appear from the ensuing discussion.

Section 186, general in nature, provides:

> "(a) No transfer of the title or any interest in or to a vehicle registered hereunder shall pass and any attempted transfer shall not be effective unless and until the parties thereto have fulfilled either of the following requirements:
>
> "(1) [*Endorsement and delivery of certificate, and card, and application for transfer of registration.*] The transferor shall have made proper endorsement and delivery of the certificate of ownership and delivery of the registration card to the transferee as provided in this code and the transferee has delivered to the department or has placed in the United States mail addressed to the department such certificate and card when and as required under this code with the proper transfer fee and thereby makes application for a transfer of registration except as otherwise provided in Section 180, or
>
> "(2) [*Delivery or mailing of appropriate documents.*] The transferor shall have delivered to the department or shall have placed in the United States mail addressed to the department the appropriate documents for the registration or transfer of registration of such vehicle pursuant to such sale or transfer except as provided in Section 178. * * *"

The subject of proper endorsement is covered by § 175, which bears the black letter heading "Endorsement of Certificate Upon a Transfer." It provides that upon transfer of the title or an interest of the legal owner (defined in § 67) or the owner (§ 66) in or to a registered vehicle, the transferor "shall write his signature, and the transferee shall write his signature and address, in the appropriate spaces provided upon the reverse side of the certificate of ownership issued for such vehicle." If the transfer covers the interest of a registered owner (§ 68) only, he shall write his signature and address, and the transferee shall write his signature and address on the reverse side and the legal owner shall write his signature in the appropriate place. No reference to dating of signatures or transfer appears in this section.

When the appropriate signatures and addresses have been thus placed upon the pink slip and same has been delivered to the transferee together with the white certificate and possession of the automobile the sale is complete for the purpose of determining who is thenceforth liable for injuries under § 402, for § 178 provides:

> "(a) An owner who has made a bona fide sale or transfer of a vehicle and has delivered possession thereof to a purchaser shall not by reason of any of the provisions of this code be deemed the owner of such vehicle so as to be subject to civil liability for the operation of such vehicle thereafter by another when such owner in addition to the foregoing has fulfilled either of the following requirements:
>
> "(1) [*Indorsement and delivery of ownership certificate, and delivery of registration certificate.*] When such owner has made proper endorsement and delivery of the certificate of ownership and delivered the certificate of registration as provided in this code. * * *"

This section relieves the seller of compliance with the requirements of notice to the Motor Vehicle Department contained in § 186 (quoted supra), and in § 177 which says: "[*Notice by owner selling or transferring title or interest and delivering possession: Requisites.*] Whenever the owner of a vehicle registered hereunder sells or transfers his title or interest in, and delivers the possession of, said vehicle to another, said owner shall immediately notify the department of such sale or transfer giving the date thereof, the name and address of such owner and of the transferee and such description of the vehicle as may be required in the appropriate form provided for such purpose by the department. * * *" See Woods v. Eastridge, 99 Cal. App.2d 625, 629, 631, 222 P.2d 296. The vendee forthwith becomes liable for negligent use of the car regardless of the fact that he has not had time to effect its reregistration before occurrence of the accident. Smith v. Western Casualty, etc., Co., 60 Cal.App.2d 508, 512, 141 P.2d 10; Ferroni v. Pacific Finance Corp., 21 Cal.2d 773, 778, 135 P.2d 569.

Throughout the sections defining the methods by which an owner may relieve himself of future liability for negligence there is present the expressed thought that delivery of the automobile, the white slip and a properly endorsed pink slip are of the essence and are all sufficient. Section 175 clearly prescribes the elements of a proper endorsement,—namely, the signature or the signature and address of a participant in the transaction. The ordinary connotation of the word "endorse" is: "To write one's own name on the back of an instrument" (Ballentine's Law Dictionary). See, also, 1 Bouvier's Law Dict., Rawle's Third Revision; 42 C.J.S. p. 1367. As to what constitutes proper endorsement Larson v. Barnett, 101 Cal.App.2d 282, 288, 225 P.2d 297, 301, uses this language: "And when Barnett, Sr., delivered the car and the pink slip, as he did, he could only deliver it 'properly endorsed' by having written thereon his own name and his address." See, also, Woods v. Eastridge, supra, 99 Cal. App.2d 625, top of page 628, 222 P.2d 296.

Prior to 1951 there could have been no doubt about what constituted proper endorsement; the concept did not include any idea of dating a signature. Before its amendment in that year § 176 read: "It is unlawful for any person to fail or neglect properly to endorse and deliver the certificate of ownership to a transferee who is lawfully entitled to a transfer of registration." That section plainly had no effect upon title or liability for negligence for those matters were fully covered by the other sections just discussed. Section 176 merely added a criminal sanction for failure to properly endorse and transfer the certificate to one entitled thereto.

[3] Such a situation is not unique in the area occupied by the Vehicle Code. It contains a large number of penal sections, specific as well as general. Section 760 says: "It is unlawful and constitutes a misdemeanor for any person to violate any provision of this code unless such violation is under the provisions of this code expressly declared to be a felony or a public offense which is punishable either as a felony or misdemeanor." It is a misdemeanor to operate an unregistered vehicle upon a highway (§ 140), to drive without a license (§ 250), to violate any other provisions of the registration laws (§ 230), to violate any traffic law (§ 450). But the operation of an unregistered vehicle does not constitute evidence of negligence nor impose civil liability upon any other ground (163 A.L.R. 1375, 1377, Annotation; 29 A.L.R.2d 963, 966, Annotation). The same is true of operation without a driver's license (6 Cal.Jur.2d, § 193, p. 673; 163 A.L. R. 1375, 1380, Annotation; 29 A.L.R.2d 963, 970, Annotation). In Henry v. General Forming, Ltd., 33 Cal.2d 223, 200 P. 2d 785, there was a failure to comply with the provisions of § 178; a creditor relying upon the penal provisions of §§ 140 and 230 claimed the transaction was illegal. Rejecting this claim the court said, 33 Cal. 2d at pages 226–227, 200 P.2d at page 787: "The code provisions do not aim at tainting with illegality the sale and purchase of an automobile which is the only contract or transaction involved. The requirements deal solely with registration of ownership to give notice of the transfer after the purchase has been consummated. * * * The legal consequences of violation of provisions for registration are to be resolved by the express provisions of the Vehicle Code." The consequences of failure to conform to the sections above discussed

are defined in those same sections rather than in 176.

Prior to 1951 that section harmonized with the others, using the phrase "properly to endorse and deliver the certificate of ownership." In that year the section was amended by inserting the word "date" after "endorse",—"properly to endorse, date and deliver." Though §§ 175 and 177 were amended at that session of the legislature, no change was made in either of them with respect to what constitutes a proper endorsement. The acts necessary thereto as defined in § 175 were not altered. Section 176 was again amended in 1953 by inserting the provision for delivery of the registration card. But § 175 was not then amended; § 186, though amended that year, retained the phrase "proper endorsement" which had been in it since 1943. In 1955 § 178 was amended but the phrase "proper endorsement" was retained. In short, the concept of proper endorsement has remained constant throughout the years and the reference to dating is found in § 176 alone. By way of administrative interpretation of the effect of the 1951 amendment to that statute it appears that the Pierce ownership certificate carries this caveat on the reverse side at the place provided for the date: "It is a misdemeanor to fail to *endorse, date* and *deliver* the certificate of ownership to a transferee lawfully entitled to a transfer of registration (Veh.Code sec. 176)." No reference here to anything other than criminal liability for such an omission.

[4, 5] It should be remembered that § 402 is in derogation of the common law and to be construed strictly in favor of one sought to be brought within its operation. "Since the imputed negligence statute created a new right of action, giving a remedy against a party who would not otherwise be liable, it must be strictly construed. Such was the holding in Cook v. Superior Court of Los Angeles County, 12 Cal.App.2d 608, 611, 55 P.2d 1227, 1228, where the court cited 59 Corpus Juris, page 1129, reading: '"A statute creating a new liability, or increasing an existing liability, or even a remedial statute *giving a remedy against a party who would not otherwise be liable,* must be strictly construed in favor of the persons sought to be subjected to their operation."' Numerous cases were cited in support of the text to which was added Leppard v. O'Brien, 225 App.Div. 162, 232 N.Y.S. 454, 456, affirmed in 252 N.Y. 563, 170 N.E. 144, a case involving a similar statute and in which the court said: 'If a statute creates a liability where otherwise none would exist, or increases a common-law liability, it will be strictly construed.' In Swing v. Lingo, 129 Cal.App. 518, 526, 19 P.2d 56, a case under section 1714¼ the court said: 'Since the statute imposes a new and unusual liability which partakes of the nature of a penalty, it should not, at least, receive a construction favoring the imposition of such liability. Snell v. Bradbury, 139 Cal. 379, 382, 73 P. 150; Merrill v. Los Angeles Cotton Mills, Inc., 120 Cal.App. 149, 7 P.2d 329.'" Weber v. Pinyan, 9 Cal.2d 226, 229, 70 P.2d 183, 185, 112 A.L.R. 407. To the same effect, see Piacun v. Hexem, 18 Cal.App.2d 145, 149–150, 63 P.2d 315; Swing v. Lingo, 129 Cal. App. 518, 526, 19 P.2d 56. The same basic considerations dictate a construction of related statutes in favor of the existence of an exemption from the liability created by § 402.

Endorsement and delivery of all kinds of commercial instruments with the date left blank is of such common occurrence that the ordinary automobile owner (other than a dealer) would give little, if any, thought to the matter. To hold that such an inadvertence would impose upon him continued liability for the negligence of a purchaser or a subsequent purchaser (as at bar) is so harsh that we are unable to go along with that line of reasoning. We hold that violation of § 176, through failure to date the transfer, does not deprive the seller of the exoneration from liability provided by § 178(a) (1), and that the judgment must be reversed as to defendant Pierce.

Re Liability of Nance Chevrolet Company

[6] This appellant is a dealer in new and used cars. Having acquired the automobile in question from Pierce on January 28, 1956, it sold the same to James W. Maines upon a conditional sale contract on February 7, 1956, and delivered possession to him on that day, but of course the pink slip was retained by the seller. It failed to give notice of sale to the Motor Vehicle Department "not later than the end of the next business day of the dealer" as required by § 177(b). The document was received by the Motor Vehicle Department on February 14, 1956. We have concluded that this failure to comply with § 177(b) deprived the vendor of exemption from liability and that it remained so liable at the time of the accident on March 6, 1956, the vehicle not having been previously re-registered in Maines' name.

Section 402 contains the following exception in subdivision (f): "If a motor vehicle is sold under a contract of conditional sale whereby the title to such motor vehicle remains in the vendor, such vendor or his assignee shall not be deemed an owner within the provisions of this section, but the vendee, or his assignee shall be deemed the owner notwithstanding the terms of such contract, until the vendor or his assignee retake possession of such motor vehicle. A chattel mortgagee of a motor vehicle out of possession shall not be deemed an owner within the provisions of this section." But its apparently unconditional exemption is qualified by the terms of § 177 (b): "[*Notice by dealer: Form.*] Every dealer upon transferring by sale, lease or otherwise any vehicle, whether new or used, of a type subject to registration hereunder, shall, not later than the end of the next business day of the dealer, give written notice of such transfer to the department upon an appropriate form provided by it but a dealer need not give such notice when selling or transferring a new unregistered vehicle to another dealer." Unless its terms are met[1] the exemption from liability under § 402 does not arise.

"In approaching the problem presented by this appeal it should first be observed that sections 402 and 177 of the Vehicle Code have been construed as providing that the conditional vendor of an automobile is liable within the amounts stated in the former section for the operation of such automobile with his consent by his conditional vendee in a negligent manner, where he delivers possession of the car to the vendee and fails to comply with section 177 with reference to giving notice of the transfer prior to the occurrence of the accident. Guillot v. Hagman, 30 Cal.App.2d 582, 86 P.2d 865; Bunch v. Kin, 2 Cal.App.2d 81, 37 P.2d 744; Helmuth v. Frame, 46 Cal.App.2d 372, 115 P.2d 846. Appellant questions the soundness of those cases, but a hearing by this court was denied in all of them and we are not inclined to disapprove them." Ferroni v. Pacific Finance Corp., supra, 21 Cal.2d 773, 776, 135 P.2d 569, 571. To the same effect are: Johnson v. Barreiro, 59 Cal. App.2d 213, 216, 138 P.2d 746; Gutknecht v. Johnson, 62 Cal.App.2d 315, 319, 144 P. 2d 854; Rosenthal v. Harris Motor Co., 118 Cal.App.2d 403, 406, 257 P.2d 1034; Traders & General Ins. Co. v. Pac. Emp. Ins. Co., 130 Cal.App.2d 158, 162, 278 P.2d 493.

The word "immediately" which appeared in 177(b) prior to 1955 was replaced in that year by the phrase, "not later than the end of the next business day of the dealer." Any flexibility there may have been in the law was thus eliminated and a specific period was prescribed for action by the dealer. He must comply at his peril, failing which he remains liable as owner. Rainey v. Ross, 106 Cal.App.2d 286, 291, 235 P.2d 45; Harbor Ins. Co. v. Paulson, 135 Cal.App.2d

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[1] Or "appropriate documents for registration of such vehicle" delivered or mailed to the Department pursuant to § 178(a) (2).

22, 25, 28, 286 P.2d 870; Pike v. Rhinehart, 112 Cal.App.2d 530, 532, 246 P.2d 963; Singleton v. Perry, 45 Cal.2d 489, 493–494, 289 P.2d 794.

Appellant argues that it was relieved of liability because its notice of sale was received by the Motor Vehicle Department on February 14th, several weeks before the accident of March 6th. There is in certain cases cited by appellant language pointing to the fact that the vendor had not acted until after the accident had occurred. Such cases are: Gutknecht v. Johnson, supra, 62 Cal.App.2d at page 315, 144 P.2d 854; Traders & General Ins. Co. v. Pac. Emp. Ins. Co., supra, 130 Cal.App.2d at page 163, 278 P.2d at page 497; Johnson v. Barreiro, supra, 59 Cal.App.2d at page 216, 138 P.2d at page 748; Rosenthal v. Harris Motor Co., supra, 118 Cal.App.2d at page 406, 257 P.2d at page 1036; Rainey v. Ross, supra, 106 Cal.App.2d at page 288, 235 P.2d at page 47. But those cases make no holding such as that sought by appellant herein. The reference to the relation of time of accident to activity of the vendor seems in each instance to be but an allusion to the facts existing in the particular case. The language of the statute and the principles established by the above-cited authorities do not permit of a holding that action taken by the vendor before the event of an accident is the equivalent of compliance with the specific terms of the statute. Failure of a dealer who makes a conditional sale to give the required notice "not later than the end of the next business day of the dealer" or to present to the Department appropriate documents for re-registration precludes him from having the advantage of exemption from owner's liability which compliance would have afforded him.

The judgment is affirmed as to defendant Nance Chevrolet Company and is reversed with respect to defendant Pierce with instructions to enter judgment in his favor.

FOX, P. J., and HERNDON, J., concur.

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169 Cal.App.2d 620

Ralph MONTY, Plaintiff and Appellant,
v.
Marino ORLANDI, individually and doing business under the firm name of Marino's Club, and John Collie, Defendants,

Marino Orlandi, individually and doing business under the firm name of Marino's Club, Respondent.
Civ. 9513.

District Court of Appeal, Third District, California.
April 14, 1959.

Action to recover for injuries sustained by customer when struck by defendant bartender who was in the employ of defendant bar owner. The Superior Court, Humboldt County, D. H. Wilkinson, J., entered judgment for plaintiff against bartender, but in favor of bar owner and customer appealed. The District Court of Appeal, Schottky, J., held that evidence presented questions for the jury as to whether assault upon customer was a personal altercation between customer and bartender, and not concerned with the maintenance of order in the bar, and as to whether bar owner was negligent in employing bartender on theory he had reason to know that because of his qualities he was likely to harm others in view of the work entrusted to him.

Judgment affirmed.

1. Master and Servant 🔑332(1, 2)

In action to recover for injuries sustained by customer when struck by defendant bartender who was in the employ of defendant bar owner, evidence presented questions for the jury as to whether assault upon customer was a personal altercation between customer and bartender, and not concerned with maintenance of order in the bar, and as to whether bar owner was negligent in employing bartender on theory he had reason to know that because of his qualities he was likely to harm others in view of the work entrusted to him.

2. Master and Servant ⚷332(2)

Where, in action by customer of a bar for injuries sustained when struck by a bartender, there was testimony that bartender ordered his common-law wife, who was sitting on a stool at the bar, to go home, which she refused to do, that bartender grabbed her and started to eject her from the barroom, that customer got off the stool on which he was sitting, walked toward bartender and said "that's an awful way to treat a woman," whereupon he was struck by bartender, an inference was created by such testimony that bartender's ejection of his common-law wife was a personal matter not concerned with maintenance of order in the bar, and therefore a question was presented for the jury as to whether assault on customer resulted from a personal matter or from bartender's efforts to maintain order in the bar.

3. Master and Servant ⚷332(1)

Where manager of a bar testified he observed bartender over a long period of time and there was nothing in his demeanor to indicate that he was pugnacious, question of whether due care was exercised by bar owner in the selection of bartender who assaulted a customer who brought an action against bartender and bar owner for injuries received, was for the jury.

4. Negligence ⚷32(1)

Relationship between a bar owner and a customer is not such that the bar owner has a duty to protect the customer that may not be delegated.

5. Trial ⚷295(5)

In action to recover for injuries sustained by customer when struck by bartender who was in the employ of defendant bar owner, instructions on bar owner's liability for negligence in employing a person whom he should have known was likely to commit an assault on persons entering the place of business, and on question of whether assault by bartender was done as a part of a transaction of bar owner's business, or was a personal matter, and instructions on bar owner's liability if assault on customer was done as part of transaction of bar owner's business, rather than as a personal matter, on the whole, properly presented issues to be resolved by the jury, even though, some of the instructions, individually, might not have been correct.

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Robert F. Appel, Crescent City, for appellant.

Keith, Creede & Sedgwick by Frank J. Creede, San Francisco, for respondents

SCHOTTKY, Justice.

Plaintiff Ralph Monty commenced an action against the above-named defendants to recover for injuries sustained when plaintiff was struck by defendant John Collie, who was a bartender in the employ of defendant Marino Orlandi.

It appears from the record that on the evening of October 16, 1955, Monty entered Marino's Club in Arcata, California, in the company of a friend. They sat at the bar and had a few drinks. Two ladies were also sitting at the bar. About 9:30 p. m. the bartender, Collie, came out from behind the bar, grabbed one of the ladies, his common-law wife, twisted her arm and started to eject her from the bar. Monty said, "that's an awful way to treat a woman." The bartender released the lady and swung around and hit Monty on the jaw. Monty fell to the floor and after he got up he asked the bartender what the idea was. The bartender replied that he was running the bar and that he would run it to suit himself. He also said he would break the other side of Monty's jaw, and he did.

Collie had been employed by Duane Godden, who was the manager of the bar. Godden had known Collie about four months prior to the time that he had employed him. During this period he had observed him while he was a patron in the bar and there was nothing in his demeanor to indicate that Collie was pugnacious. In contrast, however, there is testimony in the record that Collie was hot tempered and that several months before he had gotten into an altercation in the club.

Marino Orlandi testified that one of the duties of the bartender was to keep things quiet in the bar.

Collie's "wife," Doy, who was being ejected at the time Monty was injured, said that prior to the incident Collie had told her several times that she had had enough to drink and to go home. She also testified that the matter was personal between the two of them.

Monty's jaw was broken in three places as a result of the blows on it. He brought this action against Collie and Marino Orlandi. Collie did not answer, and the jury was instructed to bring a verdict against Collie. The jury awarded compensation in the sum of $4,800 general damages and $10,000 punitive damages against Collie. The jury brought in a verdict in favor of Orlandi, and Monty has appealed from the judgment in Orlandi's favor.

Appellant contends that the court erred in not directing a verdict against the owner of the bar, defendant Orlandi. Appellant contends also that the court erred in giving certain instructions and in refusing to give certain instructions offered by appellant.

As stated in Carr v. Wm. C. Crowell Co., 28 Cal.2d 652, at page 654, 171 P.2d 5, at page 6:

> "It is settled that an employer is liable for wilful and malicious torts of his employee committed in the scope of the employment. [Citing cases.] * * *
>
> "Defendant contends that Enloe was not acting in the scope of his employment when he injured plaintiff, on the grounds that the throwing of the hammer did not further defendant's interests as an employer and that Enloe could not have intended by his conduct to further such interests. It is sufficient, however, if the injury resulted from a dispute arising out of the employment. Under the provisions of section 2338 of the Civil Code a principal is liable for 'wrongful acts' of his agent committed 'in and as a part of' the principal's business. 'It is not necessary that the assault should have been made "as a means, or for the purpose of performing the work he (the employee) was employed to do."' [Citing cases.] In Stansell v. Safeway Stores, supra, 44 Cal.App.2d 822, 113 P.2d 264, one of defendant's grocery store managers was held to be acting in the scope of his employment when he quarreled with a customer over an order, and after an exchange of opprobrious names, ran after and injured her. In Hiroshima v. Pacific Gas & Electric Co., supra, 18 Cal.App.2d 24, 63 P.2d 340, it was held that the defendant's employee, whose duties were to collect power bills, was acting in the scope of his employment when he struck a customer in the course of a dispute as to whether the customer had received a notice that his electric service would be discontinued if he did not pay his bill.
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> "The employer's responsibility for the tortious conduct of his employee 'extends far beyond his actual or possible control over the conduct of the servant. It rests on the broader ground that every man who prefers to manage his affairs through others remains bound to so manage them that third persons are not injured by any breach of legal duty on the part of such others' while acting in the scope of their employment. [Citing cases.] * * *
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> * * * * * *
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> "If an employee inflicts an injury out of personal malice, not engendered by the employment, the employer is not liable. [Citing cases.] * * *"

[1, 2] In the instant case there was testimony that Collie, the bartender, had told Doy, his common-law wife, who was sitting on a stool at the bar, that she had had enough to drink and ordered her to go home, which she refused to do; that Collie then came from behind the bar, grabbed Doy and started to eject her from the barroom; that appellant got off the stool on

which he was sitting at the bar and walked toward Collie and said, "that's an awful way to treat a woman," whereupon he was struck by Collie. From this testimony an inference could be drawn that Collie's ejection of Doy was a personal matter and was not concerned with the maintenance of order in the bar. The assault upon appellant resulted from this incident. Under such circumstances the question was properly left to the jury since the assault may not have been in the course of Collie's employment, for as stated in Fields v. Sanders, 29 Cal.2d 834, at page 839, 180 P.2d 684, at page 688, 172 A.L.R. 525: "* * * Of course, where the agent, for however brief a space of time, has ceased to serve his principal, he alone is responsible for his acts during the period of such cessation."

We do not agree with appellant's contention that it was error to refuse to direct a verdict against Orlandi on the theory that he was reckless or negligent in hiring Collie. The rule is stated in Restatement of the Law, Second, Agency 2d, sec. 213, that "A person conducting an activity through servants * * * is subject to liability for harm resulting from his conduct if he is negligent or reckless: * * * (b) in the employment of improper persons * * * involving risk of harm to others: * * *"

Comment d. reads in part:

> "The principal may be negligent because he has reason to know that the servant * * *, because of his qualities, is likely to harm others in view of the work * * * entrusted to him * * *
>
> "* * * An agent, although otherwise competent, may be incompetent because of his reckless or vicious disposition, and if a principal, without exercising due care in selection, employs a vicious person to do an act which necessarily brings him in contact with others while in the performance of a duty, he is subject to liability for harm caused by the vicious propensity. * * *" See, also, Rahmel v. Lehndorff, 142 Cal. 681, 76 P. 659, 65 L.R.A. 88.

[3] In the instant case Orlandi's manager testified that he had observed Collie over a period of time and that there was nothing in his demeanor to indicate that he was pugnacious. In view of this testimony the question of due care in the selection of the employee Collie was properly left to the jury.

[4] Unless this court can say that the relationship between the respondent bar-owner and the appellant patron is such that the bar-owner has a duty to protect the patron that he may not delegate, the question whether or not the employee was acting within the scope of his employment was germane. Harper & James, The Law of Torts, Vol. 2, p. 1391. California holds that no such duty exists between a bar-owner and a patron. Rahmel v. Lehndorff, supra; Kingen v. Weyant, 148 Cal.App.2d 656, 307 P.2d 369; see, also, Annotation 34 A.L.R.2d 376.

Appellant contends that the court erred in giving the following instruction:

> "If you should find from the evidence that the duties of the bartender, John Collie, include not only the serving of customers but also the maintaining of order in the bar room under his control, then the bar owner can be held liable for his employee's assault upon a customer though the employer has instructed the employee against the use of force and the bartender violated the order in so doing."

[5] Appellant argues that this instruction was erroneous because it placed the burden on appellant of proving that a bartender in sole charge of a bar is also required to keep the peace. While the issue might well have been withdrawn from the jury since Orlandi testified that Collie's duties included keeping things quiet in the bar, we do not believe that the instruction was erroneous. The burden was upon appellant to show that at the time he suffered the injuries the relationship of master and servant existed and that the wrongful act

was within the scope of the servant's employment. Tarasco v. Moyers, 81 Cal.App. 2d 804, 810, 185 P.2d 86. Further, as respondent points out, the instruction was not concerned with the burden of proof, but told the jury that Orlandi could be held liable even if the act was done contrary to the specific orders of Orlandi.

Appellant next challenges the following instruction:

> "If you find that the defendant, Marino Orlandi, failed to exercise the judgment of an ordinarily prudent man in hiring the defendant, John Collie, and provided you have determined that John Collie was a man of known vicious propensities, which an ordinarily prudent man would have discovered, then plaintiff, Ralph Monty, is entitled to judgment against defendant, Marino Orlandi, for all of the damages proximately caused by defendant, John Collie."

While this instruction would be erroneous and likely to mislead the jury if it were the only instruction given on this phase of the case, yet when all of the instructions are considered as a whole, as we are required to do, we do not believe that it can be held to be prejudicially erroneous. For the court had already instructed the jury as follows:

> "You are instructed that there is no evidence in this case which would tend to show that the plaintiff, Ralph Monty, was either negligent, or conducted himself in a wilful, wrongful, or unlawful manner, so as to provoke the assault and battery committed upon him by the defendant, John Collie, and you are therefore instructed that in determining the issues in this case, the evidence clearly shows that the defendant, John Collie, without just cause, committed an assault and battery upon the plaintiff, Ralph Monty."
>
> "You are instructed that the issues to be decided by you in determining the liability or non-liability of the defendant, Marino Orlandi, are as follows:
>
> "Was the assault and battery committed by John Collie, done in and as a part of the transaction of the business owned by Marino Orlandi?
>
> "If you should resolve this issue in the affirmative, then, you will render your verdict in favor of the plaintiff, and against the defendant, Marino Orlandi, and assess damages in accordance with these instructions.
>
> "If you should resolve this issue in the negative, you then have a further issue to determine, namely, did the defendant Marino Orlandi, through negligence, employ a person of objectionable characteristics, temperament, or propensity, rendering him liable to assault such persons that may enter his place of business?"

Appellant also contends that the court erred in giving the following instruction:

> "If you find from the evidence that defendant Marino Orlandi was in the exercise of ordinary care immediately prior to and at the time of the accident, then I instruct you that he had the right in the absence of reasonable ground indicating otherwise to assume that John Collie would exercise ordinary care and caution and would not engage in any unlawful assault and battery upon a patron of the Club."

While this instruction likewise might tend to mislead and confuse the jury if it were the only instruction dealing with this phase of the case, yet, when all of the other instructions given by the court are considered as a whole, we do not believe that it can be held to be prejudicially erroneous.

We are satisfied from a careful study of all of the instructions that, taking the instructions as a whole, the jury was fully and correctly instructed. While the jury might well have returned a verdict in favor of appellant, we cannot say that the verdict in favor of respondent Orlandi is without support in the record. The jury was told clearly that if the assault upon appellant by Collie was done as part of the transaction of Orlandi's business their verdict should be in favor of appellant. The jury was told also that if Orlandi through negligence employed a person whom he should have known was likely to commit an assault on persons entering the place of business, they should render a verdict in favor of appellant and against Orlandi. Under such circumstances we can only conclude that the jury determined that the assault upon appellant was a personal altercation between appellant and Collie, that it was not in the course of Collie's employment by Orlandi, and also that Orlandi was not negligent in employing Collie. These were issues of fact to be determined by the jury and their determination of said issues upon conflicting evidence is binding upon us.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

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169 Cal.App.2d 673

UNITED STATES CREDIT BUREAU, INC., a corporation, Plaintiff and Respondent,

v.

Mary DIGORAS, also known as Mary Digouras, also known as Mary Untrecht, also known as Mary Holstein, Defendant and Appellant.

Civ. 23429.

District Court of Appeal, Second District, Division 3, California.

April 17, 1959.

Proceeding on bankrupt's motion for order directing cancellation and discharge of judgment. The Superior Court, Los Angeles County, John F. Aiso, J., entered order denying the motion, and the defendant appealed. The District Court of Appeal, Parker Wood, J., held that where there was a specific finding that judgment debtor willfully withheld personal property and there was no finding that judgment debtor willfully withheld real property or rent and it could not be determined from the judgment, nor from the stipulation as to amount of judgment nor from the record, how much of the $6,000 judgment related to real property and how much of it related to personal property, the judgment creditor had not carried its burden to show that the judgment or a specified part of it was not dischargeable in bankruptcy, and consequently the judgment debtor, who had received a discharge in bankruptcy, was entitled to have all of the judgment cancelled under the Bankruptcy Act provision that discharge in bankruptcy releases a bankrupt from all of his provable debts except such as are liabilities for willful and malicious injuries to the property of another.

Order reversed with direction.

1. Bankruptcy 🔑433(7), 436(3)

Where there was a specific finding that judgment debtor willfully withheld personal property and there was no finding that judgment debtor willfully withheld real property or rent and it could not be determined from the judgment, nor from the stipulation as to amount of judgment nor from the record, how much of the $6,000 judgment related to real property and how much of it related to personal property, the judgment creditor had not carried its burden to show that the judgment or a specified part of it was not dischargeable in bankruptcy, and consequently the judgment debtor, who had received a discharge in bankruptcy, was entitled to have all of the judgment cancelled under the Bankruptcy Act provision that discharge in bankruptcy releases a bankrupt from all of his provable debts except such as are liabilities for willful and malicious injuries to the property of another. Bankr.Act, § 17, 11 U.S.C.A. § 35; West's Ann.Code Civ.Proc. § 675b.

2. Bankruptcy 🔑436(1)

In proceeding on bankrupt's motion for order directing cancellation and discharge of judgment, the judgment creditor had the burden to show that the judgment or a specified part of it was not dischargeable in bankruptcy. Bankr.Act, § 17, 11 U.S.C.A. § 35.

J. B. Mandel, Los Angeles, for appellant.

Hayes, Bletz & Lawson, and S. Oliver Bletz, Los Angeles, for respondent.

PARKER WOOD, Justice.

In 1946, Betty Viner, Business Women's Association, and Western States University obtained a judgment for $6,000 against Mary Untrecht, who is now known as Mary Digoras and is the defendant herein. In 1951, the plaintiff herein, United States Credit Bureau, Inc., to which the judgment had been assigned, obtained a new judgment, based on the 1946 judgment. In 1955, defendant received a discharge in bankruptcy. The plaintiff herein, Credit Bureau, was listed as a creditor in the bankruptcy proceeding. In 1958, defendant made a motion in the superior court, under section 675b of the Code of Civil Procedure, for an order directing the cancellation and discharge of the 1951 judgment. The motion was denied.

Defendant appeals from the order denying the motion.

Section 17 of the Bankruptcy Act (11 U.S.C.A. § 35) provides, in part: "(a) A discharge in bankruptcy shall release a bankrupt from all of his provable debts * * * except such as * * * (2) are liabilities * * * for willful and malicious injuries to the * * * property of another."

[1] The question herein is whether the 1946 judgment was based upon a willful and malicious injury to the property of the persons who were plaintiffs in the original action. If the 1946 judgment was based upon such an injury, the 1951 judgment was not dischargeable in bankruptcy. See Wilson v. Walters, 19 Cal.2d 111, 121, 119 P.2d 340.

In 1942, Betty Viner, Business Women's Association, and Western States University commenced an action against Mary Untrecht (who is now known as Mary Digoras and is the defendant herein) to obtain a judgment that defendant held certain real property as trustee, to recover possession of certain personal property, and to recover punitive damages for withholding the personal property.

Some of the findings therein were, in effect, as follows: In 1940 Mary agreed to lend money, not exceeding $1,500, to the association to be used in paying part of the $6,300 purchase price of a house and lot; the association agreed to provide a room in the house for Mary until the loan was repaid, and agreed that she might attend the university without charge; it was also agreed that, as security for the loan, title to the property would be vested in Mary until the loan was repaid; Mary paid $715 as the down payment for the property; title to the property was conveyed to Mary; Betty Viner was president of the association and was secretary of the university; after Mary acquired title to the property, Viner moved certain furniture into the house; thereafter the university conducted classes in the house, and Mary attended classes; Viner, the association, the university, Mary and other members of the association occupied the property about one and one-half years; during that time Viner and Mary made payments for improvements, taxes, and installments on the purchase price; the total amount paid by Mary, including the down payment, was $1,679.62; after the property had been so occupied about one and one-half years, Mary notified Viner, the association, and the university to the effect that she cancelled any agreement she had made with them, and that she was the owner of the real property; thereafter Mary occupied the house and collected room rent from other persons residing there; she claimed a lodging-house keeper's lien for $3,142 upon certain personal property which was owned by Viner and the university (the property owned by Viner was house furniture and furnishings—the property owned by the university was office desks, chairs, and bookkeeping machines, etc.); she claimed ownership of certain other personal property (house furniture and furnishings) which they owned. Viner and the university demanded that Mary release the personal property but she refused to comply with the demand.

In that action (commenced in 1942) the court also found that Mary held title to the real property as trustee for the association; she had a lien on the real property for money advanced to Viner, the association, and the university; the association was entitled to possession of the real property; Mary had no lien upon or interest in the personal property, and she withheld the personal property from the university and Viner; the withholding of the personal property from the university "was willful and without just or any cause therefor and was done for the purpose of harassing" the university; the withholding of the personal property from Viner "was willful and wholly without right and was done for the purpose of harassing" Viner; the university and Viner were entitled to punitive damages of $500 each for such withholding; the university and Viner had incurred attorneys' fees of $500 each for legal services in securing a return of the personal property; Mary should account to the association for the rent received by her from the real property from July 4, 1942, until the association receives possession of the property. The findings also include a statement to the effect that it is necessary that an interlocutory judgment be made restoring to plaintiffs their possession of said properties, in order that a final accounting may be made of such sums as the plaintiffs may be entitled to receive, by reason of the acts of defendant, at the time when such possession is had; and upon the plaintiffs taking possession of said properties they shall forthwith charge the defendant with the value of the use and occupancy of the real property and the value of the personal property which may have been withheld by defendant; that after the entry of the interlocutory judgment, any party to the action may move the court to make its final judgment "in accordance with the foregoing."

On July 7, 1943, an interlocutory judgment was entered in that action. That judgment provided that the association was the owner and was entitled to the possession of the real property; Mary had no interest in the real property, except a claim of lien thereon in the amount of $1,679.62 for money loaned to the association for part of purchase price, taxes, and improvements; the association was entitled to a setoff of $623.55 (net amount of rentals collected by Mary) against said lien; the university and Viner were the owners and were entitled to the possession of certain personal property; Viner and the university shall have judgment for $500 each for attorneys' fees incurred in recovering possession of the personal property; Mary should account for the personal property; after she "shall account" for the personal property, a hearing should be had to charge her "for any of said personal property not made available to plaintiff," and judgment should be "rendered also for the value of such of said property" as may be damaged or not produced by Mary; the association was entitled to a deed from Mary conveying the title of the real property to the association upon the payment to Mary of any amounts due to her from the association, after the application of any setoff.

As above stated, there was a finding that the university and Viner should recover punitive damages of $500 each. It is to be noted, however, that in the judgment there was no award of punitive damages. Also there were findings that Mary should account for the use and occupancy of the real property and should account for the personal property (furniture, etc.). It is to be noted that the only provision in the judgment regarding an accounting was that she should account for the *personal* property.

Mary Untrecht, defendant in that case, appealed from the interlocutory judgment. On that appeal the judgment was modified by striking out the provision awarding attorneys' fees. Viner v. Untrecht, 26 Cal.

2d 261, 158 P.2d 3. The plaintiffs (respondents) in that case asserted on appeal (26 Cal.2d at page 272, 158 P.2d 3) that the findings concerning attorneys' fees should be interpreted as referring to punitive damages. The court therein said (26 Cal.2d at page 272, 158 P.2d at page 8): "The court * * * did not award punitive damages, rather it found that plaintiffs had incurred attorney's fees in the sum of $1,000 in pursuit of the property and awarded that amount." As above indicated, the award of attorneys' fees was stricken out and the judgment, as so modified, was affirmed.

On May 6, 1946, after the remittitur in that action had been filed in the trial court, the plaintiffs obtained an order that Mary show cause why she "should not render an accounting, turn over all the personal property referred to in the judgment heretofore rendered, and for the execution of a deed to the Business Women's Association in accordance with the terms of the judgment." A hearing was held on the order to show cause, and on June 17, 1946, a minute order was entered which provided: "As per stipulation by both sides, the Court makes the following order: Final judgment is for the plaintiffs and against the defendant in the sum of $6,000.00. Findings are waived."

The final judgment, entered on August 21, 1946, provided: "The * * * action came on for hearing on Order to Show Cause re Accounting * * *. Findings of Fact and Conclusions of Law being waived, the Court orders, adjudges and decrees: 1. Final judgment is for the plaintiffs and against the defendant in the sum of Six Thousand ($6,000.00) Dollars."

The stipulation, upon which the 1946 judgment was based, that is, the stipulation as to the amount for which judgment should be rendered upon the accounting, did not state what part of the $6,000, if any, represented the accounting for the personal property, or what part thereof, if any, represented the accounting for the use and occupancy of, or the rents from, the real property. It cannot be determined from the judgment whether the $6,000 represented an accounting in connection with the personal property or the real property, or whether a part of the $6,000 related to the personal property and a part of it related to the real property. As above stated, there was a finding that the withholding of the *personal* property by defendant Mary was willful and without just cause and was for the purpose of harassing the university and Viner. There was no finding that she withheld the real property in such manner, but there was a finding that she should account for the use and occupancy of, and rents from, the real property. The interlocutory judgment included a provision that she should account for the personal property which she withheld, but it did not include a provision that she should account with respect to the real property. In attempting to determine, however, whether the $6,000, set forth in the final judgment, related solely to an accounting in connection with the personal property or whether it also related to an accounting in connection with the real property, consideration should be given to the finding that Mary should account for the value of the use and occupancy of, and rents from, the real property. That finding would indicate that the final judgment, which purportedly was made pursuant to the findings and interlocutory judgment, would include an accounting with respect to the real property. Also, in attempting to determine what accounting or accountings were represented by the $6,000, consideration should be given to a finding that the value of the personal property was $3,500. It is apparent, from that finding, that the $6,000 was not intended to represent the amount which Mary should pay in accounting for personal property of the value of $3,500. It thus appears that the $6,000 related to an accounting with respect to both personal and real property.

As above stated, the finding with respect to willfully withholding property stated specifically that it was personal property that was so withheld. It is to be noted that there was no finding that the real property or the rent was willfully withheld;

but, on the contrary, there was a finding that Mary had a lien on the real property for money advanced by her for the down payment, other installments, taxes, and improvements. The factual background of the real property transaction indicates that it was Mary's money that constituted the principal investment in the real property; that more than a year had elapsed from the time she made the down payment, and no reimbursement had been made for money advanced by her; and a controversy existed as to whether she was the owner or the trustee of the real property. Under such circumstances it might well be that the judge (at the trial in 1943) considered that, from Mary's viewpoint of the existing controversy, there was at least color of right or authority, on her part, in taking possession of the real property, and for that reason the judge did not find that she withheld the real property willfully and without just cause.

The specific finding that the personal property was willfully withheld, and the absence of a finding that the real property or rent was willfully withheld, the finding that Mary had a lien on the real property, and the factual background of the real property transaction indicate that the part of the $6,000 which represented an accounting with respect to the *real property* was not based upon a willful and malicious injury to property.

[2] It appearing that a part of the $6,000 judgment represented an accounting with respect to real property, and that the part thereof relating to real property was not based upon a willful and malicious injury to property (as referred to in section 17 of the Bankruptcy Act), the question arises as to how much of the $6,000 related to real property and therefore was dischargeable in bankruptcy. In Tudryck v. Mutch, 320 Mich. 86, 30 N.W.2d 512, 517, the question was whether a judgment was based upon willful and malicious injuries to property, within the meaning of section 17 of the Bankruptcy Act. In that case the defendant, without plaintiff's knowledge or consent, occupied and used plaintiff's farm, and rented the farmhouse to others and kept the rent. It was said therein that it was necessary to separately consider the items comprising the judgment, for the reason that some of the items might have been based upon willful and malicious acts and other items might not have been based upon such acts. In that case it could be determined from the record that some of the items were based on willful and malicious injuries to property. It was held therein that the portions of the judgment which were based on such injuries were not dischargeable in bankruptcy; and that other portions of the judgment which were not based on such injuries were dischargeable in bankruptcy. With reference to the rent which defendant therein had collected, it was said that under the circumstances of that case the plaintiff's claim for rent "was not based on injury to the property but rather on the right to be paid the reasonable value of the use thereof," and that the amount of the rent was "not included in the judgment on any possible theory that plaintiff's property had been damaged by the use for which recovery of the rental was sought," and that the part of the judgment for rent "not being for 'wilful and malicious injuries' to plaintiff's property," was dischargeable in bankruptcy. In the present case, as above stated, it cannot be determined from the judgment, nor from the stipulation as to the amount of the judgment, nor from the record, how much of the $6,000 (amount of the judgment) relates to real property or how much of it relates to personal property. A certified copy of appellant's discharge in bankruptcy having been filed in support of her motion to cancel the judgment, the burden was upon respondent (Credit Bureau) to show that the judgment or a specified part of it was not dischargeable in bankruptcy. See Morris v. Drubin, 165 Cal.App.2d 467, 332 P.2d 371. Respondent has not sustained that burden.

The order denying the motion to cancel the judgment is reversed, and the superior court is directed to make an order granting the motion.

SHINN, P. J., and VALLÉE, J., concur.

169 Cal.App.2d 617

The PEOPLE of the State of California, Plaintiff and Respondent,
v.
James E. CLIFTON, Defendant and Appellant.
Cr. 6469.

District Court of Appeal, Second District, Division 3, California.
April 14, 1959.

Prosecution for possession of marijuana. From adverse judgment of the Superior Court, Los Angeles County, Albert E. Wheatcroft, J., the defendant appealed. The District Court of Appeal, Vallée, J., held that where police officer approached defendant at night and detected a strong odor of marijuana about his person and officer examined defendant's eyes with his consent and found that the pupils were dilated and failed to react to light, officer had reasonable cause to believe defendant had committed a public offense in his presence, and search and seizure of defendant's person without his consent resulting in the finding of three marijuana cigarettes was not unreasonable, and testimony of the officer and cigarettes themselves were properly admitted in prosecution for possession of marijuana.

Affirmed.

1. Criminal Law 🔑394.4(13)
Searches and Seizures 🔑7(20)

Where police officer approached defendant at night and detected a strong odor of marijuana about his person and officer examined defendant's eyes with his consent and found that pupils were dilated and failed to react to light, officer had reasonable cause to believe defendant had committed a public offense in his presence, and search and seizure of defendant's person without his consent resulting in finding of three marijuana cigarettes was not unreasonable, and testimony of officer and cigarettes themselves were properly admitted in prosecution for possession of marijuana. West's Ann.Health & Safety Code, § 11500.

2. Searches and Seizures 🔑7(10)

A search without a warrant is not unreasonable if officer has reasonable cause to believe that a person is carrying contraband.

3. Searches and Seizures 🔑7(10)

Reasonable cause for a search without a warrant is a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true.

4. Arrest 🔑63(3)

There is nothing unreasonable in an officer's questioning person outdoors at night, and an officer may use his sense of smell to afford him knowledge that an offense is being committed in his presence.

◆

Robert L. Gardner, Van Nuys, under appointment by the District Court of Appeal, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Ernest E. Sanchez, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

The court, sitting without a jury, found defendant guilty of possessing marijuana. Health & Saf. Code, § 11500. He appeals from the judgment sentencing him to state prison.

[1] On April 1, 1958 about 7:45 p. m. Officer Wiseman of the Los Angeles Police

Department and his partner observed defendant in a doorway at 416 East Fifth Street, Los Angeles. Wiseman had arrested defendant in 1957 for possession of marijuana and defendant had been acquitted of that charge. When Wiseman and his partner saw defendant on April 1, 1958, Wiseman approached defendant and detected a strong odor of marijuana about his person. Wiseman said to defendant, "You have been blasting a little tea." Defendant said, "No, I haven't. I gave that up. I have a job now." Wiseman told defendant he was going to look in his eyes. Defendant nodded and made no comment. Wiseman examined defendant's eyes with his flashlight and found they were dilated and failed to react to light. Wiseman had worked on the narcotics squad about two years. He formed the opinion that defendant had been smoking marijuana. Wiseman reached inside defendant's coat pocket and removed a small cellophane package containing three marijuana cigarettes. Defendant did not give Wiseman permission to search him.

As Wiseman removed the package from defendant's pocket, defendant lunged toward him in an attempt to grab the cigarettes out of his hand. A scuffle followed. Defendant was handcuffed, arrested, and taken to the police station. Defendant told Wiseman he had found four cigarettes in the street and had smoked one just before seeing the officers; he was not trying to run away; he was just trying to grab the cigarettes to get rid of them.

The officers had neither a search warrant nor a warrant for defendant's arrest.

Defendant moved to strike the testimony of Officer Wiseman on the ground the search and seizure were unreasonable. The motion was denied. Defendant objected to the reception in evidence of the three marijuana cigarettes on the same ground. The objection was overruled.

Defendant's sole contention is that the search and seizure were unreasonable and that the court erred in denying his motion to strike the testimony of Officer Wiseman and in overruling his objection to the reception of the cigarettes in evidence.

[2-4] A search without a warrant is not unreasonable if the officer has reasonable cause to believe a person is carrying contraband. People v. Gale, 46 Cal.2d 253, 255, 294 P.2d 13. Reasonable cause is a suspicion founded on circumstances sufficiently strong to warrant a reasonable man in the belief that the charge is true. People v. Brite, 9 Cal.2d 666, 687, 72 P.2d 122. There is nothing unreasonable in an officer's questioning a person outdoors at night. People v. Simon, 45 Cal.2d 645, 650, 290 P.2d 531. An officer may use his sense of smell to afford him knowledge that an offense is being committed in his presence. People v. Cahill, 163 Cal.App.2d 15, 328 P.2d 995. Mr. Justice Dooling, in People v. Bock Leung Chew, 142 Cal.App.2d 400, at page 403, 298 P.2d 118, at page 120, wrote:

> "The weight of authority, with which we are in agreement, is with the view that the offense is committed in the presence of an officer 'when the officer receives knowledge of the commission of an offense in his presence through any of his senses', 6 C.J.S. Arrest § 5, p. 581, and this includes the sense of smell. See cases collected in note 52, 6 C.J.S., p. 582. The crime of possession of a narcotic does not require the immediate presence of the defendant so long as he has 'knowledge of the presence of the object as embraced within the concept of "physical control with the intent to exercise such control," which constitutes the "possession" denounced by the statute.' [Citation.] Thus, if respondent, as he later admitted, had physical control of the yen shee with knowledge of its *narcotic* character, the crime of possession was being committed in the presence of the officers although respondent was not there at the time. Respondent's arrest, in view of his absence from the apartment, was made with reasonable promptness thereafter.

> The search is not unlawful because it precedes rather than follows the arrest. [Citation.]"

The officer approached defendant at night, detected a strong odor of marijuana about his person, examined his eyes with his consent, and found that the pupils were dilated and failed to react to light. The officer had reasonable cause to believe that defendant had committed a public offense in his presence, and the search and seizure were not unreasonable. The court did not err in denying the motion to strike the testimony of Officer Wiseman or in overruling the objection to the reception of the marijuana cigarettes in evidence.

Affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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169 Cal.App.2d 524

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert David WHEARTY and Joseph Keith Dawson, Defendants and Appellants.

Cr. 6418.

District Court of Appeal, Second District, Division 1, California.

April 10, 1959.

Defendants were convicted of assault by means of force likely to produce great bodily injury. The Superior Court, Los Angeles County, Walter R. Evans, J., rendered judgment and defendants appealed from judgment of conviction and from "probation and sentence." The District Court of Appeal, White, P. J., held that where automobile owner had authorized tow truck driver to take possession of vehicle and to tow it to owner's home and owner had agreed to pay cash for that service, driver had legal possession of automobile and, even if he were wrong in refusing to relinquish possession of automobile until he was paid the fee in cash, owner had no right to invoke force to regain possession and resort by owner and another to such means, rather than legal proceedings, amounted to an assault upon driver, and that attempted appeals from probation and sentence would be dismissed.

Attempted appeals from probation and sentence dismissed, judgments of conviction affirmed.

1. Criminal Law 🔑1023(12)

Under statute to effect that appeal may be taken by defendant from final judgment of conviction and that order granting probation shall be deemed to be a final judgment, attempted appeal from order denying probation would be dismissed. West's Ann.Pen.Code, § 1237.

2. Criminal Law 🔑1131(2)

Where defendants appealed both from final judgment of conviction and probation and sentence, appeal from probation and sentence would be dismissed and appeal would be considered as being from final judgment of conviction. West's Ann.Pen. Code, § 1237.

3. Assault and Battery 🔑48

Right to use force, and particularly force against person of another, is limited by condition that force must be no more than is reasonably adequate and necessary to the occasion and question of what constitutes reasonable force is for trier of fact. West's Ann.Pen.Code, § 245.

4. Assault and Battery 🔑92

In prosecution for assault by means of force likely to produce great bodily injury, evidence sustained finding that unreasonable and unnecessary force was used by defendants. West's Ann.Pen.Code, § 245.

5. Criminal Law 🔑260(11)

Where record amply supports conclusion of fact arrived at by trial court, that conclusion may not be disturbed on appeal.

6. Assault and Battery ⚷48

Where automobile owner authorized tow truck driver to take possession of automobile and tow it to owner's home and owner agreed to pay cash for that service, driver had legal possession of automobile and even if he were wrong in refusing to relinquish possession of automobile until he was paid the agreed service fee in cash, owner had no right to invoke force to regaining possession of vehicle and resort by owner and another to such means, rather than legal proceedings, amounted to an assault upon driver. West's Ann.Pen.Code, § 245.

7. Automobiles ⚷379

Where automobile owner authorized towing service to take possession of his vehicle and tow it to owner's home, service had a lien on towed automobile and owner and another were not entitled to use force to prevent service's employee from retaining possession of automobile until paid. West's Ann.Civ.Code, § 3051.

◆

Morris Lavine, Los Angeles, for appellants.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

WHITE, Presiding Justice.

[1, 2] In an information filed by the District Attorney of Los Angeles County defendants were accused of violating Section 245 of the Penal Code in that on or about February 13, 1958, they committed an assault upon Harold James Schlarman by means of force likely to produce great bodily injury. Trial by jury was duly waived and the cause submitted on the transcript of the testimony adduced at the preliminary examination, with each side reserving the right to offer additional evidence. No additional testimony was offered, and after reading and considering the aforesaid transcript, the court adjudged each defendant guilty of simple assault, a lesser and necessarily included offense in that charged. Defendant Whearty was denied probation and sentenced to serve a term of thirty days in the Los Angeles County Jail. Defendant Dawson was sentenced to serve a term of six months in the Los Angeles County Jail. Execution thereof was suspended and conditional probation granted him. From the judgment of conviction and "probation and sentence" each defendant prosecutes this appeal. Since defendant Whearty was denied probation, his attempted appeal from such an order must be dismissed (Penal Code, sec. 1237) and since defendant Dawson appeals both from the final judgment of conviction and "probation and sentence" we shall, in the interest of clarity dismiss his appeal from "probation and sentence", and consider the appeal of both defendants as being from the final judgment of conviction.

Since neither defendant offered any testimony in his own behalf, we consider the following a fair epitome of the factual background surrounding this prosecution. About 2:30 a. m. on the morning of February 13, 1958, John Layman was returning home from work and driving on the Santa Ana Freeway. As he was rounding the off-ramp at Valley View he observed an automobile in a ditch. He stopped to "see if there was anything I could do", when defendant Dawson came out of the ditch and asked the witness if the latter would get him some gasoline. They drove to some service stations, and finally obtained a small can of gasoline at a station in Buena Park. They then drove back to the stalled vehicle and poured gasoline into the tank and the carburetor. When the car did not start, defendant Dawson asked Layman if he would drive the latter and defendant Whearty back to Dawson's house. The three men then drove in Layman's car to Dawson's house. They went inside the house and defendant Dawson said he was going to call a tow truck. He dialed the number of a tow truck company which he knew, and then asked Layman to tell the exact location of the car.

Layman told the manager of the company, Harold Schlarman (the complaining witness), the exact location of the car, that he would meet him at the car, and direct him back to defendant Dawson's house. During the telephone conversation, Mr. Schlarman said he had to have cash when he brought the car. Layman then told defendant Dawson about the cash request, and Dawson said, "That's all right, go ahead and meet him." Though Layman didn't want any money for his services, the defendants wanted to give him some. In order "to avoid any trouble", since there was quite a bit of drinking done by the latter, Layman let them put a five dollar bill "in his pants". Layman then drove down to the stalled car, met Schlarman, who then followed Layman back to defendant Dawson's house. Schlarman parked the tow truck and the stalled car in front of Dawson's house.

Layman went to the door of Dawson's house and told Mrs. Dawson that the tow truck was here, and that defendant Dawson should go out to the car. Dawson told Layman to invite Schlarman into the house for a drink and he would draw a check. Layman hollered this to Schlarman who said he couldn't leave the truck and that taking a check was against the company policy. Defendants Dawson and Whearty, accompanied by Layman, then went out of the house to talk to Schlarman.

At this time defendant Dawson's car was released and the chains from the tow truck were hanging down on the street though the truck and the automobile were bumper to bumper. While discussing the taking of a check, Schlarman said he would have to tow the car back to the yard and that defendant Dawson could come and pick it up when he could pay cash. While the argument was progressing, Schlarman managed to hook the car with the chain, though the defendants were "moving after him". Layman had said to the defendants that they should pay cash, but he never heard Dawson offer to pay in cash. Schlarman had twice previously performed towing services for defendant Dawson, and had received cash each time. After hooking the car, Schlarman went around to the truck and got in it. He rolled the window down a little bit and talked to the defendants. Before he locked the door, the defendants opened the same and dragged him out of the truck, though Schlarman managed to blow the truck horn to attract attention. One of the defendants hit him on the side of the head, and Schlarman went down. Defendant Dawson jumped on top of him and pushed his hand inside Schlarman's mouth and held the back of his head with his other hand. Defendant Whearty grabbed hold of Schlarman's left ear and jacket back and proceeded to bump Schlarman's head on the street. Layman tried to stop the struggle, but was hit in the stomach by defendant Whearty. Layman then hollered to Schlarman to get under the truck while the former went to a neighbor's house for help.

Schlarman then rolled under the truck and while he did this the defendants kicked him about four or five times in various parts of his body. Defendant Dawson then told defendant Whearty to go into the house and get a gun so they could shoot Schlarman. Dawson then went into the house and a few minutes later Whearty also went into the house. About then, the sheriff's car arrived at the house. At no time, according to his testimony, did Schlarman strike or attempt to strike the defendants. Schlarman had never met Layman previous to this date.

Carl E. Wilson, a deputy sheriff assigned to Patrol Division, Norwalk Station, was the arresting officer. When he arrived at defendant Dawson's house he observed that Schlarman's face was covered with blood and several contusions and abrasions about his face. He entered the house to arrest the defendants and noticed that both had been drinking. Deputy Wilson did not observe any cuts, bruises, or any damage whatsoever to either of the accused.

[3] On this appeal it is the contention of appellants that when the victim herein refused to deliver defendant Dawson's automobile to him as the owner thereof, unless cash was paid for the tow service, the former "became, in effect, an embezzler

or thief of the automobile". That thereupon appellants "had the right to use all necessary force to restrain him (the complainant herein)". That therefore, since appellants were only attempting to prevent the complaining witness, Mr. Schlarman, from driving away with the property of appellant Dawson, he, with the aid of appellant Whearty, was entitled to use force in retaking the property and that the evidence is therefore insufficient to sustain the conviction of assault. However, the cases relied upon by appellants stand for the principle that the right to use force, and particularly force against the person of another, is always limited by the condition that the force must be no more than is *reasonably adequate and necessary* to the occasion. And the question of what constitutes reasonable force is a question to be determined by the trier of fact. As was said by the court in Fawkes v. Reynolds, 190 Cal. 204, 212, 213, 211 P. 449, 452:

"The plaintiff's contention that the verdict of the jury is erroneous because of the uncontradicted evidence that defendant used more force than was reasonably necessary cannot be sustained. The question of the amount of force justified in repelling an assault or maintaining the possession of property is one peculiarly within the province of the jury. * * *"

[4, 5] We have set forth above, in more or less detail, the testimony in the instant case and need not here repeat the same. Suffice it to say that the victim testified he did not strike or attempt to strike either appellant, nor was he able to offer any resistance to the attack made upon him. Appellants offered no evidence to show that the assault was made in self defense or that any resistance upon the part of the victim reasonably justified the vicious and brutal assault made upon him by appellants. The record amply supports the conclusion arrived at by the trial court that unreasonable and unnecessary force was used by appellants, and under well established rules, this conclusion may not be disturbed on appeal (People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778).

[6] There remains another ground upon which the judgment herein must be affirmed and that is that the court below could well have concluded that Schlarman (who towed appellant Dawson's automobile) had lawful possession of the same and that appellant Dawson and his aid, appellant Whearty, did not have the right to use force to regain possession, but that appellant Dawson was required to resort to legal proceedings as a remedy. It is without contradiction that appellant Dawson had authorized the victim to take possession of his vehicle and tow it to the former's home, and had agreed to pay in cash for that service. Therefore, Schlarman had legal possession of the automobile and the evidence points unerringly to the fact that he refused to relinquish possession of the vehicle until he was paid the agreed service fee in cash. Though it be assumed that Schlarman was wrong in refusing to relinquish his possession of the automobile, which possession he had legally acquired, appellants had no right to invoke force to regain possession of the vehicle, and their resort to such means, rather than legal proceedings, amounted to an assault upon Schlarman. The rule just enunciated finds support in the case of Rogers v. Kabakoff, 81 Cal.App.2d 487, 490, 491, 184 P.2d 312, 313, which was a civil action for assault and battery. This case involved a situation wherein defendant parked his automobile on the plaintiff's parking lot. He parked the vehicle in such a way that it occupied two spaces, locked it and left it on the parking lot for the entire day. A sign on the lot announced, "Locked cars 50¢". When defendant returned he handed plaintiff 25¢, but the plaintiff demanded $1.00. Defendant then entered his automobile and inserted the key in the ignition. Plaintiff reached into the car and removed the key. Defendant alighted from the car and, after standing for a minute, hit the plaintiff twice in the face. This court, in holding for the plaintiff, said: "Appellant insists that his conduct was not unlawful because respondent made an excessive and unlawful charge for parking the former's automobile, and was unlawfully withholding

his vehicle from him. This argument is unavailing. Appellant bailed his vehicle to respondent for parking purposes and the latter secured possession of it legally. *The fact that appellant was entitled to the right of possession of the automobile did not entitle him to take the same from respondent, who was in the actual rightful possession, by force or violence.* The rule in that regard is thus stated in Deevy v. Tassi, 21 Cal.2d 109, 118, 130 P.2d 389, 395:

> " 'The assumed fact that Mr. and Mrs. Deevy were in default under the terms of the chattel mortgage and that Tassi had a legal right to acquire possession of some or even all of the cattle he attempted to take, does not justify the commission of assault and battery in effecting recaption. Admittedly, the Deevys' possession had been lawfully acquired. The rule is stated by the American Law Institute in Restatement of the Law (Torts, § 108, p. 240) as follows: *"The use of force against another for the purpose of recaption of a chattel, which the other is tortiously withholding from the actor, is not privileged if the other's possession was rightfully acquired."*

The comment, on the same page is: "An invasion of another's interests of personality for the purpose of regaining a chattel, the possession of which the other has rightfully acquired, is not privileged. This is so although the other's right to possession has ceased and he is therefore a wrongdoer in refusing to give the chattel up to the actor, who is entitled to the possession thereof. *Thus, if the actor has bailed his chattel to the other, he is not privileged to use force to retake it, even though the bailment is at an end and the bailee's retention of it is a conversion.*' " (Emphasis added.)

[7] Appellants assert that the victim Schlarman "had no lien on it (the towed automobile)" and therefore appellants were entitled "* * * to use force to prevent him from the continuation of the theft of the automobile * * *". However, Section 3051 of the Civil Code confers a lien in favor of "Every person, who, while lawfully in possession of an article of personal property renders any service to the owner thereof, by labor or skill, employed for the protection, improvement, *safekeeping, or carriage thereof*" (emphasis added), and "may retain possession of the same until the charges are paid". In interpreting this section, the court, in Hessel v. Pickwick Stages System, Inc., 100 Cal.App. 682, 684, 280 P. 1016, 1017, had this to say: "* * * the agreed facts show that the defendant S. N. Thames rendered services *in towing* of the admitted value of $61.50; thereupon his lien became a perfect lien. There is nothing in the Code section (Civil Code, sec. 3051) to the contrary." (Emphasis added.) See also Vehicle Code, sec. 425.

The attempted appeals from "Probation and Sentence" are dismissed. The judgment from which these appeals were taken, is affirmed.

FOURT and LILLIE, JJ., concur.

169 Cal.App.2d 547

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ronald William POND, Defendant and Appellant.

Cr. 1388.

District Court of Appeal, Fourth District, California.

April 10, 1959.

Prosecution for burglary of a house, robbery, and assault with a deadly weapon. From adverse judgment of the Superior Court, San Diego County, John A. Hewicker, J., and from an order denying a new trial, the defendant appealed. The District Court of Appeal, Mussell, J., held that where defendant ordered three men to take out their wallets and throw them on the floor and when one of men refused, defendant seized his wallet and threw it on the floor, and removed contents of each wallet and placed them in his pocket and ordered one of men to sign a traveler's check which he had found in such man's wallet, three separate robberies were committed.

Judgment and order affirmed.

1. Criminal Law ⚷29

Where defendant ordered three men to take out their wallets and throw them on the floor and when one of men refused, defendant seized his wallet and threw it on the floor, and removed contents of each wallet and placed them in his pocket and ordered one of men to sign a traveler's check which he had found in such man's wallet, three separate robberies were committed.

2. Robbery ⚷24(1)

In prosecution for burglary of a house and for robbery of three men therein by defendant, who after entering house and after having obtained wallets from victims, obtained a knife from kitchen sink, evidence sustained finding that defendant was armed. West's Ann.Pen.Code, §§ 211, 211a, 459, 969c.

3. Robbery ⚷27(1)

In prosecution for burglary and robbery of three men committed in a house in which defendant obtained a knife from kitchen sink after he had ordered victims to throw their wallets on floor and had gone through the wallets, it was not mandatory to charge that defendant was armed during commission of burglary and robbery. West's Ann.Pen.Code, §§ 211, 211a, 245, 459, 654, 969c.

4. Assault and Battery ⚷56

Where defendant after taking property of three men by means of force and fear, subsequently placed a knife which he had obtained from kitchen sink against stomach of one of men and threatened him, such subsequent act constituted a separate and distinct act from the robbery and burglary, rendering him subject to prosecution for assault with a deadly weapon. West's Ann.Pen.Code, §§ 211, 459, 654.

◆

Thomas Whelan, San Diego, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Philip C. Griffin, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

In count one of an information appellant was charged with the crime of Burglary (Pen.Code, sec. 459) of a house and building occupied by Jesse A. Hoyt at 419 Church Street, in Chula Vista. In counts two, three and four he was charged with the crime of Robbery (Pen.Code, sec. 211) and it was alleged that on or about February 1, 1958, he did wilfully, unlawfully, feloniously and by means of force and fear and against the will of Jesse A. Hoyt, Fred L. Hoffa and H. A. Dunbar take from the persons, possession and immediate presence of said Jesse A. Hoyt, Fred L. Hoffa and H. A. Dunbar $4, lawful money of the United States of America, the personal property of said Jesse A. Hoyt; $15, lawful money of the United States of America, the personal property of said Fred L. Hoffa; and $78, lawful money of the United States, the personal property of said H. A. Dunbar. In count five he was charged with the crime of Assault With a Deadly Weapon (Pen.Code, sec. 245) and it was alleged that on or about February 1, 1958, he assaulted said Jesse A. Hoyt with a deadly weapon.

Appellant was tried by the court without a jury and he was found guilty on all five counts. The court found the offense charged in the first count to be burglary in the first degree and that appellant was armed, and further found the crimes charged in counts two, three and four to be robbery in the first degree and that appellant was armed at the time of the commission of said crimes. Appellant's motion for a new trial and his application for probation were denied and he was sentenced to the state prison for the term prescribed by law, the sentences to run consecutively with relation to counts two, three and four, and counts one and five to run concurrently with relation to each other and to counts two, three and four. Appellant appeals from the judgment and the order denying his motion for a new trial.

On February 1, 1958, Fred L. Hoffa, his wife, Mary, and their daughter, Helen, were invited to the home of Dorothy and Jesse Hoyt at 419 Church Street in Chula Vista for dinner that evening. They arrived at the Hoyt residence at 6:15 p. m. and parked in the driveway beside the porch. Mr. Hoffa got out of the car and took some salad into the house. When Mrs. Hoffa started to get out she noticed appellant getting out of his car, which was parked in back of the Hoffa car. She spoke to him but he did not answer. He then approached Mrs. Hoffa, with his right hand in his trouser pocket, and told her to go into the house. She replied that her daughter (who was a polio victim) could not go in; that she could not walk. Whereupon, appellant said, "All of you go into the house and don't make any noise." At about this time Mr. Hoffa and Mr. and Mrs. Hoyt came out of the house and saw appellant and his car. Mr. Hoffa picked up his daughter, Helen, and carried her into the house. He was followed by his wife, the Hoyts and appellant, who ordered them to "proceed on into the house." Mr. Hoffa carried his daughter into the front bedroom and put her on the bed. Appellant agreed that Mrs. Hoffa might stay with her. Whereupon, he closed the door and left them together. Mrs. Hoffa then climbed out of the window in the bedroom and ran to a nearby house, where she telephoned to the police. While appellant was accompanying the Hoffa's into the bedroom, Mrs. Hoyt slipped out the back door of the house through the kitchen and went to a nearby house to use the telephone.

Meanwhile, in the living room appellant ordered the three men to take their wallets out and throw them on the floor. Mr. Hoffa and Mr. Dunbar (who, with his wife, was a guest of the Hoyts) each threw their wallets on the floor and when Hoyt refused to comply with the order, appellant took the wallet out of his hand, threw it down, and said, "I am giving the orders around here." Appellant then picked up each of the wallets, went through them and removed the money and cards therefrom. He took $15 from Mr. Hoffa's wallet and $10.25 from that of Mr. Hoyt and put the money in his pocket. He found a traveler's check in Mr. Dunbar's wallet and Mr. Dunbar signed it when ordered to do so by appellant.

After having torn up the wallets, appellant obtained a knife from the kitchen sink and asked Hoffa to bring his daughter out of the bedroom. Hoffa complied with this request and appellant then ordered him to take his daughter into the back bedroom. When this had been done, the daughter, Helen, was left there with Mrs. Dunbar. Appellant then ordered the three men into the front bedroom but as soon as they entered that room he ordered them into the bathroom. Appellant then went through the closet and dresser drawers in the back bedroom and asked Mrs. Dunbar where the wall safe was located and said, "I don't want to hurt a cripple, but I will if you don't tell me where the safe is." Appellant then brought the three men into the back bedroom and lined them up. Appellant ordered Miss Hoffa to get up and walk. He then walked over to Hoffa and placed the knife against Hoffa's stomach, saying, "You get up and walk or I will kill your father." Miss Hoffa then attempted to get off the bed and fell to the floor. Hoffa picked her up and put her back on the bed on appellant's order. Appellant then walked over to Hoyt and placed the knife against Hoyt's stomach and asked him where the safe was located and threatened him. At about this time one of the police officers who had been informed by Mrs. Hoffa of the situation called on the telephone and asked for Mr. Hoyt. Appellant answered the phone and said, "There is no trouble here. You cops might as well go home." Hoyt was then ordered to tell the officer everything was all right. After Hoyt's compliance with this order, appellant again took the phone and said, "Listen, cop, I have seven hostages here and one is a polio patient. I am not in any trouble. You come in here and you know what will happen." The officer then said, "We have the place surrounded with tear gas and we are prepared to bring out the hardware if that is the way it has to be." Appellant replied, "I told you there was a polio patient here. If you throw tear gas in here it will kill her. Go ahead and throw it. I will be waiting for her."

While this telephone conversation was taking place, three other police officers entered the house through the bedroom window. One of these officers approached appellant, who was holding a knife in his right hand, and ordered him to drop the knife. Appellant refused and lunged for the bed where Miss Hoffa was lying and said, "I will get her if you shoot, I will get her." As appellant reached toward Miss Hoffa, the officer struck him with a revolver, rendering him unconscious.

A search of appellant's pocket revealed $47 in cash, plus a $50 traveler's check, and his own wallet, containing $46.52. He was later questioned by the officers and stated that he knew who he was and what he had done that evening. When asked why he had done these things he replied, "I don't know. I must have been crazy. I just guess I wanted to be a bad man." When asked what he was looking for while in the house he said, "Well, I was looking for a wall safe for some reason." He stated he did not have a gun when he entered the house and did not remember whether he pretended whether he had a gun or not.

At the trial he testified that on the morning of February 1, 1958, he had consumed three or four cans of beer and during that afternoon he had purchased two pints of vodka and had consumed about four-fifths of each of them. He recalled some things about being in the house and doing certain things but did not know where or when it all happened.

Appellant admits that the evidence herein is legally sufficient to support a conviction of the crimes of burglary, robbery and assault with a deadly weapon and that the burglary, under the circumstances, was burglary of the first degree. He contends, however, that the evidence justifies a conviction of but one robbery and that the robbery was robbery of the second degree. This contention is without merit.

In People v. Lagomarsino, 97 Cal.App.2d 92, 100, 217 P.2d 124, the court held that a robbery of several persons, where property is removed from each person, involves a separate act and a separate intent toward each victim, and that a separate offense is committed against each person robbed. See also People v. De Casaus, 150 Cal.App.2d 274, 280, 309 P.2d 835.

[1] In the instant case, appellant ordered Mr. Hoffa, Mr. Dunbar and Mr. Hoyt to take out their wallets and throw them on the floor. When Mr. Hoyt refused, appellant seized his wallet and threw it on the floor. He then removed the contents of each wallet and placed them in his pocket. He ordered Dunbar to sign a traveler's check which he had found in Dunbar's wallet. Under these circumstances it clearly appears that three separate robberies were committed.

Robbery which is perpetrated by a person armed with a dangerous or deadly weapon is robbery in the first degree. Pen.Code, sec. 211a. In People v. Wallace, 36 Cal.App.2d 1, 97 P.2d 256, it was held that robbery includes the element of asportation, and the appropriation of another's property at the scene of the holdup is a transaction which continues after the perpetrators depart from the place where the property was seized; that the perpetration of the crime of robbery is not necessarily completed the moment the stolen property is in the possession of the robbers, and that the escape of the robbers with their illgotten gains by means of arms is as important to the execution of the robbery as gaining possession of the property.

[2] The finding of the trial court that appellant was armed is supported by the record. In this connection appellant argues that it was error to include in the judgment a statement that the appellant was armed where no such charge was included in the information. Citing Penal Code, section 969c. However, in People v. Verdier, 96 Cal.App.2d 29, 33, 214 P.2d 433, 435, the court said:

> "With respect to appellant's other point based on People v. Lesterjette, 40 Cal.App.2d 327, 104 P.2d 844, that under section 969c, Penal Code, the fact that defendant was armed with a deadly weapon must be charged in the information if that fact is to be relied on in fixing the degree it is sufficient to point out that sec. 969c makes no reference to section 211a, Penal Code. The latter section provides: 'All robbery which is perpetrated by torture or by a person being armed with a dangerous or deadly weapon is robbery in the first degree * * *', but it is not necessary to allege such facts as long as the information or indictment charges the crime. People v. Meyers, 31 Cal.App.2d 515, 88 P.2d 212. The degree of a crime is not required to be included in the charge. People v. Mendez, supra, 27 Cal.2d 20, 23, 161 P.2d 929."

[3] Penal Code, section 969c formerly provided: "Whenever a defendant is armed with a firearm or other weapon under such circumstances as to bring said defendant within the operation of * * * (Mimimum Penalties Law and Dangerous Weapons Act) the fact that the defendant was so armed *shall be* charged in the indictment or information or complaint. * * *" (Italics ours.) Penal Code, section 969c, as amended, has provided since 1957: "Whenever a defendant is armed with a firearm or other weapon under such circumstances as to bring said defendant within the operation of Section 3024 of the Penal Code relating to certain minimum penalties or of Section 12022 of the Penal Code, the fact that the defendant was so armed *may be* charged in the accusatory pleading. * * *" (Italics ours.) It therefore appears that it was not mandatory to charge that the appellant was armed during the commission of the burglary and robberies involved herein.

[4] Appellant further argues that the assault with a deadly weapon must necessarily be a part of one offense if the court finds he was armed during the burglary and the robberies. This argument is likewise without merit. In In re Chapman, 43 Cal.2d 385, 273 P.2d 817, the court held that if the force relied upon to establish the robbery is the same which is required to prove the assault, then petitioner is being punished twice for the same act contrary to section 654 of the Penal Code, but if it is not the same then the two convictions and sentences can stand; that to constitute first degree robbery it is necessary only that the accused be armed with a deadly weapon and that he take the property of another from his person against his will "by means of force or fear"; that if after the robbery is accomplished the robber beats the victim with the weapon, he is guilty of a separate crime of assault by means of force likely to produce great bodily injury; and that the applicability of Penal Code, section 654, depends on whether a separate and distinct act can be established as the basis for each conviction. Here, appellant took the property of three men by means of force and fear and subsequently, in another room of the house, he placed a knife which he had obtained from the kitchen against Mr. Hoyt's stomach and threatened him. This constituted a separate and distinct act from the robbery and burglary.

Judgment and order affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

169 Cal.App.2d 563

Harry E. SIBERT, Petitioner and Appellant,

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Alcoholic Beverage Control Appeals Board, Defendants and Respondents.

Civ. 23483.

District Court of Appeal, Second District, Division 2, California.

April 13, 1959.

Liquor licensee's proceeding against Department of Alcoholic Beverage Control, Alcoholic Beverage Control Appeals Board, for peremptory writ of mandate to compel the respondents to set aside decree suspending his license because he had violated department rule in permitting wife to work on licensed premises without having been previously fingerprinted. From an adverse judgment of the Superior Court of Los Angeles County, Bayard Rhone, J., the licensee appealed. The District Court of Appeal, Fox, P. J., held, inter alia, that provision of Department of Alcoholic Beverage Control rule stating that the husband or wife of a licensee shall have his or her fingerprints taken if such spouse is to work on or in the licensed premises or is to be engaged to work in any way in the operation of the licensed premises, where read in conjunction with purpose of fingerprinting requirements and general scheme of rule, clearly set forth requirement that such spouse's fingerprints be taken sometime prior to time she actually began work, and such provision was not so vague that men of common intelligence would necessarily be required to guess at its meaning, and it did not violate due process clauses of state or federal constitution.

Affirmed.

1. Intoxicating Liquors 🔑6

Particular problems presented by traffic in liquor properly subject it to regulation by state in exercise of police power.

2. Intoxicating Liquors 🔑1

There is no inherent right in a citizen to engage in business of selling alcoholic beverages. West's Ann.Const. art. 1, § 11; U.S.C.A.Const. Amend. 14, § 1.

3. Constitutional Law 🔑48, 208(1)

A classification made for purpose of regulation will be upheld unless it is without any reasonable basis, and party attacking such a classification has burden of demonstrating the arbitrariness thereof. U.S.C.A.Const. Amend. 14, § 1; West's Ann.Const. art. 1, § 11.

4. Constitutional Law 🔑211

Equal-protection clause of the federal constitution does not take away from state power to classify in adoption of police laws but admits exercise of wide scope of discretion and avoids what is done only when it is without any reasonable basis and, therefore, is purely arbitrary. U.S.C.A. Const. Amend. 14, § 1.

5. Constitutional Law 🔑211

A classification having some reasonable basis does not offend against equal-protection clause of federal constitution merely because it is not made with mathematical nicety or because in practice it results in some inequality. U.S.C.A.Const. Amend. 14, § 1.

6. Constitutional Law 🔑48

When the classification of a law enacted under the police power is called in question, if any state of facts can reasonably be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. U.S.C.A.Const. Amend. 14, § 1; West's Ann.Const. art. 1, § 11.

7. Constitutional Law 🔑48

One who assails classification of a law enacted under the police power must carry burden of showing that it does not rest upon any reasonable basis but is essentially arbitrary. U.S.C.A.Const. Amend. 14, § 1; West's Ann.Const. art. 1, §§ 11, 13.

8. Constitutional Law 🔑240(3)

The provision of Department of Alcoholic Beverage Control rule which required that husband or wife of licensee have fingerprints taken, if such spouse was to work on licensed premises, in same manner as licensee was required to be fingerprinted, did not proceed upon a mere arbitrary distinction in requiring the spouse's fingerprints, though not requiring them of other employees and was not violative of equal-protection clauses of either state or federal constitutions. U.S.C.A.Const. Amend. 14, § 1; West's Ann.Const. art. 1, § 11; West's Ann.Bus. & Prof.Code, §§ 23000 et seq., 23952.

9. Constitutional Law ⚷296(1)

Provision of Department of Alcoholic Beverage Control rule stating that the husband or wife of a licensee shall have his or her fingerprints taken if such spouse is to work on or in the licensed premises or is to be engaged to work in any way in the operation of the licensed premises, where read in conjunction with purpose of fingerprinting requirements and general scheme of rule, clearly set forth requirement that such spouse's fingerprints be taken sometime prior to time she actually began work, and such provision was not so vague that men of common intelligence would necessarily be required to guess at its meaning, and it did not violate due process clauses of state or federal constitutions. U.S.C.A.Const. Amend. 14, § 1; West's Ann.Const. art. 1, § 13.

10. Constitutional Law ⚷42

Person attacking rule on ground of asserted unconstitutionality was limited in his attack to application of rule to factual situation in which it was applied to him.

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Norman D. Rose, Dorothy Kendall, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Edward M. Belasco, Warren H. Deering, Deputies Atty. Gen., for respondents.

FOX, Presiding Justice.

Petitioner appeals from a judgment of the superior court which denied his petition for a peremptory writ of mandate and quashed an alternative writ previously issued.

Petitioner was the holder of an on-sale beer license issued by the Department of Alcoholic Beverage Control.[1] On or about January 29, 1957, an accusation under the Alcoholic Beverage Control Act, Business and Professions Code § 23000 et seq. was issued against petitioner charging, among other things, that he permitted his wife to work in and upon the licensed premises intermittently from January 11, 1957, to January 29, 1957, in violation of the Department's Rule 57 (Rule 57, Ch. 2, Title 4, California Administrative Code),[2] in that his wife had not been fingerprinted as required by the above rule. A hearing was had on the accusation before a hearing officer of the Department who, at the termination thereof, filed his findings of fact and a proposed decision. This proposed decision was adopted by the Department and a fifteen-day suspension levied against petioner. Petitioner stipulated to the truth of the facts giving rise to this aspect of the accusation. Thereafter, the Board affirmed the above decision.

Petitioner thereafter filed a petition in the superior court for a writ of mandate to compel respondents to set aside their decree. An alternative writ was issued which was subsequently quashed and the peremptory writ denied. It is from this judgment that petitioner appeals.

It is petitioner's contention that Rule 57 violates the following constitutional provisions:

(1) the equal protection clause of the Constitution of the United States (U.S. Const. Amend. XIV, § 1) and of the State of California (Cal.Const. art. I, § 11),

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[1] For convenience, respondents will be referred to as Department (Department of Alcoholic Beverage Control) and Board (Alcoholic Beverage Control Appeals Board).

[2] Since the filing of the accusation in this case, Rule 57 has been amended. However, reference in this opinion is to the version in effect at the time of the filing of the accusation.

and (2) the due process clause of the Constitution of the United States (U.S. Const. Amend. XIV, § 1) and of the State of California (Cal.Const. art I, § 13).

In 1957 Rule 57 provided:

"Every licensee and the managing officers of every corporate licensee shall have their fingerprints taken by the board, if they have not heretofore been so fingerprinted.

"Every person who applies for a license and the managing officers of a corporate applicant shall have their fingerprints taken by the board at the time of filing an application for a license. The husband or wife of a licensee or of an applicant for a license shall have his or her fingerprints taken by the board, if such spouse works or is to work on or in the licensed premises or is engaged or is to be engaged to work in any way in the operation of the licensed business."

With respect to the equal protection argument petitioner does not dispute the Department's right to require that licensees or applicants be fingerprinted, nor does he suggest any barrier to a requirement that the spouse of a licensee or applicant be fingerprinted. However, he does argue that the classification established in Rule 57 is unreasonable, arbitrary and capricious in that it singles out a class of employees (only those who occupy the status of a spouse of a licensee or an applicant) to be fingerprinted and there is no rational basis upon which to justify distinguishing between employees.

[1–7] There can be no question that because of the particular problems presented by traffic in liquor that it is subject to regulation by the state in the exercise of its police power. Schaub's, Inc. v. Department of Alcoholic Beverage Control, 153 Cal.App.2d 858, 867, 315 P.2d 459. Furthermore, "'* * * there is no inherent right in a citizen to engage in the business of selling alcoholic beverages * * [and] the governing authority may, therefore, in the exercise of the police power for the protection of the public morals, health and safety, grant the privilege of selling alcoholic beverages upon such terms and conditions as it may determine.'" Kirchhubel v. Munro, 149 Cal.App.2d 243, 247–248, 308 P.2d 432, 435. A classification made for the purpose of regulation will be upheld unless it is without any reasonable basis and the party attacking such classification has the burden of demonstrating the arbitrariness thereof. As stated in Ferrante v. Fish & Game Commission, 29 Cal.2d 365, 371–372, 175 P.2d 222, 226, quoting from Lindsley v. Natural Carbonic Gas Co., 220 U.S. 61, 78–79, 31 S.Ct. 337, 55 L.Ed. 369: "'* * * 1. The equal-protection clause of the 14th Amendment does not take from the state the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis, and therefore is purely arbitrary. 2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality. 3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed. 4. One who assails the classification in such a law must carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.'"

"In order to constitute the uniformity of operation specified in the constitution [Cal. Const. art. I, § 11], it is not necessary that the general law must operate alike upon all the subjects or persons to which it applies, independent of all other considerations, but that it shall operate uniformly upon all persons standing in the same category, and upon rights and things in the same relation." People ex rel. Daniels v. Henshaw, 76 Cal. 436, 442, 18 P. 413, 416. "The Legislature can make reasonable classifications; i. e., classifications which have a substantial relation to a legitimate object to be accomplished. (Citations.) A law is general and uniform and affords equal protection in its operation when it applies equally to all persons within such a classification. (Citation.)" Lelande v. Lowery, 26 Cal.2d 224, 232, 157 P.2d 639, 645, 175 A.L.R. 1109. "The constitution does not prohibit legislative classification. '[T]he mere production of inequality which necessarily results to some degree in every selection of persons for regulation does not place the classification within the constitutional prohibition.'" Armenta v. Churchill, 42 Cal.2d 448, 453, 267 P.2d 303, 306. Furthermore, as stated in the Lowery case, supra, 26 Cal.2d at page 232, 157 P.2d at page 645, quoting from Miller v. Wilson, 236 U.S. 373, 382–384, 35 S.Ct. 342, 59 L.Ed. 628: "'The legislature is not debarred from classifying according to general considerations and with regard to prevailing conditions; otherwise, there could be no legislative power to classify. * * * [T]he legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. [Citation.] It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest.'"

The following cases are illustrative of situations where classifications in the alcoholic beverage area have been upheld: Ex parte Hayes, 98 Cal. 555, 33 P. 337, 20 L.R.A. 701 (no license to be issued where females are permitted to wait or attend in any manner on any person); Mercurio v. Department of Alcoholic Beverage Control, 144 Cal.App.2d 626, 301 P.2d 474 (female employees on premises holding on-sale liquor license may not solicit or accept alcoholic drinks from patrons); People v. Jemnez, 49 Cal.App.2d Supp. 739, 121 P.2d 543 (female prohibited from mixing drinks at an on-sale licensee's premises unless she was the licensee or the wife of the licensee of the premises); Tokaji v. State Board of Equalization, 20 Cal.App.2d 612, 67 P.2d 1082 (on-sale distilled spirits license only issuable to citizens).

[8] Rule 57 was designed to aid the Department in making its investigations of applicants and to verify the truth of statements made pursuant to section 23952, Business and Professions Code, as to whether the applicant has been convicted of a felony or of having violated the liquor laws. The information obtained by virtue of the fingerprinting may well be utilized to protect the people of this state from having in this area of business activity those undesirable persons who, because of criminal records or the like, could present a serious danger to the public health, safety, welfare and morals.

With respect to the spouse of a licensee or applicant who works on the licensed premises, such spouse occupies a position entirely distinguishable from that of an ordinary employee or of a spouse who does not participate in any way in the operation of the licensed premises. It is obvious that a licensee's spouse who works on the licensed premises occupies a position or has a status strikingly similar to that of the licensee himself. People v. Jemnez, supra. Upon the absence of the licensee, the spouse oftentimes would be in sole control of the premises and the same rationale for requiring the fingerprinting of the licensee would be applicable. This, of course, would not be the case if the spouse were in no way engaged in the operation of the licensed premises or when dealing with ordinary employees. In People v. Jemnez, supra, the court stated, 49 Cal.App.2d Supp. at pages 742–743, 121 P.2d at page 545: "As to the wife of a licensee, she is more nearly in the position of the licensee than that of an employee and her presence may fairly be considered to be a restraint upon impropriety. A mere employee would not have the same incentive to prevent improprieties that either a licensee or the wife of a licensee would naturally have." Applying the reasoning of the above case to the instant problem, a spouse of a licensee who works on the premises, due to her (his) relationship with the licensee, would pose a more serious threat to the public, if such spouse were of undesirable character, than an ordinary employee or a spouse not working on the premises.

It is our opinion that the rule "under view does not proceed on a mere arbitrary distinction, but on one founded in intrinsic differences which naturally suggest the propriety of different adjustments of the law. * * *" Vail v. San Diego County, 126 Cal. 35, 38, 58 P. 392, 393.

As to petitioner's due process argument, it is his contention that Rule 57 is vague and uncertain in that it does not sufficiently appraise an individual subject to its provisions of the precise time when the spouse must be fingerprinted.

The provisions of Rule 57 are not difficult to understand if it is borne in mind that it was promulgated to cover situations that existed when it became effective and also other situations that thereafter arose. The provision that a spouse of a licensee shall have his or her fingerprints taken by the Department "if such spouse works * * * on or in the licensed premises * * *" obviously applies to the situation where such spouse was there employed when the rule went into effect. The further provision of the rule that the spouse of a licensee shall have his or her fingerprints taken by the Department "if such spouse * * * is to work on or in the licensed premises * * * or is to be engaged to work in any way in the operation of the licensed business" applies to situations that have arisen since the rule became effective and simply means that if such a spouse either is to work on the licensed premises or engage in the operation of the business such person "shall have his or her fingerprints taken by the Board." This is a condition of the licensee's right to have the spouse so engaged. Thus the Department has a consistent policy-pattern by means of which it may identify and investigate the character and background of those persons who, by reason of marital ties, have an interest in and participate in the operation of the licensed premises.

[9] As Rule 57 was in force when the facts of the instant case arose, we are only concerned with the second situation. Specifically, is the phrase "is to work on or in the licensed premises * * * or is to be engaged to work in any way in the operation of the licensed business" so vague as to when the fingerprints are to be taken "that men of common intelligence must necessarily guess at its meaning and differ as to its application"? Wotton v. Bush, 41 Cal.2d 460, 464, 261 P.2d 256. This must be answered in the negative.

The above phrase, when read in conjunction with the purpose of the fingerprint requirement and the general scheme of Rule 57, clearly sets forth a requirement that the spouse's fingerprints be taken sometime prior to the time she actually begins work. The very language employed yields of no other reasonable construction. Precisely how much time in advance of commencing work the fingerprints are to be taken is immaterial. The Department, by establishing the classification previously discussed, voiced concern over a potential danger to the public health, safety, welfare and morals when the spouse of a licensee participated in the operation of the business if said spouse was of undesirable character. So long as the fingerprints are taken before participation begins, the above threat is minimized to the extent Rule 57 is effective and nothing would be gained by requiring any particular time interval between fingerprinting and participation.

[10] In the instant case, petitioner's wife actually worked on the premises without having been fingerprinted. This violated the clear provision of Rule 57. We are not called upon to decide whether the provisions of Rule 57 would be vague and uncertain if applied to different circumstances. Petitioner is limited in his attack to the application of Rule 57 to the factual situation in which it was applied. Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 468, 55 P.2d 177;

Mercurio v. Department of Alcoholic Beverage Control, supra, 144 Cal.App.2d at pages 631–632, 301 P.2d at pages 478–479. As stated in the Kunsman case, supra, 5 Cal.2d at page 468, 55 P.2d at page 187: "Respondent presents several hypothetical situations under which enforcement of the act would be inequitable or difficult, or, perhaps, even unconstitutional. It is elementary, of course, that a statute may be invalid as applied to one set of facts, yet valid as applied to another. (Citation.) The situations conjured up by respondent are not here involved, and respondent is limited in his attack to the application of the statute to the factual situation now before the court."

Therefore, as there is no merit in either of petitioner's constitutional arguments and no other contentions have been presented for our consideration, his appeal must fail.

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

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169 Cal.App.2d 768

Horace STOREY, Plaintiff and Appellant,
v.
SHASTA FORESTS COMPANY, a corporation, and William M. Beaty, Defendants and Respondents.
Civ. 9563.

District Court of Appeal, Third District, California.
April 21, 1959.

Action for malicious prosecution. The Superior Court, Shasta County, Albert F. Ross, J., entered judgment for defendant after defendant's demurrer to the complaint had been sustained and plaintiff failed to amend. The District Court of Appeal, Warne, J. pro tem., held that an action for malicious prosecution is subject to the one-year statute of limitations, rather than the two-year statute of limitations, since such an action is one for injury to the person, and not to one's property.

Judgment affirmed.

Limitation of Actions 🔑31

An action for malicious prosecution is subject to the one-year statute of limitations, rather than the two-year statute of limitations, since such an action is one for injury to the person, and not to one's property. West's Ann.Code Civ. Proc. §§ 339, subd. 1, 340, subd. 3.

◆

Alfred J. Hennessy, Manton, for appellant.

Carr & Kennedy, Redding, for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment entered in favor of the defendants after their demurrer to the complaint was sustained and plaintiff failed to amend.

The record shows that this is an action for malicious prosecution filed on December 3, 1957, against the defendant, William M. Beaty, and his employer, Shasta Forests Company, a corporation. The complaint alleges, among other things, that on December 5, 1955, defendant Beaty, acting in the course and within the scope of his agency and employment, maliciously and without probable cause filed a criminal complaint accusing plaintiff of the offense of grand theft, a felony; that plaintiff was arrested on said charge and held to answer in the Superior Court in and for the County of Tehama County, where he was tried and acquitted on May 10, 1956.

Defendants demurred to the complaint on the ground that the action was barred under the provisions of Section 340, Subdivision 3, of the Code of Civil Procedure. This section provides, in part, that an action "for injury to or for the death of one caused by the wrongful act or neglect of another" is barred within one year after the wrongful act is committed.

Plaintiff contends that an action for malicious prosecution is governed by the two-year limitation provided for in Subdivision 1 of Section 339 of the Code of Civil Procedure, and, therefore, the action was timely filed. We do not agree with plaintiff.

In Oppenheimer v. Tamblyn, 162 Cal. App.2d 293, 327 P.2d 574, 576, the court stated:

> "The period of limitations applicable to an action of this nature [malicious prosecution] is indeed one year. Code Civ.Proc., § 340, subd. 3; Simons v. Edouarde, 98 Cal.App.2d 826, 221 P. 2d 203."

In Simons v. Edouarde, 98 Cal.App. 2d 826, 221 P.2d 203, plaintiff brought an action for fraudulent abuse of process based upon defendants' alleged wrongful eviction of plaintiffs by means of an unlawful detainer action, and a demurrer to the complaint was sustained without leave to amend on the ground that the action was barred by the provisions of Section 340, Subdivision 3, of the Code of Civil Procedure. In that action, as in the case at bar, the question was whether the cause of action was barred by Section 340, Subdivision 3. The court said, 98 Cal. App.2d at page 828, 221 P.2d at page 204:

> "This question must be answered in the affirmative. An action for injury to the person is barred within one year after the wrongful act is committed. (Code Civ.Proc., Sec. 340(3).) The clause 'or for injury to or the death of one caused by the wrongful act or neglect of another,' in subdivision 3 of section 340, Code of Civil Procedure, embraces therein all infringements of personal rights as opposed to property rights. [Citing cases.]
>
> "Likewise an action for abuse of process falls within the provisions of statutes of limitations covering 'injuries done to the person.' [Citing cases.]"

Likewise by analogy an action for malicious prosecution is an infringement of personal rights as opposed to property rights. In fact, plaintiff alleges in his complaint that he "suffered great distress of mind and body." Injuries of this nature are not damages to one's property, but injuries to one's person.

Berson v. Ewing, 1890, 84 Cal. 89, 23 P. 1112; McCusker v. Walker, 1888, 77 Cal. 208, 19 P. 382; Sharp v. Miller, 1881, 57 Cal. 431, relied upon by plaintiff, were decided prior to 1905, the date of the amendment to Subdivision 3 of Section 340 of the Code of Civil Procedure, which brought within the scope of the section injuries to the person. And as pointed out in the Simons case, supra [98 Cal.App.2d 826, 221 P.2d 204]:

> "* * * The statement in Merron v. Title Guarantee & Trust Co., supra, 27 Cal.App.2d [119], at page 122, 80 P.2d [740], at page 742, 'Undoubtedly it is the law that where the gist of the action is a malicious prosecution, the statute begins to run when the wrongful act is done, and the limitation is two years' was dictum and failed to note that the authority, McCusker v. Walker, 77 Cal. 208, 212, 19 P. 382, cited, was decided prior to 1905, the date of the amendment to subdivision 3 of section 340, Code of Civil Procedure, * * *."

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

169 Cal.App.2d 635

Minnie JONES, Plaintiff,

v.

John REGAN and William Regan, Individually, and doing business under the firm name and style of Regan Farms, Defendants.

Minnie JONES, Plaintiff and Appellant,

v.

John REGAN and William Regan, Individually, and doing business under the firm name and style of Regan Farms, Defendants and Respondents.

Civ. 5686.

District Court of Appeal, Fourth District, California.

April 15, 1959.

Rehearing Denied May 15, 1959.

Action by tenant against landlords for personal injuries alleged to have been suffered from a fall caused by a defective porch floor. From adverse judgment of the Superior Court, Kern County, Norman F. Main, J., the tenant appealed. The District Court of Appeal, Shepard, J., held that instruction to effect that evidence must fairly and reasonably show to the jury by a preponderance of the evidence that there was an express agreement by landlords to maintain and keep porch in repair before landlords could be held liable was not prejudicial.

Judgment affirmed.

1. Landlord and Tenant 🔑169(3)

In absence of fraud, concealment or a covenant in the lease, a landlord is not liable to a tenant or his invitees for defective conditions or faulty construction of leased property, and a tenant seeking to recover against a landlord on theory that he has a cause of action falling within any exception to the general rule must plead and prove facts which will bring him within the exception under which he claims.

2. Landlord and Tenant 🔑164(2)

Mere failure of landlord to make repairs after notice or a promise to do so imposes no tort liability on a landlord.

3. Landlord and Tenant 🔑164(6), 169(6)

A landlord who has convenanted to keep premises in good repair may be liable in tort for a defective or dangerous condition known to him or which with reasonable diligence he should have known, and previous knowledge of defective or dangerous condition is not, of itself, conclusive evidence that a plaintiff failed to exercise due care or was guilty of contributory negligence.

4. Appeal and Error 🔑996

Landlord and Tenant 🔑169(11)

Where a landlord has covenanted to keep premises in good repair, question of whether a plaintiff, who has been injured by reason of alleged defective or dangerous condition in premises, was guilty of contributory negligence is ordinarily a question of fact for jury, and a reviewing court is not authorized to substitute its deductions for those of the trial court.

5. Landlord and Tenant 🔑164(2)

Mere failure of landlord to make repairs after notice or a gratuitous promise without consideration imposes no tort liability on the landlord.

6. Landlord and Tenant 🔑164(2)

The tortious liability of a landlord for a defective or dangerous condition of demised premises is limited to the case of an express covenant to make repairs included in the terms of the lease, or otherwise supported by a consideration.

7. Landlord and Tenant 🔑168(1)

In absence of special warranty or agreement to repair or maintain, tenant assumes all risks arising from damages which are obvious to ordinary observation.

8. Landlord and Tenant 🔑169(10)

In action by tenant against landlords for personal injuries alleged to have been suffered from a fall caused by a defective porch floor, instruction to effect that evidence must fairly and reasonably show to jury by a preponderance of evidence that there was an express agreement by landlords to maintain and keep porch in repair before they could be held liable was not error.

9. Trial ⚷260(1)

Court is under no duty to repeat a statement of law already given.

10. Trial ⚷256(1)

If a party desires greater amplification of a matter, he must properly request the same; otherwise error cannot be predicated upon failure to give such additional instructions.

◆

Morris B. Chain, Milton M. Younger, Bakersfield, for appellant.

Baker, Palmer, Wall & Raymond, Bakersfield, for respondents.

SHEPARD, Justice.

This is an action for damages for personal injuries alleged to have been suffered from a fall caused by a defective porch floor. Judgment was for defendants and plaintiff appeals.

Plaintiff's husband was employed by defendants in 1952 and as a part of his employment was furnished a home for himself and family. The original home was supplanted a few months later in the same year by another home in which one of the defendants had lived up to that time. Plaintiff lived therein with her husband and family about four years before the accident complained of occurred. She testified that she stepped onto the porch; that her heel broke through the floor; and that she was thereby caused to trip and fall, suffering injury as a proximate result of the alleged defective condition of the floor.

Plaintiff's evidence indicates that the porch floor condition, which she claimed caused her heel to break through the floor, was known to her and her husband during all of said four years; that she or her husband called this condition to the attention of defendants at least six times, one of which times was just prior to the time plaintiff and her husband moved into it. The evidence on whether or not defendants covenanted to keep the house and porch in repair is in conflict, and there is also some conflict on whether any promise by defendants to repair, if made at all, was made after occupancy and as a mere gratuity without any new consideration.

In addition to the usual standard instructions on witnesses, inferences, presumptions, negligence, ordinary care, contributory negligence, proximate cause, burden of proof, the jury's prerogative to decide all facts and weigh all evidence, elements of damage, and jury room procedure, the court also gave the following instruction:

> "Your verdict, when you reach it, will be merely for or against the plaintiff's contentions, and if favorable to her will specify the amount of her damages. However, in order to reach your decision you will take up the questions presented to you in the order I will indicate.
>
> "First, you must decide whether the defendants, the landlord, owed any duty of care to the plaintiff. This depends on whether the defendants undertook and agreed to assume the responsibility to repair, which is a matter of contract. If you should decide that there was no such contract, your verdict would be for the defendants, if you find under these instructions and on the evidence you have heard that the defendants expressly and unequivocally bound themselves to make repairs, and that this included repairs to the porch or stoop, thus assuming a legal duty, you will next determine whether that duty has been breached by the defendants. The questions here to be determined lie in the legal field of negligence or contributory negligence and proximate cause. If the defendants assumed the duty but were not negligent in the performance of it, or if their negligence was not a proximate cause of plaintiff's injury, your verdict will be in their favor. If you find that the defendants owed the duty and were negligent, proximately causing the injury, and the plaintiff was not contributorily negligent, your next duty

will be to fix the amount of plaintiff's damages.

"In considering the question as to whether or not the defendants were legally bound to make repairs, you will have in mind that such liability of a landlord exists only in case of an express covenant or promise by him to make the repairs, which promise is included in the lease or otherwise supported by consideration. The evidence must fairly show the existence of a definite and explicit agreement between the parties, not merely an assumption by the tenant, that the landlord will make the repairs; and this agreement must either be a part of the original leasing agreement, or be supported by other consideration—that is, if the landlord's promise was not included in the original lease, the tenant must have given some thing or promise of value in return for the landlord's special promise to repair. Legally this could occur at a point of time after the original agreement to lease. The landlord's agreement need not be in writing in order to be binding.

"In the absence of such an agreement as I have described, the landlord has no duty to repair. Indeed, in the absence of consideration, the mere failure of a landlord to make repairs, even after a promise to do so, does not render the landlord liable for injury sustained by the tenant or a member of the tenant's household.

"For the purpose of this case the plaintiff, Mrs. Jones, may be considered a tenant and entitled to the benefit of any rights against the Regans that her husband may be found to have had.

"I have referred to the term 'express covenant' or 'contract'. An express agreement is one that is set forth or declared with emphatic or unmistakable distinctness; that is, one that is exact, plain and clearly stated by the parties. That is the definition that appears in the Funk & Wagnall's New Standard Dictionary. In Webster's New International, an express agreement is said to be one that is directly and distinctly stated; express; not merely implied or left to inference."

During the jury's deliberations it returned to the court and requested the rereading of the foregoing instructions. This was done by the court except the last paragraph above set forth. The court then said: "And I defined the word 'express' from the dictionary. Do you want that? A Juror: No". Thereafter the jury again retired and later returned a verdict for defendants.

Plaintiff states the questions on appeal are first, whether it was prejudicial error for the court to give the above quoted instruction formulated by the court, and second, whether it was prejudicial error to refuse to give both or either of the instructions requested by plaintiff.

[1, 2] The law which forms the background for the opposing contentions of the parties is well settled in California.

> "In the absence of fraud, concealment or a covenant in the lease, a landlord is not liable to a tenant or his invitees for defective conditions or faulty construction in leased property. [Citations] If a plaintiff is seeking to recover against a lessor on the theory that he has a cause of action falling within any exception to the general rule, such plaintiff must plead and prove facts which will bring him within the exception under which he claims." Hogan v. Miller, 153 Cal. App.2d 107, 114[4], 314 P.2d 230, 235.

> "The mere failure to make repairs after notice or a promise to do so imposes no tort liability on a landlord." Dorswitt v. Wilson, 51 Cal.App.2d 623, 625[2], 125 P.2d 626, 627.

[3–5] In cases where the landlord has covenanted to keep the premises in good repair a landlord may be liable in tort for a defective or dangerous condition known to him or which with reasonable diligence he should have known, and in such cases previous knowledge of the defective or dangerous condition is not, of itself, conclusive evidence that a plaintiff failed to exercise due care or was guilty of contributory negligence. Harris v. Joffe, 28 Cal.2d 418, 425[7], 170 P.2d 454; Mariotti v. Berns, 114 Cal.App.2d 666, 673[5], 251 P.2d 72; Foster v. A. P. Jacobs, etc., 85 Cal.App.2d 746, 755, 193 P.2d 971. Under such circumstances the question whether or not plaintiff was guilty of contributory negligence is ordinarily a question of fact for the jury, and a reviewing court is not authorized to substitute its deductions for those of the trial court. Foster v. A. P. Jacobs, etc. supra; Harris v. Joffe, supra. The mere failure to make repairs after notice or a gratuitous promise without consideration imposes no tort liability on the landlord. Sherrard v. Lidyoff, 108 Cal.App. 2d 325, 327[3], 239 P.2d 28.

[6-8] The tortious liability of a landlord is limited to the case of an express covenant to make the repairs included in the terms of the lease, or otherwise supported by a consideration. Scholey v. Steele, 59 Cal.App.2d 402, 405[4], 138 P.2d 733, quoted in Mariott v. Berns, supra.

> " 'In the absence of special warranty or agreement (to repair or maintain) the tenant * * * assumes all risks arising from damages which are obvious to ordinary observation'." Colburn v. Shuravlev, 24 Cal.App.2d 298, 299[1], 74 P.2d 1060, 1061; Watwood v. Fosdick, 212 Cal. 84, 85[1], 297 P. 881; Chapman v. Title Ins. & Trust Co., 68 Cal.App.2d 745, 750[2], 158 P.2d 42; Zavalney v. Donovan, 70 Cal.App. 2d 182, 184[1], 160 P.2d 558.

It will be noticed in the instruction given that the trial court repeated in other places other words to show what it meant by the words "expressly and unequivocally bound themselves to make repairs." For example, it stated "The evidence must fairly show the existence of a definite and explicit agreement between the parties, not merely an assumption by the tenant, that the landlord will make the repairs." At another point in the instruction it stated, "An express agreement is one that is set forth or declared with emphatic or unmistakable distinctness; that is, one that is exact, plain and clearly stated by the parties; * * * one that is directly and distinctly stated; express; not merely implied or left to inference."

Webster's Unabridged Dictionary gives the following definitions:

Express: "Directly and distinctly stated, definite, clear, explicit, unmistakable."
Explicit: "Distinctly stated, plain in language, unequivocal, express, not ambiguous."
Unequivocal: "Clear, sincere, plain, not ambiguous."

It will be seen from the foregoing that the words "express", "unequivocal" and "explicit", as used in the instruction are in fact practically synonymous, and while under other facts and situations there might be distinctions and the form of instruction might well be unacceptable, we think under the facts presented by the evidence in the case at bar the court's meaning must have been reasonably clear to the jury, to wit, that the evidence must fairly and reasonably show to the jury by a preponderance of the evidence that there was an express agreement by defendants to maintain and keep in repair the porch in question. After a review of the entire record, we are not able to say that the giving of this particular instruction was prejudicial error.

[9] We are satisfied that the law, as contained in the two instructions not given, about which plaintiff complains, was sufficiently covered in the instruction quoted and the court was under no duty to repeat a statement of law already given. People v. Clark, 116 Cal.App.2d 219, 225[8], 253 P.2d 510; People v. Deibert, 117 Cal.App. 2d 410, 426[34], 256 P.2d 355.

[10] Complaint is made that the court did not define in greater detail what the word "consideration" meant. It is well settled in this state that if a party desires

greater amplification he must properly request the same, otherwise error cannot be predicated upon the failure to give such additional instructions. Scherrillo v. Stone & Webster Eng. Corp., 110 Cal.App.2d 785, 790[2], 244 P.2d 70. From a reading of the whole record it appears to us that the cause was fairly tried and that the jury was given a fair understanding of the law applicable to the peculiar facts adduced in this case.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

169 Cal.App.2d 763

Lawrence M. O'CONNOR, a minor, by Eugene Radding, his guardian ad litem, Plaintiff and Respondent,

v.

TRAVELERS INSURANCE COMPANY, Charles B. Lonon et al., Defendants,

Charles B. Lonon, Defendant and Appellant.

Civ. 23274.

District Court of Appeal, Second District, Division 3, California.

April 21, 1959.

Action for declaration of rights with respect to proceeds of policies. The Superior Court of Los Angeles County, V. P. Lucas, J., entered judgment in favor of insured's son, and insured's husband appealed. The District Court of Appeal, Parker Wood, J., held that where employer paid the premiums on group life insurance and group accident insurance for benefit of employee and did not deduct premiums from employee's salary, and employee and her husband did not have joint bank account and each had his or her own account and employee deposited her earnings in her bank account and with husband's knowledge the employee spent her earnings on herself or her son by previous marriage and husband knew that employee had substituted son for husband as beneficiaries of the policies, the premiums were not community property and son and not husband was entitled to proceeds of policies.

Affirmed.

Husband and Wife 🔑249

Where employer paid the premiums on group life insurance and group accident insurance for benefit of employee and did not deduct premiums from employee's salary, and employee and her husband did not have joint bank account and each had his or her own account and employee deposited her earnings in her bank account and with husband's knowledge the employee spent her earnings on herself or her son by previous marriage and husband knew that employee had substituted son for husband as beneficiaries of the policies, the premiums were not community property and son and not husband was entitled to proceeds of policies.

Norman E. Carroll, Los Angeles, for appellant.

Henry J. Sullivan and Eugene Radding, Burbank, for respondent.

PARKER WOOD, Justice.

Action by Lawrence M. O'Connor, a minor, by his guardian ad litem, for a declaration of his rights with respect to the proceeds of two group insurance policies in which his mother, Ruth M. Lonon, was the named insured and he was the named beneficiary. Ruth was formerly married to Dalton O'Connor. Plaintiff Lawrence O'Connor is the issue of that marriage. After the termination of that marriage Ruth married Charles Lonon, a defendant herein.

In July, 1954, while Ruth and Charles were husband and wife, she became an employee of Hansen-Lynn Company, a corporation. That company had an arrangement with the Travelers Insurance Company whereby the insurance company issued policies of group life insurance and group accident insurance for the benefit of the employees of the Hansen-Lynn Company. In September, 1954, Ruth became insured under those policies. The amount of her insurance under each policy was $2,500. Her employer paid all the premiums for the insurance directly to the insurance company, and no deductions for such premiums were made from Ruth's salary.

When Ruth became insured, the beneficiary named in the policies was her husband, defendant Charles Lonon. In each policy there was a provision that she had the right at any time to designate a different beneficiary. About November 15, 1955, Ruth designated her son Lawrence as beneficiary in each policy in the place of her husband. She was killed in an automobile accident on May 20, 1956.

The insurance company alleged in its answer, among other things, that it was a stakeholder of the proceeds of the policies, namely, $5,000, and it was ready to deliver the money as directed by the court. Apparently, the $5,000 was deposited in court by the insurance company.

Pursuant to stipulation of the other parties, and pursuant to order of court based on the stipulation, $2,500 of said proceeds was delivered to plaintiff Lawrence. The remainder of the proceeds $2,500, was the amount in controversy between plaintiff Lawrence and the defendant Charles.

The judgment was that plaintiff Lawrence was entitled to the remainder of the proceeds of the policies, and that the clerk of the court should deliver to the plaintiff the said amount of $2,500.

Defendant Charles Lonon appeals from the judgment.

Appellant contends that even though the premiums paid by Ruth's employer were not deducted from her salary, the premiums represented earnings by her during marriage, and as such earnings the premiums were community property; that where premiums on a life insurance policy are paid from community funds, the proceeds of the policy are likewise community property; that under such circumstances neither spouse can dispose of more than one-half of the proceeds of the policy, either by testamentary disposition or change of beneficiary, without the consent of the other spouse; that the evidence shows that the change of beneficiary in the policies herein was without appellant's knowledge or consent and was in contravention of his vested right to half of the community property.

The court found that the allegations of the complaint were true. Some of those allegations were, as follows: That on or about November 15, 1955, Ruth executed a change of beneficiary of said policies, pursuant to which she designated plaintiff Lawrence O'Connor as the sole beneficiary of said policies. That thereafter there was no further change with reference to the designated beneficiary of the policies. That defendant Charles Lonon had full knowledge and was aware that Ruth had changed the designated beneficiary to Lawrence O'Connor on or about November 15, 1955.

The court also found, as follows: The premiums paid on the policies were entirely paid by Ruth's employer as a voluntary contribution by the employer, and said premiums were not attributable to or a part of the earnings of Ruth. The said premiums were not the community property of Ruth and her husband. The policies of term insurance had no paid up or cash surrender value and would have no value whatever if the employment of Ruth had been terminated otherwise than by her death. The proceeds of said policies, payable on the death of Ruth, were not community property of Ruth and her husband.

Pacific Mut. Life Ins. Co. v. Cleverdon, 16 Cal.2d 788, 108 P.2d 405, was an interpleader action to determine conflicting claims to proceeds of a life income bond. In that case, the bond was issued in 1926 to Helen Cleverdon, as insured, with Susannah Cleverdon as the beneficiary. Helen, who was a teacher, was unmarried when the bond was issued. In 1930 she married W. A. Street, and thereafter she continued her employment as a teacher until her death, in 1936. The controversy was between the beneficiary and the husband. Before and after the marriage she maintained a bank account in her own name and all of her earnings were deposited in that account. All the premiums paid to the insurance company were paid from that account. The husband maintained a separate bank account in which most of his earnings were deposited. He testified that he did not deposit all of his earnings in his bank account, and sometimes he deposited money in her account; at times he borrowed money from his wife, and it was probable that the deposits he made in her account were repayments of the money borrowed; there was no express agreement between them concerning her separate bank account. In that case, the husband asserted that the premiums paid after the marriage were paid from community funds and that he was entitled to a proportionate share of the proceeds of the bond. The trial court therein awarded a part of the proceeds to the husband. On appeal therein, the beneficiary, as appellant, claimed that the evidence was not sufficient to support the finding that the premiums paid after the marriage were paid from community funds. The court said (16 Cal.2d at page 791, 108 P.2d at page 406): "This claim appears to be well founded. * * * 'While the rule is otherwise in some of the community property states, in California the husband may relinquish to the wife the right to her earnings during marriage without any consideration other than their mutual consent, and her earnings thereupon become her separate estate. Such relinquishment and mutual consent may be shown by evidence of the acts or conduct of the husband, indicating that he did not regard the earnings as community property.' [Citations.] When respondent's [husband's] testimony is reviewed in the light of these authorities, we see no escape from the conclusion that the earnings of the insured [wife], out of which the premiums were paid, were her separate property * * *." It was also said therein (16 Cal.2d at pages 791, 792, 108 P.2d at page 406): "But appellant [beneficiary] makes the further claim that even if the premiums, paid after marriage, were paid out of community property, said premiums were paid with the knowledge and consent of respondent and he was therefore not entitled to share in the proceeds of the policy. We believe that this claim is equally well founded. It is conceded by respondent that the premiums on this policy were paid by his wife with his knowledge and consent. We believe this fact precludes respondent from successfully asserting a claim to any of the proceeds of the policy as against the beneficiary named therein." Also in that case reference was made to cases dealing with the general subject of the right of a surviving wife, as against a named beneficiary, to a part of the proceeds of an insurance policy issued upon the life of the husband where the premiums have been paid by the husband from community funds. It was said therein (16 Cal.2d at pages 792, 793, 108 P.2d at page 407): "The reason for the rules established in such cases is that the husband * * * had acted in contravention of the wife's rights. But the reason for the rule ceases in cases, such as the present one, where the acts of the wife were done with the knowledge and consent of the husband and nothing was done in contravention of any of his rights. We therefore conclude that respondent may not now complain and that he is not entitled to share in the proceeds of the policy."

In the present case, the husband testified that he and his wife did not have a joint bank account; she had her own bank account, and he had his own bank account; she deposited her earnings in her bank account, and with his knowledge she used her earnings to send money to her boy (plaintiff herein, who is in Kansas) and she paid for part of her clothing; she spent her earnings on herself or her boy, and he (husband) was aware that she was so using her earnings.

In the present case, the facts with respect to the wife's use of her earnings were similar to the facts in the Cleverdon case above referred to. In the present case the acts and conduct of the husband with reference to the wife's earnings were such that the court might have concluded they impliedly agreed that her earnings would not be regarded as community property. As above shown, the employer made no deduction from the wife's salary in paying the premiums, and the court found that the premiums were paid by the employer as a voluntary contribution and they were not a part of the wife's earnings. Even if the premiums should be regarded as a kind of fringe benefit incident to her employment, it would not follow that such a benefit was community property. The acts and conduct of the husband with reference to the earnings the wife actually received in cash would indicate that he would also allow the wife to treat the fringe benefit (which was not cash received) as her own in the same manner as he allowed her to treat her cash earnings as her own. He testified that he knew that she deposited all her earnings in her separate bank account and she spent her earnings for herself and her boy. As above stated, the court found that the husband knew that the wife had changed the designated beneficiary on or about November 15, 1955. According to his testimony, he knew on April 20, 1956, that the beneficiary had been changed. It is implicit, in the finding that the premiums and the proceeds were not community property, that the act of the wife in changing the beneficiary was done with his knowledge and consent and was not in contravention of his rights. The findings are supported by the evidence.

The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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169 Cal.App.2d 748

May H. GRENALL, Plaintiff and Appellant,

v.

Alexander GRENALL, Defendant and Respondent.

Civ. 23479.

District Court of Appeal, Second District, Division 2, California.

April 21, 1959.

Proceeding by wife to vacate order providing for termination of her alimony payments at expiration of one year and for increased alimony payments and for an extension thereof beyond expiration of date set by former order. The Superior Court of Los Angeles County, Elmer D. Doyle, J., entered orders denying motion and application and former wife appealed. The District Court of Appeal, Herndon, J., held that where subsequent to divorce decree awarding custody of children to wife and providing for alimony and support money court ordered alimony payments to cease in one year and wife did not appeal from order, she could not move to vacate order after time for appeal had expired and she had accepted payments thereunder.

Affirmed.

Fox, P. J., dissented.

1. Motions ⚷13

Fact that order was made upon an oral motion does not spell lack of jurisdiction.

2. Divorce ⚷246

Where divorce decree was granted to wife who was given custody of children and alimony and support payments and wife subsequently applied for increase in alimony and support payments and husband at conclusion of hearing, without notice, orally moved for a cessation of alimony payments and wife did not object on ground of surprise and court ordered alimony to cease in one year and wife did not take any appeal from order and accepted payments thereunder, wife was precluded from attempting to have order vacated on ground that same was entered without proper notice.

3. Appeal and Error ⚷113(2)

An appeal from an order denying motion to vacate an appealable order or judgment will not be entertained when purpose of motion is merely to change decision of trial court upon the same facts.

4. Appeal and Error ⚷113(2)

If grounds upon which a party sought to have a judgment vacated existed before entry of judgment and would have been available on appeal from judgment, an appeal will not lie from an order denying a motion to vacate.

5. Divorce ⚷245(2, 3)

Where subsequent to divorce decree court entered order terminating wife's alimony payments within one year therefrom and such appealable order had become final, this was no bar to wife's application before expiration of year for an extension of alimony beyond expiration date set by former order but burden was upon wife to support application by showing sufficient change of circumstances since previous order to justify a new order more favorable to her.

6. Divorce ⚷245(3)

In proceeding on wife's application to extend alimony payments to her beyond time provided by former order of court providing that alimony payments to wife would cease in one year from date of order, evidence failed to disclose any abuse of discretion by trial court in refusing to extend time of payments.

7. Divorce ⚷235

There is vouchsafed to trial court a broad discretion in determining whether or not circumstances justify an award of nominal alimony for purpose of retaining jurisdiction.

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Brock, Fleishman & Rykoff, Robert L. Brock, Hollywood, for appellant.

Gordon, Knapp, Gill & Hibbert, Maurice E. Hibbert, Los Angeles, for defendant.

HERNDON, Justice.

Plaintiff appeals from two orders entered on March 28, 1958: (1) an order denying her motion to vacate a former order which provided for the termination of her alimony payments at the expiration of one year; and (2) an order denying her application for increased alimony payments and for an extension thereof beyond the expiration date set by the former order. The ground of attack on the first order is that it was void because it was not based upon any properly noticed motion. The second order is challenged as constituting a manifest abuse of judicial discretion.

In 1948 plaintiff was granted a divorce on grounds of cruelty and was awarded custody of two children, then 7 and 4 years of age. Defendant was ordered to pay plaintiff $85 per month as alimony and $80 per month for the support of the children. In 1951 the alimony was increased to $100 per month and the children's support was increased to $65 per month for each child. In 1955 defendant obtained an order reducing the alimony to $25 per month upon a showing that he had suffered a reduction in salary.

In 1957 plaintiff sought increased amounts for alimony and child support. Her affidavit showed that the minor children had reached the ages of 12 and 15, respectively; that the expenses of rearing the children had increased considerably; that defendant had found new employment at a higher salary. At the hearing, plaintiff testified that she was employed as a clerk at a salary of $42.21 per week, and that she was receiving only an insignificant amount of additional income. It was stipulated that plaintiff's net weekly salary was $42.21, and that defendant's amounted to $174.61. At the conclusion of the hearing, defendant's counsel orally moved the court for an order directing that all alimony payments be terminated. This motion was made without prior notice. However, the record indicates that plaintiff offered no objection to the hearing of the motion upon any such ground.

The 1957 proceedings were concluded by orders increasing the children's support payments from $130 to $200 per month, and providing that the alimony payments of $25 per month should terminate at the end of one year thereafter. No appeal was taken from either of the last mentioned orders.

In March of 1958, and prior to the date set for the termination of alimony payments, plaintiff applied for relief in two respects: (1) for an order vacating that portion of the 1957 order which provided for the termination of her alimony at the expiration of one year; and (2) for a modification of the then effective provisions of the judgment for alimony and child support. By this application, she sought to have the children's support increased and to have her alimony payments increased to $150 per month and to continue until further order. In support of the latter application, plaintiff alleged that she was under the care of physicians for an ovarian cyst, which involved the prospect of substantial medical and hospital expense; that she was under treatment for a gall bladder disorder, which caused her considerable pain and at times rendered her unable to work; that the expenses of caring for the children had substantially increased; that she was 47 years of age, had no work skills or background of experience, and that her net income did not exceed $46 per week when she was able to work full time; that her needs for payments on mortgages, taxes, home maintenance, insurance, utilities, clothing, food, medical and dental care and miscellaneous totalled $703.85 per month; that plaintiff was indebted on account of orthodontia done for the children to the extent of some $500; that plaintiff had been forced to borrow and accept charity from relatives. Defendant filed no affidavits in opposition.

Plaintiff's applications came on for hearing in March of 1958. Plaintiff testified that her salary had increased to $92.97 for each two-week period, and that her only other income was $16.75 per month, which she received from a mortgage. On cross-examination, she testified that her brother operated a corporation in New York known as the Vernal Company, Inc., and that she had received $500 from her brother in July, 1957. When asked whether she owned any stock in said corporation, she stated that she did not, but when asked if the payment which she received from her brother was a dividend on her stock she answered, "You could call it that I suppose." She finally stated, in answer to a question as to how much stock she owned, "I don't honestly know how much stock." It seems fair to say that her testimony as to her ownership of stock in the corporation might have been regarded as somewhat evasive and inconsistent.

Defendant testified that he had remarried subsequent to the previous court appearance in April of 1957; that his necessary living expenses had increased since the last previous order and that they currently amounted to $1,108.37 per month; and that his total net salary was then $769.80 per month. The reporter's transcript of the 1957 proceedings was received in evidence without objection.

At the conclusion of the hearing, the court denied plaintiff's motion to vacate the former order providing for the termination of alimony. Plaintiff's application for modification of the alimony order was denied, and the children's support payments were increased to $250 per month.

[1] There is no merit in plaintiff's contention that the 1957 order providing for the termination of alimony was void. The fact that the order was made upon an oral motion does not spell lack of jurisdiction. As stated in Tew v. Tew, 160 Cal.App.2d 141, at page 144, 324 P.2d 625, 627; "[T]he record shows without contradiction that plaintiff's counsel appeared at and participated in the hearing of the motion and raised no question of lack of notice. Nor was any request made for a continuance in order to make the factual showing as is now contended by plaintiff. Under the rule as enunicated in Overton v. White,

18 Cal.App.2d 567, 64 P.2d 758, 65 P.2d 99, the plaintiff could well be held to have waived failure on the part of defendant to give notice."

[2-4] The 1957 order was of course appealable; but no appeal was taken. It has been held that an appeal from an order denying a motion to vacate an appealable order or judgment will not be entertained when the purpose of the motion is merely to change the decision of the trial court upon the same facts. Litvinuk v. Litvinuk, 27 Cal.2d 38, 43-44, 162 P.2d 8. Moreover, if the grounds upon which a party sought to have a judgment vacated existed before the entry of the judgment and would have been available upon an appeal from the judgment, an appeal will not lie from an order denying a motion to vacate. Mather v. Mather, 22 Cal.2d 713, 720, 140 P.2d 808; cf. In re Estate of Richards, 17 Cal. 2d 259, 267, 109 P.2d 923; Simmons v. Santa Barbara Ice & Cold Storage Co., 162 Cal.App.2d 23, 327 P.2d 141.

It is futile for plaintiff now to argue that the order of April 9, 1957, was not supported by "any showing that there had been a change in conditions warranting the permanent termination of support payments." Obviously, such argument is not directed to any jurisdictional defect. It is purely and simply an assignment of error which plaintiff might have advanced and argued on an appeal from that order. She elected not to appeal from the order and accepted payments under it for nearly a year before questioning its validity.

[5] By virtue of an appealable order which had become final, plaintiff was and is barred from asserting that the circumstances existing at the time the former order was made did not justify its provisions. This, of course, was no bar to plaintiff's timely application for an extension of alimony beyond the expiration date set by the former order. Simpson v. Simpson, 134 Cal.App.2d 219, 221-222, 285 P.2d 313; Bechtel v. Bechtel, 124 Cal.App. 617, 618, 12 P.2d 970; Smith v. Superior Court, 89 Cal. App. 177, 187-189, 264 P. 573. However, the burden was upon plaintiff to support such application by showing a sufficient change of circumstances since the previous order was made to justify a new order more favorable to her. She recognized and attempted to meet this burden by alleging and seeking to prove, among other things, the development of conditions adversely affecting her health, increased financial burdens and so forth. In our statement of the case, we have detailed the evidence bearing upon these matters.

[6] Thus, the determinative issue on this appeal narrows to the simple question whether the trial court's action in denying plaintiff's application for an extension of alimony beyond the term set by the previous order constitutes a manifest abuse of discretion. The question posed must be answered in the negative. "It is not a question of what this court would have done in the first instance, but whether there is substantial evidence to support the trial court's determination." Wilson v. Wilson, 104 Cal. App.2d 167, 170, 231 P.2d 128, 130. We here adopt the language used and the decisions cited in McClellan v. McClellan, 159 Cal.App.2d 225, at pages 228-229, 323 P.2d 811, in disposing of a contention that the trial court had abused its discretion in that case in limiting an alimony award to a period of one year.

[7] In oral argument, appellant has urged that at the very least the trial court should have retained jurisdiction by granting an award of nominal alimony to continue until further order. There is vouchsafed to the trial court a broad discretion in determining whether or not the circumstances justify an award of nominal alimony for the purpose of retaining jurisdiction. Bird v. Bird, 152 Cal.App.2d 99, 103, 312 P.2d 773; Schraier v. Schraier, 163 Cal.App.2d 587, 329 P.2d 544. We cannot say that the instant record shows an abuse of that discretion.

The orders appealed from are affirmed.

ASHBURN, J., concurs.

FOX, Presiding Justice.

I dissent.

In my opinion it was a clear abuse of discretion to terminate completely plaintiff's alimony and thus deprive the court of jurisdiction to meet future exigencies in view of plaintiff's age, her limited earning capacity due to her lack of any special training or work skills and because of the precarious condition of her health, which makes the regularity of her future employment problematical.

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169 Cal.App.2d 510

Ethel H. VAN HOUTEN, Irene Hitch, Leon Sandefur, Fred Sandefur, Mona Ellis and Elford Teel, Plaintiffs, Respondents and Appellants,

v.

Thomas W. WHITAKER and Frances Rogers Dubbs, as executors of the estate of Clara Consuelo Haydock, deceased, Thomas W. Whitaker, Frances Rogers Dubbs, Jerome A. Whitaker and Lawrence C. Rogers, Defendants, Appellants and Respondents.

Civ. 23381.

District Court of Appeal, Second District, Division 1, California.

April 10, 1959.

Action constituting quasi-specific performance suit to impose a trust upon one-half of the distributable property in the estate of deceased who executed a joint will with her husband. From a judgment declaring such trust in the Superior Court of Los Angeles County, Paul Nourse, J., the defendants appealed and the plaintiffs cross-appealed from part of the judgment. The District Court of Appeal, Lillie, J., held that the evidence supported finding that the joint will manifested the intent of the makers to dispose of property held by them in joint tenancy; that the provision constituted a contract to devise property in a specific manner which could be specifically enforced by the beneficiaries; and that portion of judgment that plaintiffs take nothing as specific legatees under the will of the wife was unauthorized where no issue respecting their rights in that regard was tendered.

Case remanded with instructions and judgment as amended affirmed.

1. Wills 🔑100

A "joint will" is a single testamentary instrument constituting or containing the wills of two or more persons and jointly executed by them as their respective wills.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint Will".

2. Wills 🔑100

A will that is both "joint and mutual" is one executed jointly by two or more persons, the provisions of which are reciprocal and which shows on its face that the devises are made one in the consideration of the other.

See publication Words and Phrases, for other judicial constructions and definitions of "Joint and Mutual Will".

3. Frauds, Statute of 🔑139(5)

Under the statute providing that an agreement to devise property must be in writing, a subsequently executed will may relate back to the making of any oral agreement which it embodies so as to validate the latter under the statute of funds. West's Ann.Civ.Code, § 1624, subd. 6.

4. Wills 🔑92

A contract to make a will may be in the will itself and a single written instrument may constitute both the will and a contract.

5. Wills 🔑58(2)

Mere fact that a joint will contains reciprocal, similar or identical provisions does not of itself constitute sufficient evidence of any alleged oral agreement between the makers to dispose of their property held in joint tenancy to their respective relatives.

6. Wills 🔑188

Mere fact that a joint will contains reciprocal and identical provisions does not establish a legal obligation to forebear revocation in the absence of a valid contract though it is no longer necessary to show that the will was made pursuant to an agreement not to revoke.

7. Appeal and Error 🔑842(8)

Where the trial court interpreted the will without the aid of extrinsic evidence although such evidence was taken in a consolidated action from which an appeal had not been taken, interpretation of the will was before the Appellate Court as a matter of law although the Appellate Court was not bound by the construction adopted below.

8. Specific Performance 🔑121(7)

In action in quasi-specific performance contending that will of surviving wife did not dispose of one-half of the property held by her with husband as joint tenants and that the husband's relatives and named beneficiaries of the prior joint will were entitled to his one-half, evidence sustained finding that the joint will was sufficiently contractual in character as to make it enforceable. West's Ann.Prob.Code, § 228.

9. Wills 🔑439

In examining a testamentary document, court must do so with the view to discovering the dominant testamentary scheme.

10. Wills 🔑58(1)

It is not necessary that a covenant to make joint wills be spelled out in order to insure that one party will not take unfair advantage of the situation.

11. Contracts 🔑168

In every contract, there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement.

12. Evidence 🔑77(6)

Where attorney who drafted joint will was never called as a witness for the defendants, statements made to him by the makers in the presence of each other respecting agreements made or about to be made were not privileged and hence the failure to offer such evidence raised the inference that it would have been adverse if produced.

13. Husband and Wife 🔑266

While generally the taking of title as joint tenants is tantamount to a binding agreement that the same should not thereafter be held as community property, the character of the property thus held may be changed by an executed oral agreement between the parties and may be express or implied and the change in status may be shown by the nature of the transaction or appear from the surrounding circumstances.

14. Husband and Wife 🔑266

Where spouses executed joint wills providing that upon the death of the survivor the estate remaining should be divided one-half to go to the relatives of the husband and the other to the relatives of the wife, will was construable as providing that by their joint will the parties transmitted into community property any and all property held of record as joint tenants.

15. Husband and Wife 🔑276(3)

In suit for accounting of moneys given to certain relatives of deceased wife, where evidence established that an amount was loaned or given to a niece of the deceased wife after the husband's death to finance the purchase of property and the sum had never been repaid, the trial court should have authorized that one-half thereof be subject to the administration of the wife's estate.

16. Specific Performance 🔑127(1)

In specific performance suit on ground that surviving wife did not dispose of one-half of the property held by her with the deceased husband as joint tenants as agreed to by joint will, refusal of an accounting as to additional moneys allegedly given to certain of the wife's relatives following the husband's death was within the province of the trial court's province as a trier of fact.

17. Judgment ⚷251(1)

A judgment that goes beyond the issues litigated is void in so far as it exceeds those issues.

18. Judgment ⚷251(1)

In specific performance action of joint wills executed by spouses, portion of judgment declaring that plaintiffs took nothing as specific legatees under the wife's will presently in the course of administration was unauthorized where no issue respecting those rights was tendered either by the pleadings or the facts developed at trial nor was any finding of fact made with respect thereto.

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Courtney A. Teel, San Marino, for respondents and appellants.

James J. McCarthy, Santa Monica, and David G. Jackson, Monrovia, for appellants and respondents.

LILLIE Justice.

Plaintiffs' action was one to impose a trust upon one-half of the distributable property in the estate of Clara Haydock, deceased. From a judgment declaring such a trust, defendants have appealed. A cross-appeal is prosecuted by all plaintiffs from part of the judgment denying additional relief and by certain of the plaintiffs from such portion of the judgment as decreed that they take nothing under decedent's will.

The facts may be summarized as follows: Clara and her husband, Leon, had been married for 50 years or thereabouts. Except for a small ranch separately owned by Leon, all their property was community. In March of 1950, when Clara was 75 and Leon 80, they executed a document entitled "Joint Will" prepared by an attorney and never thereafter revoked. The critical provisions thereof are contained in paragraphs Second, Third, Fourth and Fifth.

By the Second paragraph, Leon willed all his property to Clara, should she survive him, with the further provision that upon her death any of his property still held by her should go to certain of his named relatives. By the Third, Clara left all her estate to Leon with the proviso that any portion of her estate remaining in his hands upon his death should go to certain of her named relatives.

The Fourth paragraph provided that if the survivor of the two should fail to survive the distribution of the estate of the one who died first, then the estate should be considered as one, and one-half of it should go to certain named persons, not all of whom are relatives of Leon, and the other half should go to the persons named as relatives of Clara.

Paragraph Fifth reads as follows: "Both of us agree that upon the death of the last one of us the estate remaining shall be divided in half, one half shall go to the relatives of Leon Albert Haydock in the manner and in the amounts and to the persons above named as his relatives, and the other half shall go to the relatives of Clara C. Haydock in the manner and in the amounts named."

At the time the will in question was executed, as well as upon Leon's death less than three months later, the great bulk of the property owned by the couple, and concededly acquired during marriage with community funds, stood in their names as joint tenants.

Upon Leon's death, the foregoing joint will was admitted to probate, the only asset eventually distributed thereunder consisting of a parcel of property worth approximately $1,190. In the same numbered proceeding, however, the probate court rendered its decree establishing the fact of Leon's death and terminating the joint tenancy which involved ten parcels of realty appraised at $86,464.40.

On April 16, 1956, some six years later, Clara executed a will apparently prepared by an attorney other than the draftsman of the joint will, leaving most of her property to defendants with certain small bequests to certain of the plaintiffs. Upon her death the document was admitted to probate, whereupon plaintiffs instituted this action in quasi-specific performance, contending that Clara's will could not, and did not, dispose of one-half of the property held by her with Leon as joint tenants, and that as Leon's relatives and named beneficiaries under the prior joint will they were entitled to Leon's one-half, subject only to Clara's use as the survivor and to the administration of said one-half in her estate.

The trial court found for plaintiffs, although it denied relief by way of an accounting as to certain property transferred during Clara's lifetime; it also decreed that certain plaintiffs named in Clara's will could not take thereunder. Both sides have appealed, plaintiffs' appeal being only from portions of the judgment adverse to them.

Defendants' main contentions, limited to the claim that the evidence is insufficient to sustain contrary findings, may be stated thus: the language of the joint will does not manifest any intent on the makers' part to dispose of property held by them in joint tenancy; and, the provisions of the same document, particularly paragraph Fifth, do not constitute a contract to devise property in a certain manner which could be specifically enforced by the promisees (plaintiffs here) against Clara or her legal representative.

[1,2] "A 'joint will' is a single testamentary instrument constituting or containing the wills of two or more persons, and jointly executed by them as their respective wills". Daniels v. Bridges, 123 Cal.App.2d 585, 588, 267 P.2d 343. A will that is both joint and mutual is one executed jointly by two or more persons, the provisions of which are reciprocal, and which shows on its face that the devises are made one in consideration of the other (Frazier v. Patterson, 243 Ill. 80, 90 N.E. 216, 27 L.R.A.,N.S., 508; Daniels v. Bridges, supra, 123 Cal.App.2d 588, 589, 267 P. 343). "Where two parties agree to make mutual wills, each promising to dispose of his property to the other or, if the other be dead, to certain third persons, and one of the parties performs by leaving his property to the other, the intended devisees and legatees are entitled to enforce their rights as beneficiaries under the agreement. The contracting party who survives becomes estopped from making any other or different disposition of the property, and his obligations under the agreement become absolutely irrevocable and enforceable against him, at least where he avails himself of the provisions of decedent's will in his favor and accepts substantial benefits thereunder". Brown v. Superior Court, 34 Cal.2d 559, 564, 212 P.2d 878, 881.

[3,4] Section 1624, subdivision 6 of the Civil Code, provides that an agreement to devise or bequeath property must be in writing; however, a subsequently executed will may relate back to the making of any oral agreement which it embodies so as to validate the latter under the statute of frauds (Potter v. Bland, 136 Cal.App.2d 125, 131, 288 P.2d 569). Furthermore, the contract to make a will may be in the will itself (Chase v. Leiter, 96 Cal.App.2d 439, 450, 215 P.2d 756), and it is now settled that a single written instrument may constitute both a will and a contract (In re Estate of Watkins, 16 Cal.2d 793, 797, 108 P.2d 417, 109 P.2d 1).

[5,6] We first consider appellants' (defendants') claim that there was neither sufficient, nor any, evidence to warrant the finding that contemporaneously with the execution of the joint will there existed an enforceable agreement between Clara and Leon to dispose of their interests in the manner provided—such an agreement, of course, would be a condition precedent to the maintenance of the present action. Brown v. Superior Court, supra, 34 Cal.2d 564, 212 P.2d 878. The mere fact that a joint will contains reciprocal, similar or identical provisions does not of itself constitute sufficient evidence of any alleged oral agreement (Notten v. Mensing, 3 Cal.2d 469, 477, 45 P.2d 198) nor is it enough to establish a legal obligation to forebear revocation in the absence of a valid contract (Daniels v. Bridges, supra, 123 Cal.App.2d

585, 589, 267 P.2d 343); however, it is no longer necessary to show that the will was made pursuant to an agreement not to revoke (Brown v. Superior Court, supra, 34 Cal.2d 564, 565, 212 P.2d 878), disapproving of a contrary statement in Lynch v. Lichtenthaler, 85 Cal.App.2d 437, 193 P.2d 77, relied on by appellants.

[7] The trial court interpreted the will as it involved this proceeding without the aid of extrinsic evidence, although such evidence was taken with respect to a consolidated action from which an appeal has not been taken; its interpretation, therefore, is before this court as a matter of law (In re Estate of Platt, 21 Cal.2d 343, 352, 131 P.2d 825). Although not bound by the construction adopted below, we are of the view that the trial court was correct in finding that the joint will was sufficiently contractual in character as to make it enforceable in a proceeding of this kind.

[8] A mere reading of the instrument shows an obvious intent to avoid intestate succession under section 228 of the Probate Code. Just as a contract must be construed in its entirety (12 Cal.Jur.2d 331–332), it is also the rule that in examining a testamentary document one must do so with a view to discovering the dominant testamentary scheme (In re Estate of Kruger, 55 Cal.App.2d 619, 622, 131 P.2d 619). It must be borne in mind that the great bulk of the property owned by both decedents had been acquired during marriage and with community funds. Although such property stood in their names as joint tenants, Leon and Clara looked upon their holdings as community property and intended to make testamentary disposition thereof as such; thus, Leon's cash bequests exceeded by almost tenfold his community interest in the sole parcel of property not held in joint tenancy, and Clara in turn devised her interest in certain improved property which likewise stood in joint tenancy. Paragraph Fourth, effective if both parties died during the administration of the other's estate, provided that "our estate shall be considered as one and shall be divided equally among our respective relatives in the following manner * * *." Significantly enough, certain of Leon's relatives who might have taken under section 228. Probate Code, are disinherited. Clara, on her part, disposed of her share of the family's holdings in a manner other than provided by the aforementioned statute of succession. Coming now to paragraph Fifth, if respondents (plaintiffs) constituted all of Leon's relatives who, in the absence of testamentary disposition by Clara, as survivor, would be entitled to take under section 228, and if the same were true as to those persons named by Clara, the paragraph would mean that both Leon and Clara agreed not to exercise the right of testamentary disposition over the one-half received from the other by paragraphs Second and Third; the situation here is otherwise. As the trial court correctly reasoned: "* * * if we are to give meaning to paragraph Fifth, the only meaning can be that each agreed that if he or she were the survivor, he or she would will one-half of the property remaining at his or her death to the named relatives of the other."

[9–12] But, contend appellants (defendants), paragraph Fifth does not expressly provide for the making of such wills; however, a covenant to do so was necessarily implied if essential to pass the property as agreed on the survivor's death. It is not necessary that such a covenant be spelled out in order to insure that one party will not take unfair advantage of a situation (12 Cal.Jur.2d 345–346). "In every contract there is an implied covenant of good faith and fair dealing that neither party will do anything which injures the right of the other to receive the benefits of the agreement" (Brown v. Superior Court, supra, 34 Cal.2d 564, 212 P.2d 878, 881). The case of Halldin v. Usher, 49 Cal.2d 749, 321 P.2d 746, where the present point was raised, does not appear to be to the contrary. There parol evidence was introduced to show that the document was intended as a testamentary instrument and not as a third party beneficiary contract; the Supreme Court affirmed on the ground that substantial evidence existed to support such a finding. Had such parol evidence been forthcoming in the case at bar, the trial court's decision might or might not have been different. In that respect, it is significant that the attorney who drafted the joint will, although available to testify, was never called as a witness for the defendants. Statements made to him by Leon and Clara in the presence of each other respecting agreements made or about to be made were not privileged (Scherb v. Nelson, 155 Cal.App.2d 184, 187–188, 317 P.2d 164); hence, the failure to offer such evidence raised the inference that it would have been adverse if produced (Shehtanian v. Kenny, 156 Cal. App.2d 576, 580, 319 P.2d 699).

[13] The remaining contention on defendant's appeal relates to the power of testamentary disposition over joint tenancy property. It is urged that the taking of title as joint tenants was tantamount to a binding agreement that the same should not thereafter be held as community property, citing Schindler v. Schindler, 126 Cal. App.2d 597, 272 P.2d 566. While such is the general rule, it has long been established that the character of property thus held may be changed by an executed oral agreement between the parties (Woods v. Security First Nat. Bank, 46 Cal.2d 697, 701, 299 P.2d 657). Such an agreement may be express or implied (Long v. Long, 88 Cal. App.2d 544, 549, 199 P.2d 47), and the change in status may be shown by the nature of the transaction or appear from the surrounding circumstances (James v. Pawsey, 162 Cal.App.2d 740, 328 P.2d 1023).

[14] Mention has heretofore been made of the fact that Leon made bequests far in excess of his disposable interest in the sole asset conceded by defendants to be community property. Too, Clara in turn disposed of property held in joint tenancy. Paragraphs Second and Third, respectively, refer to "all of my estate," and it is inconceivable that persons who had reached the maturity enjoyed by both of these parties would anticipate acquistion of additional holdings not then within their purview. In re Estate of Watkins, 16 Cal.2d 793, 108 P.2d 417, 109 P.2d 1, declares that under proper circumstances a will may be a contract which becomes effective as soon as executed. The case is apposite and the following language therefrom here pertinent, "Even if it be assumed that they did have such intention at the time of the execution of the so-called joint tenancy instruments above mentioned and that the execution of said instruments had the effect of carrying out such intention, it seems entirely clear that subsequently and at the time of the execution of the joint and mutual will, they jointly expressed their intention in writing that all of said property should have the status of community property." 16 Cal.2d at page 797, 108 P.2d at page 419. We think that the only sensible construction of the document at bar was that by their joint will the parties transmuted into community property any and all property held of record as joint tenants.

[15, 16] We now consider plaintiffs' cross-appeal from that part of the judgment that denied them relief by way of an accounting of moneys given to certain of Clara's relatives following Leon's death. Briefly, the evidence established that $1,025 was loaned or given to a niece, defendant Frances Dubbs, in or about the year 1956 to finance the purchase of certain property. Admittedly that sum has never been repaid, and the trial court should have authorized that one-half thereof be subjected to the administration of Clara's estate. Sandrini v. Ambrosetti, 111 Cal.App.2d 439, 451, 244 P.2d 742 The refusal of an accounting as to additional monies was within the trial court's province as the trier of fact and cross-appellants concede that their supporting testimony is "questionable." As to that phase of the cross-appeal, we cannot reweigh such testimony and the finding must stand.

[17, 18] Finally, certain plaintiffs have cross-appealed from such portion of the judgment as declared that they take nothing as specific legatees under Clara's will of 1956 presently in the course of administration. No issue respecting their rights in that regard was tendered either by the pleadings or the facts developed at the trial; nor was any finding of fact made with re-

spect thereto. The estoppel here involved did not apply to Clara's one-half, although the trial court may have felt that there were equitable grounds for decreeing that these cross-appellants should not be permitted to share in both estates. Under the circumstances, we are bound by the rule that a judgment that goes beyond the issues litigated is void insofar as it exceeds those issues (In re Wren, 48 Cal.2d 159, 163, 308 P.2d 329).

The case is remanded to the trial court with instructions to modify its findings of fact, conclusions of law, and judgment in accordance with the views herein expressed. The judgment as so amended is affirmed. Both parties will bear their own costs.

WHITE, P. J., and FOURT, J., concur.

169 Cal.App.2d 494

Charles J. GOTTESMAN and Ruth Gottesman, Plaintiffs and Appellants,

v.

Harry E. SIMON, Defendant and Respondent.

Civ. 5990.

District Court of Appeal, Fourth District, California.

April 9, 1959.

Action for personal injuries allegedly sustained by husband in automobile accident and by wife for loss of companionship, consortium, and mental and physical suffering. The Superior Court of Riverside County, S. Thomas Bucciarelli, J., rendered judgment for defendant on ground that plaintiffs' action was not commenced within the statutory limitation period of one year, and the plaintiffs appealed. The District Court of Appeal, Griffin, P. J., held that husband's mental incompetency during the period that he was under guardianship tolled the running of the statute of limitations, but that the statute of limitations, as to the wife, was not tolled.

Judgment against wife affirmed and judgment against husband reversed.

1. Limitation of Actions 🔑76(4)
Mental Health 🔑8, 161

Where husband was injured in automobile accident on September 4, 1954, and wife was appointed guardian on October 8, 1954 on ground that husband, due to brain and physical injuries received in accident, was incompetent to properly manage and take care of himself or his property, the order appointing guardian conclusively established that husband was incompetent until guardianship was terminated by order of court in October 1955, and other evidence was inadmissible to show that husband was competent at an earlier date, and therefore husband was "insane" within statute tolling period of limitations during time that person entitled to bring action is insane, with result that husband's personal injury action commenced on April 9, 1956, within one year after termination of guardianship, was timely. West's Ann.Code Civ.Proc. §§ 340, subd. 3, 352, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Insane".

2. Limitation of Actions 🔑74(1)

In statute tolling period of limitations during time that person entitled to bring action is insane, the term "insane" means such a condition of mental derangement as actually to bar the sufferer from comprehending rights which he is otherwise bound to know and embraces temporary unsoundness of mind as well as chronic or fixed insanity; the words "insane" and "incompetent" are not necessarily convertible terms, and the person may be incompetent by reason of insanity or from some other cause. West's Ann.Code Civ.Proc. § 352, subd. 2.

See publication Words and Phrases, for other judicial constructions and definitions of "Incompetent".

3. Mental Health 🔑3

The term "insane" is the equivalent of "non compos mentis", both meaning "not sane" or "of unsound mind".

See publication Words and Phrases, for other judicial constructions and definitions of "Non Compos Mentis".

4. Limitation of Actions 🔑174(1)

Failure of guardian to file personal injury action in behalf of ward within one year limitation period did not prevent ward from instituting action within one year after his restoration to competency, since the right of action vested in the ward. West's Ann.Code Civ.Proc. §§ 340, subd. 3, 352, subd. 2.

5. Husband and Wife 🔑209(4)

Wife does not have cause of action for loss of injured husband's consortium.

6. Husband and Wife 🔑221
Limitation of Actions 🔑31, 74(1)

Under statute, wife was entitled to sue alone for any claimed damage to her by reason of injuries to husband, and such action must be brought within one year after the injuries, and husband's incompetency during period of his guardianship would not toll running of the one year period in which the wife must sue. West's Ann. Code Civ.Proc. §§ 340, subd. 3, 352, subd. 2, 370.

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Tony Geram, Fontana, for appellants.

Fullerton & Morris, San Bernardino, for respondent.

GRIFFIN, Presiding Justice.

Plaintiffs and appellants, husband and wife, brought this action against defendant and respondent for personal injuries claimed to have resulted from an automobile accident. The complaint was filed on April 9, 1956, alleging the accident and injuries occurred on September 4, 1954, one year, seven months and five days after the alleged accident. It also alleged that the excusable delay in filing the action was due to the disability of the husband by reason of mental incapacity, incompetency and insanity from the time of the accident to October 1, 1955, as permitted under section 352, subdivision 2, of the Code of Civil Procedure.

The wife's claim for separate damages for $25,000 was predicated upon loss of companionship, consortium, and mental and physical suffering. No mention was made in the complaint as to the existence of any guardianship proceedings pending during that period. An answer thereto was filed October 4, 1956, denying negligence and wilful misconduct of defendant and alleging contributory negligence of plaintiff husband. Defendant also raised the defense of the statute of limitations in that the action, as pleaded by both plaintiffs, was barred by section 340, subdivision 3, of the Code of Civil Procedure.

The court, on November 8, 1957, ordered a separate trial of this latter defense before the trial of the other issues. After hearing evidence on the subject of plaintiff's claimed insanity and its duration, sitting without a jury, the court made its finding that plaintiff husband had regained his sanity prior to April 8, 1955, and was sane on and after that date, and held that plaintiffs' action was not commenced within the statutory limitation. Judgment was against plaintiffs and for defendant. A motion for new trial was denied.

[1] It is plaintiffs' main contention on appeal that the undisputed evidence submitted shows plaintiff husband to have been insane within the meaning of that term as set forth in said section 352, subd. 2, C.C. P.; that his insanity continued well past the period described, and therefore the statute of limitations was tolled during that time and the action was not barred when filed on April 9, 1956. It is further argued

that the court erred in finding that before, on and after April 8, 1955, plaintiff husband had regained his sanity.

Plaintiff husband and defendant's wife were injured while he was driving a car owned by defendant husband. Defendant followed them in his other car and Gottesman, in an endeavor to get away from him, lost control of the car he was driving, sideswiped a telephone pole, and caused the car to go into a spin. Defendant Simon, in pursuit, applied his brakes, speeded through the intersection, and smashed into the car driven by plaintiff husband, or at least both machines collided with the same telephone pole. As a result, plaintiff husband was thrown out of the car and suffered injuries which have probably crippled him for life. He was unconscious for a number of weeks, coma set in and he suffered some loss of memory for a considerable period of time. He was confined in the Riverside Hospital with severe fractures and a brain concussion for several weeks and was, on September 21, 1954, transferred to the Veteran's Hospital in Long Beach. Plaintiff wife was appointed guardian of the person and estate of her husband on October 8, 1954, on the alleged ground that he was and has been unconscious ever since September 4, 1954, due to brain and physical injuries and incompetent to properly manage and take care of himself or his property. An order for restoration was not obtained until October, 1955.

Plaintiff, in support of the issue of insanity, called as his witness a doctor who testified of his experience in neurology and neuropsychiatric work; that he had known plaintiff husband since September, 1940, gave him a physical examination for a pilot's license about 1953, and said he was then in excellent condition; that he learned about the accident after September 4, 1954, visited him at the Riverside Hospital on several occasions, and that in his opinion, when he first saw Gottesman there he was unconscious and that he remained unconscious until he was transferred to the Veteran's Hospital. Records of the hospital were read in evidence. Gottesman was discharged from the Veteran's Hospital on June 24, 1955. During the time he was there, on at least two occasions, he returned to his home on week-end passes. The doctor testified that he then saw him socially on these occasions; that subsequently he saw him professionally; that during all these occasions, from a medical point of view, his memory was poor, his speech was garbled, and to a certain extent he was probably partially rational; that he did think his actions were such as to call him responsible, but he did not appear to have any memory of the accident and its details until two or three months thereafter; that in his opinion he was not physically or mentally competent to see danger, to observe it or know his condition; that there was evidence of permanent brain damage, such as a condition existing in some ex-boxers who are called "slap happy", or emotionally unstable; that the term "Euphoric", used on the patient's chart, indicates "one step above a person being happy and probably one step below being maniac", i. e., "he is walking on a cloud". The witness was then confronted with a certificate, dated September 22, 1955, which he had filed in the guardianship proceedings on the petition for restoration, stating that Gottesman "is mentally competent as of August 1, 1955".

Gottesman's wife testified she visited her husband in the Riverside Hospital and he was then unconscious; that he was unconscious at the time of his removal to the Veteran's Hospital; that about November, 1954, he was conscious enough to speak a word or two to her; that some time after he regained consciousness, he seemed to understand and then a few minutes later he would forget what she said; that this condition existed from January, 1955, through June, 1955, and even to the present date.

It does appear that she had him sign a deed to some real property dated January 25, 1955, during the period the guardianship existed. He marked an "X" on it and it recited that at his request it was witnessed by two other witnesses. The notary's certificate recites that on February 16, 1955, Gottesman acknowledged he executed and delivered the same and that the witnesses subscribed their names thereto. (The question of the validity of this deed is not here involved.)

A physical therapist at the Veteran's Hospital testified he first treated Gottesman about February, 1955, and he was then bedfast; that the patient was cooperative; that he did not believe he was ever "irrational", but he was unstable; that at the time he obtained his first pass he would not say he was insane but he did not believe he was capable of taking care of himself, and that he was gradually growing better in every way.

Defendant produced the notaries public who acknowledged the grant deed executed by the patient, and after testifying as to the practice, over a period of years, of notaries and acknowledging instruments executed by patients in the Veteran's Hospital, they first consulted the doctor and also propounded certain questions themselves in determining whether the patient understood the nature of his act, that this was the practice followed in the instant case at the time the deed was executed.

A duly qualified psychiatrist from Patton State Hospital testified, in response to a hypothetical question propounded to him by counsel for defendant, regarding the material facts in reference to the accident, treatment received by the patient, testimony of other witnesses, and the nature of the injuries produced from the progress notes of the patient's charts, were considered by him. In response to the general question the doctor said he was of the opinion that, from the latter part of February and no later than the early part of March, and certainly on April 8, 1955, the patient was sane, had a full mental capacity, and was not, in a legal sense, insane.

[2] In Pearl v. Pearl, 177 Cal. 303, 177 P. 845, 846, in dealing with the defense of insanity, as used in section 352, supra, the trial court found that decedent was "incapable of caring for his property, or transacting business, or understanding the nature or effects of his acts". The Supreme Court said this "was equivalent to a finding in the express terms that the deceased was insane" under this section. See also In re Zanetti, 34 Cal.2d 136, 208 P.2d 657. In 54 C.J.S. Limitations of Actions § 242, p. 269 it is stated:

> "The party who invokes the protection of such saving clause, or those claiming under him, must show the condition of mind contemplated by the statute, which will not be extended to embrace other conditions. The term 'insane', as used in this connection, has been give a generic, rather than a technical, meaning, and has been held to mean such a condition of mental derangement as actually to bar the sufferer from comprehending rights which he is otherwise bound to know, and the exception has been held to embrace temporary unsoundness of mind as well as chronic or fixed insanity."

[3] The term "insane" is the equivalent of "non compos mentis", both meaning "not sane" or "of unsound mind". Jacks v. Estee, 139 Cal. 507, 73 P. 247. Wood on Limitations, 4th Ed., Vol. II, p. 1070.

Defendant fully agrees with plaintiffs that the applicable definitions of insanity are set forth in the excerpts from Pearl v Pearl, supra, and Wade v. Busby, 66 Cal. App.2d 700, 152 P.2d 754, where it is held that the words "insane" and "incompetent" are not necessarily convertible terms, as a person may be incompetent by reason of insanity or from some other cause. Defendant concedes in his brief that a person lacking in mental capacity to understand the nature or effect of his act is insane.

A narrative summary of the chart made by the attending physician at the Veteran's Hospital showed that on entrance there the patient was in a stuporous condition and unconscious; that by April, 1955, he had improved in his balance and was able to walk short distances using his wheel chair, and that as of June 1, 1955, he was oriented and rational and his speech was understandable. In the absence of the question of the legal effect of the guardianship proceedings it is clear that there was a conflict in the evidence as to the patient's sanity on the date found, which would be sufficient to support the finding of the trial court. It should be here noted that a guardian was appointed under the representations in the petition, as above indicated. The next question is the effect of the guardianship proceedings. It is plaintiffs' claim that proof of adjudication of incompetency presupposes lack of mental capacity to understand the nature and effect of the ward's acts, is conclusive as a matter of law, not subject to an indirect attack, and until a legal decree is obtained restoring him to legal competency such condition is conclusively presumed to exist, citing such authority as Hellman Commercial Trust & Savings Bank v. Alden, 206 Cal. 592, 275 P. 794; Carroll v. Carroll, 16 Cal.2d 761, 767, 108 P.2d 420; Gibson v. Westoby, 115 Cal.App.2d 273, 251 P.2d 1003. See also 27 Cal.Jur.2d p. 359, sec. 35, where it is said:

> "A person of unsound mind whose incapacity has been judicially determined cannot make a contract or delegate any power until his restoration to capacity. Such an adjudication constitutes notice 'to all the world' of the incapacity. It amounts to an adjudication in rem, conclusive as such. Whenever it is binding on any person, it is equally binding on all persons, though they have constructive notice only. Hence, where mental incapacity has been adjudged, no further evidence of mental incapacity is required while the decree remains in full force and effect; proof of the adjudication of incompetency amounts to proof of lack of mental capacity to understand the nature and effect of the transaction involved. This is true regardless of whether the person involved was adjudicated insane or incompetent, and regardless of the character or degree of mental derangement involved." See also Condee California Probate Court Practice, Vol. II, p. 219.

It is then argued that the reception of other evidence on the subject by the trial court, over objections, after the admission of such guardianship proceedings in evidence, was prejudicial error, and that such a cause of action remains in the person under such legal disability and does not shift to the person of the guardian, and the right of action is not affected by the failure of the guardian to sue within the prescribed time, citing Dixon v. Cardozo, 106 Cal. 506, 39 P. 857; O'Shea v. Wilkinson, 95 Cal. 454, 30 P. 588; and O'Brien v. United Bank Co., 100 Cal.App. 325, 279 P. 1048.

Most authorities relied upon by plaintiff involved the application of sections 38, 39 and 40 of the Civil Code. In re Estate of Powers, 81 Cal.App.2d 480, 184 P.2d 319 [Hearing denied in Supreme Court] involving *testamentary capacity,* it was held that an adjudication of incompetency following testatrix' admission to a hospital prior to the date of execution of the will, is not *prima facie* evidence of her subsequent incompetency to make a will. There, certain language used in the Hellman case, supra, was said to be dictum and opposed the court's holding in Re Estate of Johnson, 200 Cal. 299, 252 P. 1049, where it was held in a will contest that an adjudication of insanity *raised a presumption* of lack of testamentary capacity on that date but a judgment in the incompetency proceeding was only evidence of mental condition on the day of the adjudication.

Although there is contrary authority from other jurisdictions it appears that the authorities of this state, as they pertain to section 38 (person entirely without understanding in making contracts), section 39 (conveyance or contract of a person of unsound mind but not entirely without understanding), and section 40 (after incapacity has been judicially determined, a person of unsound mind can make no conveyance or other contract until restored to capacity), hold that a judicial determination fixing the status of incompetency prevails until such time as the incompetent is restored to capacity or the guardianship has been substantially abandoned. 28 Am. Jur. 696, sec. 57; Gibson v. Westoby, 115 Cal.App.2d 273, 251 P.2d 1003. In O'Brien v. United Bank, etc., supra, a different rule appears to apply in reference to mental capacity of a person to execute a will. The critical inquiry in such a case is to determine such capacity at the time of the execution of the will. If this rule can be held to apply to the statute of limitations under section 352, subdivision 2 of the Code of Civil Procedure (Insanity) then the guardianship proceeding would not be conclusive of incompetency of Mr. Gottesman on the date found, and other evidence on the subject of restoration to capacity would be admissible. In analyzing this question we are immediately confronted with the opposite rule above cited in respect to sections 38, 39, and 40, supra, as well as Vigne v. Superior Court, 37 Cal.App.2d 346, 99 P.2d 589, where it is held that when it has been judicially determined in a proceeding for the appointment of a guardian, that a person is incompetent to handle his person and property, the effect thereof is to fix the status of incompetency until such time as the incompetent is again restored to capacity; and when a guardian has been appointed, there is no method of restoration to capacity except that provided by section 1470 of the Probate Code, and the probate court is without jurisdiction to pass upon the question of the ward's sanity in a proceeding under sections 613, 614, and 1552 of said code to require the custodian of the ward's will to deliver it to the ward's attorney. To the same effect is Gibson v. Westoby, supra; O'Brien v. United Bank, etc., supra; and Carroll v. Carroll, supra.

Neither our research nor the briefs of counsel have brought to our attention any case in this state involving the tolling of the statute by reason of insanity, which directly determines the conclusive effect of an order appointing a guardian for an incompetent, in so far as it pertains to the admissibility of the evidence contrary to the finding of the court in the guardianship proceeding.

Defendant argues with some convincing merit that if the doctrine of res judicata should be applied in such cases, an injured party could well take advantage of the situation and refuse or fail to secure an order of restoration to capacity in the guardianship proceeding and thus continue to take advantage of the limitations statute forever, and defendant would be powerless to object or to compel action by the ward to have restoration to capacity otherwise legally determined; that a holding in this case that the commencement of the running of the statute of limitations would be dependent upon timeliness of termination of guardianship proceedings and not upon any actual incapacity of the plaintiff would result in great mischief and would permit the plaintiffs in this case, and also plaintiffs in the future, to make an affirmative, intended or unintended and abusive use of the guardianship proceedings.

Under sections 38, 39, and 40 of the Civil Code the incapacity arises as a matter of law, unless the guardianshp has been terminated by an order of the court or has been substantially abandoned (28 Am.Jur. p. 696, sec. 57.) This might indicate there may be other circumstances where the harsher rule would not apply. 54 C.J.S. Limitations of Actions § 242, p. 269. The evidence in the instant case does not affirmatively show that plaintiff husband did make an affirmative, intentional or unintentional or abusive use of the guardianship proceeding, and there is no finding to this effect. Accordingly, we are not confronted with the question as to what an adequate remedy would be for such claimed abuse. In fact, attending physicians were of the opinion the patient was mentally incapacitated and incompetent to transact any business until June, 1955, or later. (Contracting with an attorney and filing an action may be considered business.)

Opposed to that is the opinion of an expert based mainly on charts kept in the hospital and other evidence produced, without actual knowledge of the patient's mental condition. See In re Estate of Powers, supra, 81 Cal.App.2d at page 485, 184 P.2d at page 322. Neither the legislature nor the courts have seen fit to relax the rule as applied under sections 38, 39, and 40 of the Civil Code, to conform to the rule applied in the making of testamentary disposition of property. We conclude from the decisions that it was the intent to equally apply them to section 352, subdivision 2 of the Code of Civil Procedure. Accordingly, any evidence as to the sanity of plaintiff husband, admitted over objections after the reception in evidence of the guardianship adjudication, was erroneously received. O'Brien v. United Bank, etc., supra, 100 Cal.App. at page 329, 279 P. at page 1050.

[4] Since the right of action vests in the ward, it is not affected by the failure of the guardian to sue within the prescribed time. O'Shea v. Wilkinson, 95 Cal. 454, 30 P. 588; Dixon v. Cardozo, 106 Cal. 506, 39 P. 857.

[5, 6] As to plaintiff wife, Ruth Gottesman, her claimed cause of action was referred to by appellants' counsel in his brief as being for loss of "consortium". If so, an action for loss of "consortium" is not actionable. Deshotel v. Atchison, Topeka & Santa Fe Ry. Co., 50 Cal.2d 664, 328 P.2d 449. Regardless of this, the statute of limitations, as to her, was not tolled under any theory. Under section 370 of the Code of Civil Procedure, she was entitled to sue alone for any claimed damage to her, and such an action was barred by section 340, subdivision 3 of the Code of Civil Procedure. Moody v. Southern Pacific Co., 167 Cal. 786, 141 P. 388; Basler v. Sacramento etc. Gas. Co., 166 Cal. 33, 134 P. 993. The judgment as to her should be affirmed. A new trial should have been granted to plaintiff husband.

Judgment against plaintiff Ruth Gottesman affirmed. Judgment against plaintiff Charles J. Gottesman reversed.

MUSSELL and SHEPARD, JJ., concur.

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169 Cal.App.2d 727

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Robert Ronald JORDAN, Defendant and Appellant.

Cr. 2889.

District Court of Appeal, Third District, California.

April 20, 1959.

Defendant was convicted of violation of Penal Code, §§ 220 and 286. The Superior Court, Stanislaus County, David F. Bush, J., rendered judgment, and defendant appealed. The District Court of Appeal, Peek, J., held that certain clothing worn by prosecutrix at time the alleged acts were committed was admissible despite its prejudicial tendency.

Affirmed.

1. Criminal Law 🔑1153(4)
Witnesses 🔑267

On cross-examination great latitude should be allowed, however scope thereof is committed to sound discretion of trial court, and its rulings will not be disturbed on appeal in absence of a clear showing of abuse of discretion.

2. Witnesses 🔑282½

In prosecution for violation of Penal Code, §§ 220 and 286, wherein it appeared that question asked of prosecutrix on cross-examination was unduly embarrassing and insulting, and it appeared that like questions had been asked previously and prosecutrix had answered apparently as best she could, restriction of cross-examination with respect to such question was not an abuse of discretion. West's Ann.Pen.Code, §§ 220, 286; West's Ann.Code Civ.Proc. § 2066.

3. Criminal Law 🔑404(4)

In prosecution for violation of Penal Code, §§ 220 and 286, certain clothing worn by prosecutrix at time the alleged acts were committed was admissible despite its prejudicial tendency. West's Ann.Pen.Code, §§ 220, 286.

4. Criminal Law 🔑485(1)

A hypothetical question must be based upon facts shown by the evidence and any question that assumes facts not in evidence is improper.

5. Criminal Law 🔑485(1)

In prosecution for violation of Penal Code, §§ 220 and 286, objection of prosecution to hypothetical question asked of doctor, who had examined prosecutrix, was properly sustained where question assumed facts which were not in evidence. West's Ann. Pen.Code, §§ 220, 286.

6. Criminal Law 🔑728(2, 5)

In prosecution for violation of Penal Code, §§ 220 and 286, even if comments of district attorney were improper, defendant waived objection to them by failing to object and to request that jury be admonished to disregard them, especially where there was no showing that comments were prejudicial or that any prejudice resulting therefrom could not have been cured by prompt admonition by the court. West's Ann.Pen. Code, §§ 220, 286.

7. Criminal Law 🔑720(1)

Counsel, in his argument to the jury, is permitted a reasonable latitude in discussing merits of case and his views in that regard.

8. Criminal Law 🔑730(7)

In prosecution for violation of Penal Code, §§ 220 and 286, even if statements made by district attorney in his final argument to jury was closely akin to that which might have been taken as evidence, reversal was not required where trial court promptly admonished jury to disregard the same and jury was fully and fairly instructed on all phases of the case. West's Ann.Pen.Code, §§ 220, 286.

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Ted James Kukula, San Francisco, for appellant.

The Attorney General, by William O. Minor, Deputy Atty. Gen., for respondent.

PEEK, Justice.

Defendant appeals from a judgment of conviction of one count charging violation of Penal Code, section 220, and from a second count charging violation of Penal Code, section 286.

The sufficiency of the evidence is not attacked, but defendant does contend (1) that the trial court unduly restricted his cross-examination of the prosecutrix; (2) that the court erred in admitting certain items of wearing apparel into evidence; (3) that the trial court erred in sustaining an objection to a hypothetical question asked of an expert witness on cross-examination; and (4) that the prosecuting attorney committed prejudicial misconduct.

[1,2] It has long been the rule that on cross-examination great latitude should be allowed (People v. Williams, 18 Cal. 187); however the scope thereof is committed to the sound discretion of the trial court, and its rulings will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion. People v. Nazworth, 152 Cal. App.2d 790, 796, 313 P.2d 113. The particular question asked of the prosecutrix by defense counsel related to the element of sexual connection. The situation presented was not such as where a party was completely precluded from cross-examining a witness upon a material fact. Like questions had been asked previously, and the prosecutrix had answered apparently as best she could. Furthermore it appears from the discussion of this issue in the briefs of the parties that the manner in which the question was asked was unduly embarrassing and insulting to the prosecutrix. While it is difficult to determine such matters from the cold record, if the question did fall into such category, the question as asked was likewise improper upon this ground. Code of Civ. Proc. sec. 2066; Dastagir v. Dastagir, 109 Cal.App.2d 809, 816, 241 P.2d 656.

[3] Defendant's second contention refers to the admission into evidence of certain clothing worn by the prosecutrix at the time the alleged acts were committed. It is well established that "'* * * any evidence [is admissible] which may have a tendency to illustrate or throw any light on the transaction in controversy, or give any

weight in determining the issue, leaving the strength of such (testimony) tendency or the amount of such weight to be determined by the jury.' " People v. Mooney, 177 Cal. 642, 655, 171 P. 690, 695. And such evidence is admissible despite its prejudicial tendency. People v. Cavanaugh, 44 Cal.2d 252, 282 P.2d 53.

[4, 5] The third contention of defendant relates to a hypothetical question asked of the doctor who examined the prosecutrix. A hypothetical question must be based upon facts shown by the evidence, and hence any question that assumes facts not in evidence is improper. People v. Wilson, 25 Cal.2d 341, 153 P.2d 720. In the present case the question asked of the doctor assumed facts which were not in evidence, nor is it so contended by the defendant, and hence the objection of the prosecution was properly sustained.

It is next contended by defendant that the prosecution asked certain questions of a defense witness on cross-examination, knowing that the answers would involve hearsay statements. We find no support in the record for such contention. The witness was called by the defendant and there is no showing whatsoever that the prosecution had any knowledge of what her answers would be. In any event the jury was promptly admonished to disregard the testimony.

A further contention is that the prosecution was guilty of misconduct in deliberately attempting to place the burden of proof on the defendant. The record shows that the district attorney was merely referring to the evidence showing defendant's guilt, and that the attack had been witnessed by two persons. The trial court thoroughly and correctly instructed the jury on the question of the burden of proof.

[6] Defendant next contends that the district attorney cast aspersions on defense counsel. Even though we assume that such comments were improper, the defendant has waived objection to them by failing to object and to request that the jury be admonished to disregard the same. Furthermore, there is no showing that such comments were prejudicial or that any prejudice resulting therefrom could not have been cured by prompt admonition by the court.

[7, 8] Lastly defendant attacks certain statements made by the district attorney in his final argument to the jury. It must be remembered that counsel, in his argument to the jury, is permitted a reasonable latitude in discussing the merits of the case and his views in that regard. Even if it could be said that the statements of the prosecutor were closely akin to that which might be taken as evidence, the trial court promptly admonished the jury to disregard the same. Additionally it should be noted that the jury was fully and fairly instructed on all phases of the case.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

169 Cal.App.2d 448

L. H. PRICE and E. W. Van Buskirk, Plaintiffs and Respondents,

v.

John D. SLAWTER, Jr., Defendant and Appellant,

Frances R. Slawter, etc., Defendant.

No. 18657.

District Court of Appeal, First District, Division 1, California.

April 9, 1959.

As Modified on Denial of Rehearing May 6, 1959.

Action to terminate joint venture of plaintiffs and defendants in purchase of certain real property, its development as a motel and the sale thereof. The Superior Court, County of Santa Clara, N. J. Menard, J., entered judgment denominated as an "interlocutory judgment", and one of the defendants appealed and petitioned for writ of supersedeas and temporary stay and respondents moved to dismiss appeal. The District Court of Appeal, Bray, J., held that where "interlocutory judgment", adjudged that joint venture should be dissolved and its affairs wound up and assets sold by a commissioner appointed therefor and proceeds applied to discharge liabilities of venture, and pending further order of court management and control of joint venture was left in plaintiffs subject to authority of commissioner to sell, such a judgment, regardless of name given to it, was final and appealable.

Motion to dismiss appeal denied, and writ of supersedeas issued.

1. Appeal and Error ⚷485(1)

If so-called "interlocutory judgment" was a final judgment, appeal would operate as a supersedeas without necessity of a bond. West's Ann.Code Civ.Proc. § 949.

2. Appeal and Error ⚷76(1)

Whether a judgment is a final one which is appealable does not depend on what it is entitled but what it does. West's Ann.Code Civ.Proc. § 963.

3. Judgment ⚷527

In determining what matters were decided by judgment, findings of fact and conclusions of law as well as judgment itself must be considered.

4. Judgment ⚷216

Where anything in the nature of judicial action is necessary to a final determination of rights of parties, a judgment is interlocutory and not final.

5. Appeal and Error ⚷80(3)

Where action was brought to terminate joint venture and court entered what it called an interlocutory judgment in which it was adjudged that joint venture should be dissolved and its affairs wound up and assets sold by a commissioner with proceeds to be applied to discharge of liabilities of venture, and findings set forth the interests of each party in joint venture, if there were any net proceeds of sale, division among joint venturers was an arithmetical one not requiring judicial determination, and this fact did not prevent judgment from becoming a final, appealable one.

6. Appeal and Error ⚷80(3)

Where court, in action to terminate a joint venture, entered what it called an interlocutory judgment adjudging that joint venture should be dissolved, its affairs wound up and assets sold by a commissioner appointed therefor and proceeds to be applied to discharge of liabilities of venture, fact that under statute estate of deceased joint venturer had right to elect whether it should receive as its share of profits, if any, value of that share at time of death of deceased with interest, or in lieu of interest profits attributable to use of decedent's right in property of joint venture after death, did not prevent finality of judgment for appeal purposes. West's Ann.Corp.Code, § 15042.

7. Executors and Administrators ⚷213.5

Estate of a deceased joint venturer cannot be charged with losses accruing subsequent to his death.

8. Appeal and Error ⚷80(4)

Where action was brought to terminate joint venture and court entered what it called an interlocutory judgment determining that joint venture should be dissolved, its affairs wound up and its assets sold by court-appointed commissioner and proceeds to be used for discharge of venture's liabilities, and accounting by court was of date selected by parties as nearest available date of accounting prior to trial, fact that there had to be further accounting did not prevent judgment from being a final one for purposes of appeal.

9. Appeal and Error ⚷80(1)

Where court entered what it denominated as an interlocutory judgment in which it adjudged that joint venture should be terminated and its affairs wound up with its assets to be sold by court-appointed commissioner who was to apply the proceeds in discharge of joint venturer's liabilities, fact that after conclusion of trial one of the parties learned that a deed of trust on joint venture property was executed by one of the joint venturers and no motion was made to reopen case to determine whether loan was a partnership liability and no mention was made of it in the findings or judgment, existence of trust deed did not prevent finality of judgment for purposes of appeal, since finality of judgment had to be determined as of matter submitted to court for determination.

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Di Maria & Daschbach, Palo Alto, for appellants.

L. W. Wrixon, San Francisco, James W. Foley, San Jose, for respondents.

BRAY, Acting Presiding Justice.

Petition by appellant John D. Slawter, Jr., for writ of supersedeas and temporary stay. Motion by respondents to dismiss appeal.

Question Presented.

Is the "Interlocutory Judgment" a final judgment and hence appealable?

Record.

In an action brought by respondents against defendants to terminate a joint venture of the plaintiffs, defendants John D. Slawter, Jr., and Benjamin Lee Slawter (since deceased and here represented by Frances R. Slawter, administratrix), in the purchase of certain real property, its development as a motel and the sale thereof, the court made findings of fact and conclusions of law and then entered its "Interlocutory Judgment," wherein it found and adjudged that the joint venture should be dissolved and its affairs wound up; that its assets be sold by a commissioner appointed therefor, and the proceeds applied to discharge the liabilities of the venture. Pending the further order of the court the management and control of the joint venture business (the operation of a motel) was left in plaintiffs, subject to the authority of the commissioner to sell it.

The court found that the total value of the assets of the venture was $375,208.79 and its liabilities were $478,368.98, of which sum $186,237.09 was owed plaintiffs for advances. The court ordered that the net proceeds from the sale of the assets should be applied to liabilities (a) to those owing to creditors other than partners, (b) to those owing to joint venturers other than for capital and profits, (c) to those owing to joint venturers in respect of capital (the court found that appellant had made no contribution to capital), and (d) to those owing to joint venturers in respect of profits. The judgment then provided that the excess, if any, "shall be retained by the * * * Commissioner, subject to the further order of this Court and the rendition of a final judgment herein; * * * 9. That this Court hereby reserves jurisdiction over the dissolution and winding up of said joint venture and authority to make such further orders as may reasonably be required in order to consummate the dissolution and winding up of said joint venture and the rendition of a final Judgment; * * *."

Pursuant to the interlocutory judgment the commissioner noticed for sale the real and personal property of the venture setting the sale for March 4, 1959. Thereupon petitioner applied to this court for a writ of supersedeas and temporary stay. We granted a stay to await the determination of the application for writ of supersedeas. Thereafter respondents moved to dismiss the appeal upon the ground that the interlocutory judgment is not a final one and therefore not appealable.

Is the "Interlocutory Judgment" Appealable?

[1, 2] It is conceded that unless it is a final judgment under section 963, Code of Civil Procedure, it is not appealable. See Bakewell v. Bakewell, 1942, 21 Cal.2d 224, 130 P.2d 975. If it is a final judgment, the appeal would operate as a supersedeas without the necessity of a bond. Code Civ.Proc. § 949; Zappettini v. Buckles, 167 Cal. 27, 138 P. 696. It has been held

that whether a judgment is a final one does not depend upon what it is entitled but what it does. Brown v. Memorial Nat. Home Foundation, 1958, 158 Cal.App.2d 448, 453, 322 P.2d 600.

The judgment here is practically identical with the one in Zappettini v. Buckles, supra, 167 Cal. 27, 138 P. 696, which the court there held was appealable as a final judgment. There, as here, it was an action for dissolution of a partnership, an accounting and distribution of the assets after payment of debts. A receiver appointed by interim order took possession of all the assets. (Here the sale is to be made by a commissioner who has not taken possession of the assets, rather than a receiver, a distinction without a difference.) There judgment was entered determining (as here) the rights of the partners as between themselves, and as here, it ordered (a) dissolution of the partnership, (b) sale of its assets by the receiver, (c) payment of its debts, and distribution of any balance to the partners in the proportions determined by the judgment. The court stated (167 Cal. at page 32, 138 P. at page 698): "Notwithstanding the deferring of the fixing of the compensation of the receiver and of the referee, and the reservation of the determination of the question of the debts of the firm to others, the judgment fully and finally determined all the rights of the parties as between themselves." See also Brown v. Memorial Nat. Home Foundation, supra, 158 Cal.App.2d 448, 322 P.2d 600; Taylor v. Taylor, 1957, 153 Cal.App.2d 144, 314 P.2d 60; Peterson v. Lightfoot, 47 Cal.App. 646, 191 P. 48; Sondergard v. Breaum, 83 Cal.App. 352, 256 P. 580.

[3] In determining what matters were decided by the judgment the findings of fact and conclusions of law as well as the judgment itself must be considered. See 2 Witkin, California Procedure, p. 1831, § 102.

[4, 5] Respondents point to the well-established rule that where anything in the nature of judicial action is necessary to a final determination of the rights of the parties a judgment is interlocutory and not final. See Bakewell v. Bakewell, supra, 21 Cal.2d 224, 227, 130 P.2d 975; Taylor v. Taylor, supra, 153 Cal.App.2d 144, 314 P.2d 60. They then contend that there were four matters still awaiting judicial action. First they contend that the findings and judgment did not determine how the net assets, if any, should be divided among the joint venturers. While the findings and judgment could have been clearer written in this respect, nevertheless a study of them shows that the court did make this determination. This fact differentiates this case from Bakewell v. Bakewell, supra, 21 Cal.2d 224, 130 P.2d 975, where the court in its interlocutory decree did not determine the interests of the partners.

Paragraph 12 of the findings incorporates certain provisions of the joint venture agreement, among which is the following: "1. All profits, earnings, losses and liabilities arising from the purchase and development of said real property shall be shared among the parties hereto as follows:" one-quarter to each. While the paragraph in the findings containing this statement relates primarily to the liability of the partners to the repayment to plaintiffs of the amount which the court found was owing from the joint venture to the plaintiffs for money advanced, it is clear from the findings and judgment as a whole that the proportion in which the profits, if any, from the sale of the assets after making the payments specifically provided to be paid, were to be divided one-quarter to each partner. Paragraph 17 states: "Title to the motel real property owned by the Desert Inn Motel Company Joint Venture is held of record in undivided one-fourth interests in * * *" the parties to this action. Actually respondents make no contention that the profits are to be divided otherwise. They do contend, however, that the estate of Benjamin Lee Slawter has an option of determining just how its one-quarter share shall be determined (this will be discussed hereafter) but they do not contend that the estate's interest is more than a one-quarter share.

Thus, if there are any net proceeds of the sale the division is an arithmetical one and does not require judicial determination.

[6, 7] Respondents' second contention that the judgment is not final relates to their contention that under section 15042, Corporations Code, the estate of the deceased partner has a right to elect whether it should receive as its share of the profits, if any, the value of that share at the time of the death of Benjamin with interest, or in lieu of interest the profits attributable to the use of the decedent's right in the property of the joint venture after his death. The estate of a deceased joint venturer cannot be charged with losses accruing after death. Harvey v. Harvey, 90 Cal.App.2d 549, 554, 203 P.2d 112. Assuming that, as contended by plaintiffs, the question of whether a section 15042 election is still available to the estate was reserved (the record fails to disclose this fact—respondents contend that it was not), such a determination of the method of arriving at the proper sum to be paid the estate of a partner (his proportionate share as between himself and the other partners having been determined) is not of such character as to take away the finality for appeal purposes of the judgment rendered.

[8] Respondents' third contention is that there must be a further accounting. The judgment was entered December 26, 1958. The accounting determined by the court was as of August 31, 1958, the date selected by the parties as the nearest available date of accounting prior to trial. This further type of accounting is similar to those which in Zappettini v. Buckles, supra, 167 Cal. 27, 138 P. 696, and Brown v. Memorial Nat. Home Foundation, supra, 158 Cal.App.2d 448, 322 P.2d 600, were held not to take away the finality aspects as regards appeal of the judgment theretofore rendered. Gunder v. Gunder, 1929, 208 Cal. 559, 282 P. 794, is not in point. There no accounting whatever had been had. In distinguishing that case from Zappettini v. Buckles, supra, 167 Cal. 27, 138 P. 696, and Clark v. Dunnam, 46 Cal. 204, in both of which cases the interlocutory decrees were held to be final for purposes of appeal, the court, after pointing out that the decree in the Gunder case referred all matters of accounting to a referee appointed for that purpose, said (208 Cal. at page 561, 282 P. at page 795): "In neither of those cases did the decree involve a reference for an accounting, but in each case it ordered a sale of property and specified the distribution to be made of the proceeds."

[9] Respondents' fourth contention is based upon statements in an affidavit of one of the respondents to the effect that after the conclusion of the trial of this case respondents learned that on July 1, 1958 (a date prior to the trial) a deed of trust on the joint venture property was recorded, executed by appellant and his wife to secure the payment of $35,000 to one Jack Marks; that appellant in court on December 26, 1958, admitted the execution of this instrument and that respondents had never authorized the execution of such deed of trust nor been advised of its existence. Apparently this matter was brought out on a hearing on the findings. (There is nothing in the record on this matter.) No motion was made to reopen the case to determine whether this loan is a partnership liability or chargeable solely to appellant, nor is any mention made of it in the findings or judgment. The finality of the judgment must be determined as of the matters submitted to the court for determination. After discovered matters cannot make a judgment which is final for purposes of appeal less final.

As the judgment for purposes of appeal is a final one and appealable, and as section 949, Code of Civil Procedure, provides that no bond is required upon appeal from such a judgment, the motion to dismiss the appeal is denied. Let the writ of supersedeas issue restraining the Superior Court of

Santa Clara County and the Judge thereof, its officers, and the respondents L. H. Price and E. W. Van Buskirk from proceeding with the execution of any portion of the judgment given on December 26, 1958, in said Superior Court wherein L. H. Price and E. W. Van Buskirk are plaintiffs and John D. Slawter, Jr., and Frances R. Slawter, administratrix of the estate of Benjamin Lee Slawter, sometimes also known as Ben Lee Slawter, are defendants, so long as there is any appeal pending from said judgment.

FRED B. WOOD, J., and HANSON, J. pro tem, concur.

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169 Cal.App.2d 461

John M. CROW, Plaintiff and Appellant,

v.

CITY OF LYNWOOD, a Municipal Corporation, et al., Defendants,

City of Lynwood, a Municipal Corporation; Irvin L. Brockman, Roy M. Lincoln, Louis J. Reggiardo, Julius C. Lipschultz and L. W. Pettijohn, Respondents.

Civ. 23292.

District Court of Appeal, Second District, Division 1, California.

April 9, 1959.

Rehearing Denied May 5, 1959.

Hearing Denied June 3, 1959.

Proceeding on a petition by discharged policeman for a writ of certiorarified mandamus and an administrative writ of mandamus directed to personnel board of city and others seeking reinstatement as a member of police department and payment of salary from date of discharge and other relief. From adverse judgment of the Superior Court, Los Angeles County, Frank C. Charvat, J., the policeman appealed. The District Court of Appeal, Fourt, J., held that where decision of personnel board of city sustaining termination of his employment as a member of police department was received by policeman on February 26, policeman had 60 days from such date within which to file a proceeding by way of petition for writ of certiorarified mandamus and administrative mandamus, and filing of such proceeding by way of petition on April 30, was beyond period of limitations prescribed by the law.

Judgment affirmed.

1. Mandamus ⚷187(4)

Where discharged city policeman filed a proceeding denominated a "petition for writ of certiorarified mandamus and administrative mandamus" against personnel board of city, which had sustained termination of employment of policeman, and board affirmatively alleged that petition was barred by a section of government code in that it had not been timely filed, and policeman had answer for some five months before date of hearing on matter and did not indicate that he was not proceeding under such section and he led trial court to believe that he was proceeding under such section, policeman could not, for the first time on appeal, contend that he was not proceeding pursuant to government code provisions. West's Ann.Gov.Code, §§ 11500, 11501, 11523.

2. Mandamus ⚷143(1)

Where decision of personnel board of city sustaining termination of his employment as a member of police department was received by policeman on February 26, policeman had 60 days from such date within which to file a proceeding by way of petition for a writ of certiorarified mandamus and administrative mandamus and filing of such proceeding by way of petition on April 30, was beyond period of limitations prescribed by the law. West's Ann.Gov.Code, §§ 11500, 11501, 11523.

3. Limitation of Actions ⚷105(2)

Where discharged city policeman, who contended that proceedings of personnel board of city resulting in a decision sustaining termination of his employment, were invalid, filed a petition for writ of mandamus in superior court and personnel board thereafter conducted a public hearing and rendered a decision finding that policeman was guilty of insubordination and conduct unbecoming an officer and ordering that his discharge be affirmed, and thereafter board responded in court and writ of mandamus previously issued was discharged, such mandamus action did not toll period of limitations within which policeman could file a petition for mandamus under Administrative Procedure Act to review decision of board sustaining his discharge. West's Ann. Gov.Code, §§ 11500, 11501, 11523; West's Ann.Code Civ.Proc. § 1097.

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Taylor, Sherman & Heller, Los Angeles, for appellant.

Harney, Drummond & Dorsey, by David M. Harney, Los Angeles, for respondents.

FOURT, Justice.

This is an appeal from a judgment which in effect provided that the appellant had delayed beyond the statutory period the filing of his petition for a judicial review of an action of an administrative board, and that the determination of the board was final.

The appellant was employed as a policeman by the City of Lynwood. He was discharged from his job on July 26, 1956. Thereafter the Personnel Board of the City held certain proceedings to determine the validity of the termination of the employment of appellant. The Personnel Board apparently voted four to one to uphold the decision to terminate the employment of the appellant as a member of the Police Department of the City. The appellant contended that the proceedings held by the Personnel Board were invalid, and on October 4, 1956, filed a petition for writ of mandamus in the Superior Court (case No. Compton C–1471). An alternative writ of mandate was issued by that court directing the respondents either to reinstate the appellant as a member of the Police Department or to show cause why he was not so reinstated. Thereafter the Personnel Board conducted a public hearing on the question of termination of the employment of appellant as a policeman, and on February 25, 1957, rendered a decision wherein, in effect, the Board found that appellant was guilty of insubordination and conduct unbecoming an officer, and ordered that the discharge of appellant be affirmed. It was stipulated that the decision of the Personnel Board was mailed to the appellant on February 25, 1957, and was received by him on February 26, 1957.

Thereafter, the defendants in Superior Court case No. Compton C–1471 responded in court and the writ of mandamus theretofore issued was discharged. Notice of that ruling of the court was served upon the appellant's attorneys on April 1, 1957.

On April 30, 1957, the appellant filed the within proceeding denominated a "Petition for Writ of Certiorarified Mandamus and Administrative Mandamus." The prayer of the petition reads as follows:

"Wherefore, plaintiff prays that a Certiorarified Writ of Mandamus and an Administrative Writ of Mandamus be granted and issued out of and under the Seal of this Honorable Court directed to the defendants above named, commanding them to certify and return all papers, petitions, complaints, charges, specifications, notices of examinations, proceedings, testimony, findings and conclusions of the defendant Personnel Board, and decision of said Personnel Board upholding the termination of employment of plaintiff and affirming the decision of defendant, Ralph E. Darton, as Chief of Police of the City of Lynwood, dismissing plaintiff from the Police Department of the City of Lynwood, and that the above-entitled court may review said decision of defendant Personnel Board of the City of Lynwood affirming the discharge of plaintiff as the member of the Police Department of the City of Lynwood, and grant plaintiff a trial de novo, reinstate plaintiff as a member of the Police Department of the City of Lynwood and said reinstatement be as of July 26, 1956, and that defendants pay plaintiff's salary from said date; that plaintiff be awarded costs of suit incurred herein;

and such other and further relief as plaintiff may be entitled to and may be mete and proper in the premises."

An answer to the petition so filed was made, and among other defenses, the respondents affirmatively alleged that the petition was barred by the provisions of section 11523 of the Government Code in that the petition had not been properly filed within the time prescribed by law. There was no demurrer by the appellant to the affirmative defense, nor was there any motion to strike the same. The matter was then set for hearing for October 11, 1957, and apparently, at the request of respondents, the issue of the affirmative defense of the statute of limitations was heard first.

The respondents set forth in their brief the following:

"* * * the matter of said special defense was tried in the above-entitled matter and at said trial of said special defense Respondents urged that the above-entitled matter was filed pursuant to the Administrative Mandamus Procedure set forth in the Government Code and Appellant did not deny that he had filed the within action pursuant to said Government Code provisions."

After oral argument the parties were given the opportunity to submit the matter on briefs, and thereafter on February 7, 1958, the trial court made findings of fact and conclusions of law wherein the court found and concluded that the petition of the appellant was for a "Writ of Certiorarified Mandamus and Administrative Mandamus;" that section 11523 of the Government Code provides that a petition for a writ of mandamus must be filed within thirty days after the time for reconsideration within the administrative agency has elapsed; that the time for reconsideration is thirty days after the original decision is mailed; that plaintiff had sixty days from and after February 26, 1957, within which to file the instant proceedings by way of petition for certiorarified and administrative mandamus; plaintiff did not file the instant proceedings by way of petition for writ of certiorarified and administrative mandamus until April 30, 1957, which was beyond the period of limitations prescribed by law; the provisions of Government Code, section 11523 are mandatory, which conclusion was admitted by counsel for plaintiff at said hearing of October 11, 1957. The court then made and entered judgment in favor of the respondents.

The appellant did not object to the findings of fact or conclusions of law, and evidently made no request to file and did not submit any findings other than those which the judge signed.

The appellant now asserts that the trial court erred in (1) holding that section 11523 of the Government Code applied in the instant case, and (2) in holding that appellant failed to file the petition for "writ of certiorarified mandamus and administrative mandamus" within the time prescribed by law.

First of all, we have been unable to find any writ in any code designated a "Writ of Certiorarified Mandamus." Apparently, the phrase was first used by B. E. Witkin in a series of lectures in 1949, and later was used by Ralph N. Kleps in an excellent law review article in 2 Stanford Law Review 285 (February, 1950).

It is obvious, however, from a reading of the petition that appellant filed the same pursuant to, and had in mind, the provisions of the Government Code relating to Administrative Mandamus proceedings, and as heretofore pointed out, he did not deny that such was the case before the trial court, and no statements have been made to this court to the contrary.

Section 11523, Government Code, provides in part as follows:

"Judicial review may be had by filing a petition for a writ of mandate in accordance with the provisions of the Code of Civil Procedure. Except as otherwise provided in this section any such petition shall be filed within 30 days after the last day on which reconsideration can be ordered. The right to petition shall not be affected by the failure to seek reconsideration before the agency. The complete record of the proceedings, or such parts thereof as are designated by the petitioner, shall be prepared by the agency and shall be delivered to petitioner, within 30 days after a request therefor by him, upon the payment of the fee specified in Section 69950 of the Government Code as now or hereinafter amended for the transcript, the cost of preparation of other portions of the record and for certification thereof. The complete record includes the pleadings, all notices and orders issued by the agency, any proposed decision by a hearing officer, the final decision, a transcript of all proceedings, the exhibits admitted or rejected, the written evidence and any other papers in the case." Appellant insists that the section pertains only to those boards and agencies enumerated in section 11501, Government Code, which includes certain state agencies.

Section 11500, Government Code, provides in part however that "(a) 'Agency' includes the state boards, commissions and officers enumerated in Section 11501 *and those to which this chapter is made applicable by law,* * * *." (Emphasis added.)

In other words, it appears to be appellant's contention that because the legislature did not include a local agency, such as the Personnel Board of the City of Lynwood, in section 11500 by name that it was therefore not intended that section 11523 would apply in a case such as the one before us.

[1] The appellant, under the circumstances of this case, cannot, for the first time on appeal, contend that he was not proceeding pursuant to the Government Code provisions. He had the respondents' answer for some five months before the date of the hearing, in October, 1957, and did nothing to indicate that he was not proceeding under such provisions; in addition thereto, he led the trial court to believe that he was proceeding under such provisions. For him now to contend that he was not so proceeding is unfair to the trial court and to the respondents who have conducted two lengthy hearings, each resulting in an affirmation of the discharge of appellant as a policeman.

Appellant having filed his petition under the Government Code provisions, and having proceeded accordingly thereafter, as heretofore indicated, is now bound, we believe, by the limitations period prescribed in the Government Code, section 11523.

There is a dearth of authority on the point. Respondent has cited the case of Temescal Water Co. v. Department of Public Works, 44 Cal.2d 90, at pages 100–101, 280 P.2d 1, at page 7, wherein it is said:

"The appellants argue that the statute can apply only to the agencies enumerated in the Administrative Procedure Act, Gov. Code, tit. 2, div. 3, chaps. 4 and 5, to local boards or agencies or to state-wide administrative agencies which have complied voluntarily with the act. However, although specific provision is made for the use of the writ to review the proceedings of the particular agencies specified by the Legislature, Gov.Code, § 11523, the remedy is not limited to review of the decisions of those agencies or to agencies having formally adopted the procedure required of those mentioned in the act. The framers of section 1094.5 intended it to set forth 'the procedure by which judicial review can be had by the writ of mandate after a formal adjudicatory decision by *any* administrative agency.' Emphasis added; see Tenth Biennial Report of the Judicial Council of California, Appendix A, p. 45. The decisive question is whether the agency exercises an adjudicatory function in considering facts presented in an administrative hearing. As noted in Boren v. State Personnel Board, 37 Cal.2d 634, 234 P.2d 981, a case involving an agency not included within the Administrative Procedure Act but having functions specified by constitutional provisions, '[s]ince the enactment of section 1094.5 of the Code of Civil Procedure, it is no longer open to question that in this state the writ of mandamus is appropriate "for the purpose of inquiring into the validity of any final administrative order or decision made as a result of a proceeding in which by law a hearing is required to be given, evidence is required to be taken and discretion in the determination of facts is vested in the inferior tribunal, corporation, board or officer * * *."' (37 Cal.2d at page 637, 234 P.2d at page 982.)"

[2] It appears to this court that the filing of the petition, denominated a petition for "writ of certiorarified mandamus and administrative mandamus," was intended to be a petition for a writ of mandamus under the 1945 Administrative Procedure Act, and that it was not filed within the time prescribed after the effective date of the administrative decision.

[3] Appellant's last contention is to the effect that the pendency of the former writ of mandamus proceeding in fact tolled the statute of limitations provided for in Government Code, section 11523. The remedy of the appellant under the first mandamus proceeding, in the event the Board refused or neglected to obey the order of the court, was to proceed under section 1097, Code of Civil Procedure, and have the court impose a fine; or, in the event of persistent refusal to imprison the members of the Board until the writ was obeyed. In the instant case the writ was obeyed, the Board conducted a hearing and made its decision and notified the appellant of the result of such hearing. The parties stipulated as to the date the appellant received a copy of that decision, and no petition to the court was filed within the time prescribed by statute. Appellant has failed to cite to us any authority to the effect that the pendency of the previous mandamus action tolls the period of limitations provided in Government Code, section 11523. Furthermore, the two proceedings were entirely different and separate from each other. We see no merit to the contention.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

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169 Cal.App.2d 713

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Vernon Robert COPELAND, Defendant and Appellant.

Cr. 3494.

District Court of Appeal, First District, Division 2, California.

April 20, 1959.

Prosecution for forging prescriptions for narcotics, wherein defendant admitted he had been addicted to narcotics for seven years and had presented some of forged prescriptions to two pharmacists. From adverse judgment of the Superior Court, Santa Clara County, William F. James, J., the defendant appealed. The District Court of Appeal, Kaufman, P. J., held that testimony of police officers as to contents and use of a kit containing narcotic paraphernalia and hypodermic needles found in defendant's home was relevant and admission thereof was not prejudicial to defendant.

Judgment affirmed.

1. Criminal Law ⚷371(12)

In prosecution for forging prescriptions for narcotics, wherein defendant admitted he had been addicted to narcotics for seven years and had presented some of the forged prescriptions to two pharmacists, testimony of police officers as to contents and use of a kit containing narcotic paraphernalia and hypodermic needles found in defendant's home was relevant and admission thereof was not prejudicial to defendant. West's Ann.Health & Safety Code, § 11715.

2. Criminal Law ⚷404(5)

In prosecution for forging prescriptions for narcotics, wherein defendant denied signing the prescriptions, but admitted that he had been convicted of second degree burglary in 1949 and for forgery of prescriptions in 1950, signatures on the 1949 prescriptions and signature on certain sheets of paper signed by defendant in 1950 which admittedly were in defendant's handwriting, were relevant and material for comparison with signatures on prescriptions involved in present trial and were properly admitted. West's Ann.Health & Safety Code, § 11715; West's Ann.Pen.Code, § 1025.

3. Criminal Law ⚷369(2)

If evidence is material and relevant in the proof of crimes charged, it is admissible even though it may incidentally disclose the commission of another crime. West's Ann. Pen.Code, § 1025.

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William P. Callahan, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

Defendant appeals from a judgment entered on a jury verdict finding him guilty on seven counts of forging a prescription for a narcotic (Health & Saf.Code, § 11715), as charged in two informations consolidated for trial. On appeal it is argued that the prosecution introduced irrelevant evidence of a highly prejudicial nature, and that the defendant's rights under section 1025 of the Penal Code had also been violated.

[1] The evidence presented against the defendant is as follows: Five doctors testified that they had not written the seven narcotic prescriptions bearing their signatures, and introduced as People's Exhibits 1–7. These seven prescriptions had been presented to three pharmacists in Santa Clara County. One of these, Mr. Fanelli, identified the defendant as the person who presented three prescriptions on May 18, May 22 and May 23, 1957. On May 23, Mr. Fanelli became suspicious and took down the license number of the defendant's car. A second pharmacist, Roy Barthold, testified that People's Exhibit 3 had been presented to him on June 8, 1957, but was not sure that the defendant was the person who presented that prescription. The third pharmacist, Robert Piatt, testified that People's Exhibits 5, 6, and 7, were presented to him by the defendant on June 18, June 28, and August 27, 1957. On August 27, he became suspicious and called the police who came and arrested the defendant. After the arrest, the police obtained a search warrant for the person and automobile of the defendant and his home at 1295 Jackson Street, Santa Clara. In the pocket of a jacket hanging in the garage at this address, the police found a kit containing narcotic paraphernalia. They also found a pocket of hypodermic needles in the defendant's bedroom at the same address. Inspector Rice, over defendant's objection, testified as to the contents and use of the kit and needles. The admission of this testimony constitutes the first of defendant's two grounds for appeal.

Defendant, citing People v. O'Brand, 92 Cal.App.2d 752, 207 P.2d 1083, argues that this testimony was irrelevant and highly prejudicial as he was being tried for forging a prescription, not for addiction. In the case cited, the defendants were convicted of attempted burglary of a drugstore. It was held that proof of their desire for narcotics was competent to establish motive for attempting to burglarize the drugstore. The court said 92 Cal.App.2d at page 754, 207 P.2d at page 1085: "* * * While the general rule forbids the admission of evidence of other crimes and degrading practices unrelated to any issue on trial, it is the settled law that where such proof is relevant to an issue in the case on trial, it is admissible notwithstanding it tends to show immoral conduct or other crimes. The law will not permit justice to be defeated by rejecting evidence simply because it involves other crimes or gross immorality. People v. Zatzke, 33 Cal.2d 480, [484], 202 P.2d 1009; People v. Peete, 28 Cal.2d 306, 315, 169 P.2d 924. Proof of motive will not be excluded merely because it may be prejudicial to the accused if it is relevant and material. People v. Weatherford, 78 Cal.App.2d 669, 687, 178 P.2d 816; People v. Hall, 27 Cal.App.2d 440, 444, 81 P.2d 248."

Similarly, in this case, the testimony objected to was relevant to establish the defendant's motive for forging the prescriptions. Furthermore, when the defendant took the witness stand, he admitted he had been addicted to narcotics for several years, and had presented the forged prescriptions to Mr. Fanelli and Mr. Piatt. There was thus overwhelming and uncontradicted evidence of the defendant's guilt. Under these circumstances, the testimony complained of was neither irrelevant nor prejudicial. People v. Wooten, 162 Cal.App.2d 804, 328 P.2d 1040.

[2] Penal Code, section 1025, provides that if a prior conviction is admitted by the defendant, it may not be alluded to or referred to at the trial. See also People v. Hudgins, 59 Cal.App.2d 175, 138 P.2d 311. The defendant here admitted the two prior convictions charged, 2nd degree burglary in 1949 and violation of Health and Safety Code section 11715 in 1950. Over defendant's objections, Inspector House of the State Narcotics Bureau identified the defendant as the person who had signed certain documents (also prescriptions) in Tracy, California in 1949, and testified

that since that time these documents had been in the defendant's case file in the State Narcotics Bureau Office in Sacramento. Three sheets of paper bearing the defendant's signature were introduced. Attached to the sheets was a picture of the defendant. W. R. Gadsby, a detective with the San Jose Police Department, testified that in 1950 the defendant had signed two sheets of paper in his presence and that of another police officer. However, these documents were not received in evidence. The signatures were cut off and admitted over defendant's objection as People's Exhibit 13. The people's handwriting expert first testified that he could not come to any conclusion after comparing exhibits 1–7 with 12 and 13, but later testified that all of the documents were written by the same person.

Defendant argues that by the admission of People's Exhibit 12, which were prescriptions, and the testimony relating thereto, the prosecution, in violation of Penal Code, section 1025, demonstrated to the jury that the defendant had been previously convicted of forging narcotic prescriptions; and that by the admission of People's Exhibit 13 and the testimony of Officer Gadsby, the prosecution alluded to defendant's prior burglary conviction in violation of Penal Code section 1025.

[3] If the evidence is material and relevant in the proof of the crimes charged, it is well settled that Penal Code section 1025 does not bar its admission, even though it may incidentally disclose the commission of another crime. People v. Peete, 28 Cal.2d 306, 319–320, 169 P.2d 924; People v. Castellanos, 157 Cal.App.2d 36, 39, 320 P.2d 152; People v. Murray, 42 Cal.App.2d 209, 216, 108 P.2d 748; People v. Mullaly, 77 Cal.App. 60, 64, 245 P. 811, 18 Cal.Jur.2d Evidence, § 137, pp. 585–586. Since appellant denied signing the prescriptions, the materiality and relevancy of signatures admittedly in his handwriting for comparison with those on the prescriptions which were the basis of the charges against him, is patent.

We conclude that the judgment finds ample support in the record before us.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

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169 Cal.App.2d 848

J. B. SHOOPMAN, Plaintiff and Appellant,
v.
PACIFIC GREYHOUND LINES, a corporation, et al., Defendants and Respondents.

Alma LEWIS and Dave Compton, Cross-Appellants,
v.
J. B. SHOOPMAN, Cross-Respondent.
Civ. 9497.

District Court of Appeal, Third District, California.
April 24, 1959.

Action for malicious prosecution brought against bus company, employee of ticket agent and ticket agent, whose contract with bus company detailed his duties and required that such duties be performed in a manner satisfactory to bus company, that facilities furnished by agent be satisfactory, that reports be filed at such time and in such manner as company required, that company representative be permitted to inspect and check the whole property at all reasonable times and to inspect and audit all records pertaining to bus company's business and that agent was an independent contractor. From an order of the Superior Court, Napa County, William L. Blanckenburg, J., granting bus company a nonsuit and from order granting a new trial as to ticket agent and his employee, the plaintiff appealed. The District Court of Appeal, Schottky, J., held that evidence was sufficient to present a question for jury as to whether such ticket agent was an agent of bus company and not an independent contractor.

Judgment of nonsuit reversed and order granting a new trial affirmed.

1. Corporations ⚷433(1)

In action for malicious prosecution brought against bus company, an employee of ticket agent and ticket agent, whose contract with bus company detailed his duties and required that such duties be performed in a manner satisfactory to bus company, that facilities furnished by agent be satisfactory, that reports be filed at such time and in such manner as company required, that representative of bus company be permitted to inspect and check whole property at all reasonable times and to inspect and audit all records pertaining to bus company's business and that agent was an independent contractor, evidence was sufficient to present a question for jury as to whether such ticket agent was an agent of bus company and not an independent contractor.

2. Appeal and Error ⚷927(3)

In considering whether a judgment of nonsuit was proper, reviewing court must resolve every conflict in testimony in favor of plaintiff, consider every inference which could reasonably be drawn, and every presumption which can fairly be deemed to arise in support of plaintiff, and accept as true all evidence adduced, direct and indirect, which tends to sustain plaintiff's case.

3. Master and Servant ⚷5

In determining whether a person is an independent contractor or an employee, most important factor is right to control the manner and means of accomplishing the result desired.

4. Master and Servant ⚷1

If an employer has power to exercise complete control over manner and means of accomplishing result desired, and employer-employee relationship exists.

5. Malicious Prosecution ⚷71(1)

In action for malicious prosecution brought against bus company, an employee of ticket agent and ticket agent for bus company, whose contract with bus company set forth his duties in detail, one of which was to protect all baggage, arising out of arrest of plaintiff and filing of a complaint by employee under instructions from ticket agent charging defendant with unlawfully taking property of bus company by removing of articles from a shaving kit on the "sign in" desk in ticket office after refusing to pay waybill on kit which plaintiff said belonged to him, whether purpose of complaint filed against plaintiff was to recover property or to punish plaintiff for a wrongful act was a question of fact for the jury. West's Ann.Pen.Code, § 484.

6. Master and Servant ⚷306

An employer is responsible for willful and malicious acts of an employee which he has ratified.

7. Master and Servant ⚷330(3)

Failure to discharge an employee or agent guilty of oppressive acts towards patrons of the employer is in itself evidence to show ratification.

8. Master and Servant ⚷331

If an employer after knowledge or opportunity to learn of agent's misconduct retains the wrongdoer in service, employer may make himself liable in punitive damages.

9. Master and Servant ⚷332(3)

In action for malicious prosecution brought against bus company, employee of ticket agent and ticket agent for bus company, whose contract set forth his duties in detail, including duty to protect baggage and provided that agent was an independent contractor, arising out of arrest of plaintiff for unlawfully taking personal property of bus company by removal of some articles from a shaving kit on "sign in" desk in ticket office after refusing a waybill attached to kit which plaintiff said belonged to him, wherein there was evidence that ticket agent telephoned district sales representative for bus company after he had called police who arrested plaintiff, evidence presented an issue for jury as to knowledge on part of bus company of acts of ticket agent and his employee and ratification of said acts by bus company.

10. New Trial ⚿162(1)

In action to recover damages for malicious prosecution brought against bus company, ticket agent for bus company and ticket agent's employee, it was within power of court to make an order in the alternative granting a new trial as to ticket agent and employee if plaintiff refused to accept a reduction in amount of verdict against them from $20,000 to $1,450.

11. Appeal and Error ⚿854(6), 977(1)
New Trial ⚿6

Determination of a motion for a new trial rests within trial court's discretion, and its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears, and the order will be affirmed if it may be sustained on any ground, although reviewing court might have ruled differently in the first instance.

12. New Trial ⚿72

In passing upon a motion for a new trial, it is function of trial judge to make an independent appraisal of evidence including all permissible inferences, and it is his duty to grant a new trial if he is of opinion that verdict is clearly against manifest weight of the evidence.

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Laura O. Coffield, Napa, and Frank H. McAuliffe, Santa Rosa, for appellant.

Taft, Wright & Hopkins, Vallejo, for cross-appellants.

SCHOTTKY, Justice.

This is an appeal by plaintiff J. B. Shoopman from an order granting Pacific Greyhound Lines, a corporation (hereinafter referred to as "Greyhound"), a nonsuit and from an order granting a new trial to defendants Alma Lewis Simic, sued herein as Alma Lewis, and Dave Compton in an action to recover damages for malicious prosecution. Alma Lewis and Dave Compton have filed an appeal from the judgment in the event that this court reinstates the judgment.

Prior to May 23, 1956, Shoopman, a former driver for Greyhound, asked one of the Greyhound drivers to pick up a shaving kit which had been left in a storage locker in the Santa Rosa Greyhound depot. On May 23, 1956, Shoopman went to the bus depot in Calistoga to meet a driver with whom he intended to play golf. The bus depot was located in a building which had a large sign reading "Greyhound Bus Depot." The interior had a ticket office, a small candy counter, amusement devices, and was apparently a waiting room. According to Shoopman's testimony he noticed his shaving kit on the "sign-in" desk. A waybill was attached. The charges on the waybill were $3.37. After some discussion regarding the amount due and the fact that there was a tooth brush and a razor in the kit, Shoopman stated that he would not pay the bill. Davis, a Greyhound driver, who was present took out the razor and tooth brush and said that defendant Lewis could send the empty kit back to Greyhound in Santa Rosa. Shoopman testified that Alma Lewis then gave him a large envelope to put the items in and he and the driver then left.

According to Alma Lewis she saw Shoopman and Davis handling the kit. She saw Shoopman take some articles from the kit. She reported the incident to Dave Compton, the agent, who reported the incident to the police. Shoopman was arrested the same evening and remained in jail until June 1, 1956, when he was arraigned on a charge of theft. The complaint which was signed by Alma Lewis on June 1st, under instructions from Dave Compton, charged that plaintiff Shoopman "did willfully and unlawfully take away personal property of another, to wit, Pacific Greyhound Lines, Incorporated, of a value not exceeding the sum of Two Hundred Dollars ($200.00), to wit, the sum of Two Dollars ($2.00) in violation of Section 484 of the Penal Code of the State of California." After the arraignment he was returned to jail, where he remained until June 19, 1956, when he was taken to court for trial. The district attorney did not appear, and after a telephone call by the judge to the district attorney the case was dismissed with prejudice and Shoopman was released from custody.

At the time of the arrest Shoopman was employed as a route driver for a bakery concern. He testified that his weekly earnings were approximately $135 a week. After his release from jail he was unable to continue his employment with the bakery firm because it had replaced him with a new driver. About 5 weeks after his release he was able to obtain a job as a cab driver for $9 a day, and then he became a bartender at a wage of $77.50 a week.

When Shoopman was arrested he was booked for investigation of violation of probation. The booking entry of the Calistoga police had an entry "Call from Judge Stone re don't need any A D a complaint on Shoopman. Just pick him up and hold him on suspicion of violation of probation. Hold for 32 hours without bail."

[1] Dave Compton was the Greyhound ticket agent in Calistoga. The contract between Greyhound and Compton dated April 16, 1948, set forth his duties in detail. These duties were required to be performed in a manner satisfactory to Greyhound. The facilities the agent was required to furnish had to be to the satisfaction of Greyhound; reports were to be furnished at such times and in such a manner as Greyhound required; and representatives of Greyhound were to be permitted to inspect and check all the property at reasonable times and inspect and audit all records pertaining to Greyhound's business. The contract further provided that the agent was an independent contractor.

The only testimony in the record from which it can be inferred that Greyhound had knowledge of the incident was testimony by Compton that he phoned Mr. Brown at Santa Rosa. The following testimony of Compton appears in the record:

"'Q. Did you get in touch with any authorities of Greyhound concerning the matter? A. Yes. Brown. He is the—I don't know whether he is called the Supervisor or what, of that district. In other words, he is in charge of that, keeps everything. In other words, any complaint or any trouble of any description goes through Brown.

"'Q. Will you tell me about when it was that you notified him? A. Oh, I think it was the following morning. If I remember correctly, I believe I put a phone call in that afternoon for him; he wasn't in, so I phoned him the next morning.

"'Q. That will be the 24th, was it? A. I believe so.'

"Q. Are those the answers you gave to those questions at the time of taking your deposition? A. Yes, that is right.

"Q. Well then, you did get in touch with Mr. Brown, didn't you? A. I don't remember whether I got in touch with him by phone or not. However, as I mentioned here before, I talked to Mr. Brown at the Greyhound office."

Mr. Irving Brown, who stated that he is District Sales Representative for Western Greyhound Lines, testified that he did not recall receiving any phone call concerning Mr. Shoopman. After having the hereinbefore quoted testimony of Compton read to him and being asked if it refreshed his recollection, he stated: "A. No, Sir, it does not. It may have been, but I don't recall the conversation." Mr. Brown testified that he discussed the matter with Compton after he had read an article in the newspaper about a suit against Greyhound.

Appellant's first contention is that the court erred in granting the motion for nonsuit as to respondent Greyhound. Appellant argues, (1) that Compton and Alma Lewis were agents of Greyhound rather than independent contractors; (2) that the acts of Compton and Lewis were within the scope of their employment; and (3) that even if Compton and Lewis were found to be independent contractors, the jury could hold Greyhound responsible on the basis of Greyhound's ratification of their acts.

[2] In considering whether or not a judgment of nonsuit was proper, an appellate court under well-established rules must "resolve every conflict in their testimonies in favor of plaintiff, consider every inference which can reasonably be drawn and every presumption which can fairly be deemed to arise in support of plaintiff, and accept as true all evidence adduced, direct and indirect, which tends to sustain plaintiff's case." Lashley v. Koerber, 26 Cal. 2d 83, 84, 156 P.2d 441, 442. In the light of this rule and after a careful study of the record, we have concluded that the court erred in granting Greyhound's motion for a nonsuit.

[3, 4] We believe that the evidence is sufficient to support a finding that Compton, Alma Lewis's employer, was an agent of Greyhound and not an independent contractor. In determining whether or not a person is an independent contractor or an employee, the most important factor is the right to control the manner and means of accomplishing the result desired. If the employer has the power to exercise complete control, an employer-employee relationship exists. California Employment Commission v. Los Angeles Down Town Shopping News Corporation, 24 Cal.2d 421, 150 P.2d 186. The agreement between Compton and Greyhound is such that as a practical matter by the terms of the agreement Greyhound has the power to exercise complete control over the agent in the operation of the agency.

The mere fact that the agreement provided that Compton was an independent contractor does not compel a finding that in causing the arrest of appellant he was not acting within the scope of his employment as agent.

In an annotation on Malicious Prosecution—Act of Employee, in 18 A.L.R.2d at page 425 it is stated:

> "Section 21. Station or ticket agent.
>
> "Whether or not the act of a station or ticket agent in procuring a criminal prosecution will be regarded as within the scope of his authority depends upon the specific duties which the employer has imposed upon him and the particular facts and circumstances under which the criminal proceedings were instituted; in some instances, where the prosecution was commenced for the purpose of protecting property in his custody, the agent has been held to be acting within the scope of his employment.
>
> "Thus, the defendant's station agent, in suing out a warrant of arrest against the plaintiff for unloading a freight car and carrying away the shipment without paying the proper freight charges, was held to have acted within the scope of his authority in Chicago, R. I. & P. R. Co. v. Gage (1918) 136 Ark. 122, 206 S.W. 141, on the ground that although the particular method used by the agent in protecting the property was unauthorized, he was nevertheless placed in custody of his principal's property and had the implied power to use whatever means were necessary for its protection."

[5] Part of Compton's duties were to protect all baggage. The processes of the law were put into action as soon as Compton received word that the articles had been taken. We believe that it was a question of fact for the jury to determine whether or not the purpose of the complaint was to recover the property or to punish the plaintiff for a wrongful act. In Pierre v. Great Atlantic & Pacific Tea Co., 4 Cal.App.2d 468, 40 P.2d 909, which was an action for malicious prosecution and in which a nonsuit was reversed, the defendant corporation operated a chain of grocery stores, each of which was managed by a representative in charge. Plaintiff entered one

of defendant's stores which she had patronized previously. While making a purchase the manager asked her if her name was Anna Fields. She denied it. The manager then said that he knew who she was because he had been looking for her for the reason that she owed $16.50 for a "bum check." An argument ensued and she started to leave when the manager told her to pay the $16.50 or he would send her to jail. She left and later the manager and a police officer approached her. After some discussion the manager told the officer, "I gave her a chance to pay that $16.50 check and she wouldn't do it. You take her in charge and I will sign the complaint." In reversing a nonsuit the court said at page 471 of 4 Cal.App.2d, at page 911 of 40 P.2d: "In the instant case it was a question of fact to be submitted to the jury as to whether * * * [the manager] was acting for his employer in attempting to collect for the latter money to reimburse it for a check which had been cashed during the course of its business, and was using criminal process to accomplish this result."

In the Pierre case the court recognized the rule enunciated in Allen v. London, etc. Ry. Co., L. R., 6 Q.B. 65, which is the leading case on the subject. In that case Allen asked defendant's clerk for a second-class ticket for Waterloo station for which he tendered in payment a two-shilling piece. He was given the ticket and some change including a French coin which he refused to accept. He insisted on an English coin instead. The clerk refused and Allen reached over the counter and attempted to place his hand into the till which contained coin. He was seized by the clerk who insisted that a policeman on duty in the station arrest him. Allen was arrested and the next day a magistrate dismissed the charge of attempted robbery with which he had been charged. He then brought an action for assault and false imprisonment. After the jury rendered a verdict in his favor, the court entered a nonsuit in defendant's favor.

In affirming the judgment the learned judge said:

> "* * * I am inclined to think that, if a man in charge of a till were to find that a person was attempting to rob it, and he could not prevent him from stealing the property otherwise than by taking him into custody, the person in charge of the till might have an implied authority to arrest the offender; or if the clerk had reason to believe that the money had been actually stolen, and he could get it back by taking the thief into custody, and he took him into custody with a view of recovering the property taken away, it might be that that also might be within the authority of a person in charge of a till. I am not, however, prepared to pronounce a decided opinion on these supposed cases; the present case is altogether different. There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. * * [T]here is an implied authority to do all those things that are necessary for the protection of the property entrusted to a person, or for fulfilling a duty which a person has to perform."

In the instant case Compton agreed to properly protect baggage and express and to assume full liability for loss. As soon as the incident was reported to Compton he reported it to the police. Compton could not recall if he wanted him picked up or arrested. It is clear that Compton had a duty to protect the parcel. The evidence is not clear whether the processes of the law were put in operation for the purpose of recovering the property or for punishing Shoopman. However, the immediate action by Compton would permit the jury to infer that the purpose, or one of his purposes, was to recover the property so that he would not be liable for any loss. We believe that a question of fact was presented for the jury's determination and that upon the record in the instant case it cannot be held as a matter of law that Compton was not acting within the scope of his employment by Greyhound. It was therefore error for the court to grant a nonsuit as to respondent Greyhound.

[6–9] Appellant contends also that even if Compton and Lewis were found to be independent contractors the jury could hold Greyhound responsible on the basis of Greyhound's ratification of their acts. It has been held that an employer is responsible for the willful and malicious acts of an employee which he has ratified. Failure to discharge an employee or agent guilty of oppressive acts towards patrons of the employer is in itself evidence to show ratification. McChristian v. Popkin, 75 Cal. App.2d 249, 171 P.2d 85. If the employer after knowledge or opportunity to learn of the agents misconduct retains the wrongdoer in service, the employer may make himself liable in punitive damages. In the instant case Compton testified he called Brown of Greyhound about the matter. He also discussed the matter with Brown. While the evidence is not strong, we believe that upon the issue of the propriety of a nonsuit it was sufficient to present an issue for the jury to determine as to knowledge on the part of Greyhound of the acts of Compton and Lewis and ratification of said acts by Greyhound.

[10] Appellant next contends that the court erred in granting a new trial as to respondents Lewis and Compton upon appellant's refusal to accept a reduction in the amount of the verdict from $20,000 to $1,450. The order of the trial court was in the alternative. It read that if the reduction was not accepted then the motion for a new trial was granted on the ground of insufficiency of the evidence.

[11] While it would seem that a reduction from $20,000 to $1,450 is a rather large deduction, we cannot say that it was not within the power of the court to make such an order in the instant case. For "[t]he determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears, and the order will be affirmed if it may be sustained on any ground, although the reviewing court might have ruled differently in the first instance." Shaw v. Pacific Greyhound Lines, 50 Cal.2d 153, 159, 323 P.2d 391, 394.

The trial court filed a lengthy memorandum decision and order upon the motion for a new trial which indicates quite clearly that the court felt that the amount of damages awarded by the jury was "so grossly excessive as to indicate the existence of passion and prejudice in the mind of the jury." The court stated:

> "* * * There was a paucity, if not a complete absence, of evidence concerning injury to plaintiff's reputation and good name, his wounded feelings, or his being subjected to ridicule, insult and oppression, so only an infinitesimal portion of the verdict could be supported by the evidence on that basis. It is also to be noted that there is no evidence of any publication of the incident or the charges against plaintiff as a result thereof.
>
> "For a variety of reasons the court views plaintiff's testimony as to damages with some skepticism. He offered no supporting evidence to show that he lost his job as a result of the incident or to substantiate his record of earnings. * * *"

[12] In passing upon a motion for a new trial it is the function of the trial judge to make an independent appraisal of the evidence, including all permissible inferences, and it is his duty to grant a new trial if he is of the opinion that the verdict is clearly against the weight of the evidence. In the instant case the trial court weighed the evidence and reached the conclusion that the evidence did not justify

a larger verdict than $1,450 and made its conditional order accordingly. We cannot say that the court's conclusion is without support in the record and the order granting the new trial must therefore be affirmed.

Defendants Compton and Lewis filed an appeal in the alternative stating that if this court reversed the order granting them a new trial and reinstating the judgment in favor of plaintiff, then said defendants appeal from the judgment as reinstated. In view of the fact that we have concluded that the order granting a new trial should be affirmed, it is unnecessary to discuss the contentions of said defendants in said cross-appeal.

The judgment of nonsuit in favor of Pacific Greyhound Lines is reversed; the order granting the motion of defendants Compton and Lewis for a new trial is affirmed. Appellant to recover his costs on appeal against Pacific Greyhound Lines and respondents Compton and Lewis to recover their costs on appeal against appellant.

VAN DYKE, P. J., and WARNE, J. pro tem., concur

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169 Cal.App.2d 832

FORGERON INCORPORATED, a corporation, Plaintiff and Appellant,

v.

Clifford L. HANSEN, Howard W. Hansen, individually and as the general partners of L. H. Hansen & Sons, a limited partnership; L. H. Hansen & Sons, a copartnership, Defendants and Respondents.

Civ. 5659.

District Court of Appeal, Fourth District, California.

April 23, 1959.

Rehearing Denied May 22, 1959.
Hearing Denied June 18, 1959.

Action for damages alleged to have been caused by failure of defendants, as general contractors, to award a subcontract to plaintiff wherein reviewing court reversed a judgment entered in favor of plaintiff and ordered a new trial. From a judgment of the Superior Court, Kern County, R. B. Lambert, J., granting general contractors' motion for summary judgment and judgment on the pleadings, the plaintiff appealed. The District Court of Appeal, Mussell, J., held that counter affidavits filed by plaintiff in opposition to general contractors' motion for summary judgment and for judgment on the pleadings stating that during period when action was pending on prior appeal, further information was acquired concerning authority of a certain person to act on behalf of general contractors in accepting bids and that plaintiff's bid was in the form universally used and was regarded as complete and that written contract was merely a formalization of agreement contained in subcontract bid, presented issues of fact precluding the granting of summary judgment or judgment on the pleadings.

Judgment reversed.

1. Judgment ⇨185.3(8)

In action for damages allegedly caused by failure of defendants, as general contractors, to award a subcontract to plaintiff, wherein reviewing court reversed a judgment entered in favor of plaintiff and ordered a new trial, counter affidavits filed by plaintiff in opposition to general contractors' motion for summary judgment and for judgment on the pleadings stating that during period when action was pending on prior appeal, further information was acquired concerning authority of a certain person to act on behalf of general contractors in accepting bids for work and that plaintiff's bid was in the form universally used and was regarded as complete and that written contract was merely a formalization of agreement contained in subcontract bid, presented issues of fact precluding granting of summary judgment or judgment on the pleadings.

2. Judgment ⚷186

Issue to be determined by trial court in considering a motion for summary judgment is whether or not the opposite party has presented any facts which give rise to a triable issue or defense.

3. Judgment ⚷185.2(1)

Summary judgment is proper only if affidavits in support of motion state facts that, if proved, would be sufficient to sustain judgment in movant's favor and counter affidavits present no facts sufficient to raise a triable issue of fact.

4. Appeal and Error ⚷1180(1)

A reversal of a judgment and the ordering of a new trial places the parties in the same position as if the case had never been tried.

Baker, Palmer, Wall & Raymond, Bakersfield, for appellant.

Rowell, Lamberson & Thomas and Edwin H. Hiber, Fresno, for respondents.

MUSSELL, Justice.

This is an action for damages alleged to have been caused by the failure of defendants as general contractors to award plaintiff a subcontract for the plumbing in the construction of a college gymnasium and swimming pool in Bakersfield. A jury trial was had and a judgment was entered in favor of plaintiff in accordance with the verdict rendered by the jury. Defendants appealed from the judgment and from an order denying their motion for judgment notwithstanding the verdict. The judgment was reversed on appeal, a new trial was ordered, and the order denying the motion for judgment notwithstanding the verdict was affirmed. Forgeron, Inc. v. Hansen, 149 Cal.App.2d 352, 308 P.2d 406. A petition for a rehearing was denied April 18, 1957, and respondent's petition for a hearing by the Supreme Court was denied May 20, 1957. On July 9, 1957, the defendants Clifford L. Hansen, et al., filed in the superior court of Kern county a motion for summary judgment and a motion for judgment on the pleadings. These motions were heard and submitted on July 22, 1957, and on August 9, 1957, the trial court entered judgment granting the motions and ordering that plaintiff take nothing of and from the defendants. Plaintiff appeals from this judgment.

In support of the two motions made in the superior court respondents filed an affidavit of the official court reporter at the former trial as to the testimony of plaintiff Forgeron at said trial and it was stipulated that the clerk's and reporter's transcripts on appeal in the present appeal be deemed to include the clerk's and reporter's transcripts filed in connection with the prior appeal herein.

[1] Appellant Forgeron Incorporated filed two counter affidavits in opposition to these motions. In the affidavit of R. L. Raymond, one of the attorneys for plaintiff, it is stated that he tried the action and participated in the appeal from the judgment therein; that during the period when said action was pending on appeal, and immediately before the hearing on the appeal, he acquired further information confirming the authority of one Christian Jessen to act on behalf of L. H. Hansen and Sons; that he made a motion in this court for permission to file herein certain documents tending to show that Jessen was authorized by the defendants to act for them in accepting bids for the work involved, and was one of the partners doing business as L. H. Hansen and Sons. In the affidavit of F. S. Macomber, a general contractor, the affiant stated he was familiar with bidding practices and procedures in the Bakersfield area; that plaintiff's bid was in the form universally used and was regarded as complete; that any written contract is merely a formalization of the agreement contained in the subcontract bid; that according to the practice in the area an agreement to accept a low bid was made orally rather than in writing.

The judgment for plaintiff was reversed and a new trial ordered in the former appeal herein (Forgeron, Inc. v. Hansen, supra, 149 Cal.App.2d 352, 308 P.2d 406) and no ruling was made on the motion to receive further evidence on the former appeal herein for that reason. In the motion for summary judgment defendants offered no evidence other than that received in the original action.

[2, 3] In People ex rel. Chapman v. City of Garden Grove, 165 Cal.App.2d 794, 332 P.2d 841, 842 (hearing denied by the Supreme Court), this court held, that

> "' "The issue to be determined by the trial court in consideration of a motion (for summary judgment) is whether or not (plaintiff or) defendant has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case." ' " (Coyne v. Krempels, 36 Cal.2d 257, 260 (1) (223 P.2d 244).)
>
> " 'Summary judgment for plaintiff is proper only if the affidavits in support of his motion state facts that, if proved would be sufficient to sustain judgment in his favor, and defendant does not "by affidavit or affidavits * * * show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." (Code Civ.Proc., sec. 437c; Hardy v. Hardy, 23 Cal.2d 244, 245, 247 (143 P.2d 701); Gardenswartz v. Equitable Life Assur. Soc., 23 Cal.App.2d Supp. 745, 750, 751 (68 P.2d 322).)' "

[4] A retrial of the instant action involves the determination of issues of fact and the reversal of the judgment places the parties in the same position as if the case had never been tried. Heinfelt v. Arth, 4 Cal.App.2d 381, 383, 41 P.2d 191. In Weightman v. Hadley, 138 Cal.App.2d 831, 838, 292 P.2d 909, 914, the court said:

> "We think that when it is said an unqualified reversal 'remands the case for a new trial,' it means a new trial as defined by section 656 of the Code of Civil Procedure, i. e., 'a re-examination of an issue of fact.' "

In English v. Olympic Auditorium, Inc., 10 Cal.App.2d 196, 201, 52 P.2d 267, 269, it was held that

> "The authorities are uniform to the effect that a trial court may not disregard the directions of a court of review upon a reversal and remanding of a case on appeal by adding thereto or detracting therefrom any essential determination of the issues. Cowdery v. London & San Francisco Bank, Ltd., 139 Cal. 298, 307 (73 P. 196, 96 Am.St.Rep. 115; Weaver v. San Francisco, 146 Cal. 728, 732, 81 P. 119; Lial v. Superior Court, 133 Cal.App. 31, 23 P.2d 795; Standard Accident Ins. Co. v. Allen, 38 Ariz. 173, 298 P. 406; Rogers v. Hill, 289 U.S. 582, 53 S.Ct. 731, 77 L.Ed. 1385, 88 A.L.R. 744." See also Rice v. Schmid, 25 Cal.2d 259, 263, 153 P.2d 313.

Appellant concedes in its brief that the additional evidence on a retrial of the case would be essentially the same as reflected by the counter affidavits filed in the trial court on the hearing of the motions made by defendants and asks this court to reevaluate the position stated in the original appeal in light of the affidavits. The counter affidavits filed by appellant to the motions for summary judgment and judgment on the pleadings raise issues of fact, one of which is whether the witness Christian Jessen had authority to act for Hansen & Sons in accepting the bids involved. The former decision on appeal herein was based on the evidence then appearing in the record and on a new trial of the issues the evidence presented will govern the trial court or a jury in the determination of all of the factual issues involved. Under the circumstances presented by the record we conclude that the trial court erred in granting the motions of the defendants.

The judgment is reversed.

GRIFFIN, P. J., and SHEPARD, J., concur.

170 Cal.App.2d 1

Orville J. MONROE, Plaintiff and Respondent,

v.

D. W. LASHUS et al., Defendants,

Edward B. Fish and Dart Transportation Company, Inc., a corporation, Defendants and Appellants.

Civ. 5671.

District Court of Appeal, Fourth District, California.

April 27, 1959.

Action by motorist for injuries sustained when motorist at night struck defendant's tractor-trailer which blocked both southbound lanes as defendant executed a "U" turn at intersection and motorist was then struck by a codefendant. From a judgment of the Superior Court of Fresno County, Philip Conley, J., the codefendants appealed. The District Court of Appeal, Stone, J. pro tem., held that if jurors simply average the sums each juror has in mind as damages, learn the amount thereof and then each decides that amount as his verdict the verdict is not the result of chance, and that the evidence sustained the verdict of the jury finding that the codefendant was guilty of negligence and that plaintiff motorist was not guilty of contributory negligence.

Affirmed.

1. Trial 🔑315

If the jurors agree to be bound by the result obtained by averaging the sums each juror has in mind in advance of knowing what the amount would be, the verdict is the result of chance, but if the jurors simply average the sums, learn the amount thereof, and then each decides upon that amount as his verdict, the verdict is not the result of chance, and such approval subsequent to averaging the sums constitutes a valid verdict. West's Ann.Code Civ.Proc. § 657, subd. 2.

2. Appeal and Error 🔑1015(2)

It was within province of trial court to weigh conflicting affidavits on issue of whether verdict was result of chance and appellate court would not disturb trial court's finding on such question. West's Ann.Code Civ.Proc. § 657, subd. 2.

3. Appeal and Error 🔑989

Where the ultimate determination of the trial court depends upon its interpretation of a factual situation the appellate court will not attempt a revaluation of those facts.

4. Automobiles 🔑244(11)

In motorist's action for injuries sustained when motorist, at night, struck defendant's tractor-trailer which blocked both southbound lanes as defendant executed a "U" turn at intersection and motorist was then struck by codefendants' truck, evidence supported jury's verdict finding that codefendants were negligent.

5. Automobiles 🔑244(11), 245(78, 90)

In motorist's action for injuries sustained when motorist, at night, struck defendant's tractor-trailer which blocked both southbound lanes as defendant executed a "U" turn at intersection and motorist was then struck by codefendants' truck, whether motorist was driving too fast under conditions which prevailed at time of accident and whether his speed was proximate cause of accident were questions for jury and evidence supported verdict for motorist.

6. Appeal and Error 🔑882(12)

In motorist's action for injuries sustained when motorist, at night, struck defendant's tractor-trailer which blocked both southbound lanes as defendant executed a "U" turn at intersection and motorist was then struck by codefendants' truck, codefendants' requested instruction that speed at which a vehicle travels upon highway, considered as an isolated fact and simply in terms of so many miles an hour is not proof either of negligence or the exercise of ordinary care, should not have been given, in view of statute prohibiting operation of motor truck and trailer at speed in excess of 40 miles per hour but as the error was caused by the codefendants who tendered the instruction, codefendants could not complain on appeal. West's Ann.Vehicle Code, § 515(a) (1).

7. Appeal and Error ⚷989

Where record reflected substantial evidence to support verdict, appellate court would not attempt to reweigh the evidence which supported the verdict as against that opposed to it.

◆

Charles M. Hughes, Los Angeles, for appellants.

Belli, Ashe, McBride & Gerry, San Francisco, and Lewis Hoffman, Eugene, Or., for respondent.

STONE, Justice pro tem.

This action arose out of an accident which occurred November 19, 1954, at about One A.M. on Highway 99, approximately one mile north of Kingsburg, California. At this point 99 is a divided highway with two lanes south-bound and two lanes north-bound. It is intersected by Stroud Road and there is no over or underpass at the intersection, the roadway being comparatively level and straight at this point. Both north and south of the intersection there is a divider strip on highway 99, between the south-bound lanes and the north-bound lanes, planted to oleanders. The evidence discloses that the weather was very foggy at the time of the accident. James N. Henson, a defendant in the action, was driving a flat-bed tractor and trailer upon which he was hauling sheet steel. Just prior to the accident he had been traveling north on 99, and as the accident occurred he was making a "U" turn at the Stroud Road intersection to go south. Henson's tractor and trailer blocked both south-bound lanes as he executed the turn. Respondent, who was traveling south on 99, drove his tractor and trailer into the intersection, striking the Henson equipment between the tractor bed and the trailer. Two trucks which were following respondent pulled to the right and off the highway, one going into a vineyard, the other parking on the unpaved shoulder, but both avoided colliding with the equipment of either Henson or respondent. The defendant-appellant Fish next approached the scene, also travelling south, driving a tractor and trailer owned by defendant-appellant Dart Transportation Company. When he came upon the wrecked vehicles he pulled to the left over the divider, then across the north-bound lanes and onto the railroad tracks to the east of the highway right of way. As he pulled to the left and into the center strip appellant Fish struck the corner of the tractor which respondent had been driving and at that time respondent was still in the cab. The jury brought in a verdict in favor of respondent and against appellants Fish and Dart as well as defendant Henson. The trial court granted a new trial to defendant Henson because of errors of law occurring during the trial to which exception had been taken, but denied appellants' motion for a new trial. This is an appeal from the judgment entered pursuant to the verdict of the jury.

Appellants' first assignment of error is that the verdict of the jury was the result of chance. Appellants and their codefendants filed identical affidavits of two jurors which contain allegations that the jury arrived at its verdict by chance. The two affidavits stated that by prearrangement each juror wrote the amount of damages to which he or she thought the respondent was entitled on a slip of paper. The total was then divided by 12 and the quotient of $20,583.33 was rounded off at $20,500, and became the verdict of the jury. Code of Civil Procedure, Section 657, subdivision 2, provides:

> "The verdict may be vacated and any other decision may be modified or vacated, in whole or in part, and a new or further trial granted on all or part of the issues, on the application of the party aggrieved, for any of the following causes, materially affecting the substantial rights of such party:
>
> * * *
>
> "2. Misconduct of the jury; and whenever any one or more of the jurors have been induced to assent to

> any general or special verdict, or to a finding on any question submitted to them by the court, by a resort to the determination of chance, such misconduct may be proved by the affidavit of any one of the jurors; * * *"

Three counter-affidavits were filed by respondent alleging that the jurors, after discussing damages, did each write the amount he thought respondent should receive on a slip of paper and that the total was divided and the sum rounded off. However, each of the three counter-affidavits alleged that there was no agreement to be bound by such procedure, that it was used as a method of arriving at some suitable figure for discussion and that after the completion of the mathematical computations the jurors discussed the amount and then by independent vote arrived at the verdict. The trial court denied appellants' motion for a new trial. In consideration of the contention that the verdict was the result of chance, two questions are presented: first, the sufficiency of the two affidavits filed by appellants and their co-defendants; and second, the scope of the jurisdiction of an appellate court when reviewing an adjudication by the trial court which has weighed conflicting affidavits.

[1] Whether a verdict is the result of chance depends upon the point of time during the deliberations that the jurors agree to be bound by the quotient verdict. If the jurors agree to be bound by the result obtained by averaging the sums each juror has in mind in advance of knowing what the amount would be, the verdict is the result of chance. If the jurors simply average the sums, learn the amount thereof, and then each decides upon that amount as his verdict it cannot be said that such verdict is the result of chance. Will v. Southern Pacific Co., 18 Cal.2d 468, 477, 116 P.2d 44; Buhl v. Wood Truck Lines, 62 Cal.App.2d 542, 544, 144 P.2d 847; and Griffith v. Oak Ridge Oil Company, 190 Cal. 389, 394, 212 P. 913. Thus, if a jury adopts a quotient verdict by independent action after the amount is made known to them, such approval subsequent to averaging the sums constitutes a valid verdict.

The two affidavits of jurors filed by defendants are identical and in part read as follows:

> "2) That in the deliberation of this matter the twelve jurors agreed to assess damages as follows:
>
> "(a) Each juror to secretly write on a ballot the amount of damages he or she considered the plaintiff entitled to;
>
> "(b) The total of the twelve ballots to be added together and this total then be divided by twelve;
>
> "(c) The quotient thereby arrived at to be the verdict of this jury."

This language clearly reflects a chance verdict. However, immediately following paragraph 2 the following language appears in the affidavits:

> "3) Pursuant thereto the jurors did reach a verdict as follows:
>
> "(a) Each juror secretly wrote on a ballot the amount of damage he or she considered plaintiff entitled to;
>
> "(b) The twelve sums were added together and divided by twelve;
>
> "(c) The result thereupon became $20,583.33;
>
> "(d) The jury thereupon rounded off said figure to $20,500.00.
>
> "4) Each juror was thereby induced to assent to said verdict and it was arrived at without further consideration or deliberation."

Subdivisions (c) and (d) of paragraph 3 indicate a consideration of the verdict after the quotient was announced. This alone would not change the nature of the verdict but when considered with paragraph 4, the question immediately arises as to whether "Each juror was thereby induced to assent to said verdict" after the sum of $20,500 was suggested or before each juror wrote down the sum he had in mind. The trial court could very well have considered this language ambiguous and insufficient to impeach the verdict of the jury.

However, it is not necessary to indulge in semantics to affirm the ruling of the trial court because respondent filed three counter-affidavits, one of them by the jury foreman which clearly negate the charge of a chance verdict. Pertinent portions of the three affidavits read as follows:

> "* * * at great length, we discussed the evidence we had heard in this case; that we agreed that the defendants had caused the accident and the plaintiff should be awarded damages; that we then discussed damages at great length. One of the jurors suggested that each of us write on a slip of paper the amount he felt should be awarded to Mr. Monroe for damages ; that each of the jurors did write on a slip of paper the amount he or she felt should be awarded to Mr. Monroe in damages; that afterward we totaled the 12 figures and divided the total by 12; that we all then discussed at length and carefully considered the figure we arrived at by this means; that we each decided individually after this discussion to award Mr. Monroe the sum of $20,500.00 in damages for the injuries he had received; that at no time was there any agreement between any of us that any one of us or all of us would be bound by the figure we arrived at by this means * * * that the verdict which we reached in this case was not reached by collusion or previous agreement by the jurors but was the result of careful deliberation and lengthy discussion between us. * * *"

[2] It was within the province of the trial court to weigh the conflicting affidavits, and this court will not disturb the finding of the trial court in this regard. The rule governing the appellate court's consideration of a trial court's determination of conflicting affidavits is set forth in Griffith Co. v. San Diego College for Women, 45 Cal.2d 501, 508, 289 P.2d 476, 480, 47 A.L.R.2d 1349, as follows:

> "'In the consideration of an order made on affidavits involving the decision of a question of fact, the appellate court is bound by the same rule as where oral testimony is presented for review.' 4 Cal.Jur.2d Sec. 614, p. 495 (Citing cases.) When an issue is tried on affidavits, the rule on appeal is that those affidavits, favoring the contention of the prevailing party establish not only the facts stated therein but also all facts which reasonably may be inferred therefrom, and where there is a substantial conflict in the facts stated, a determination of the controverted facts by the trial court will not be disturbed. Hayutin v. Rudnick, 115 Cal.App.2d 138, 140, 251 P.2d 707." See also Buhl v. Wood Truck Lines, supra, 62 Cal.App.2d at page 545, 144 P.2d at page 848; Ham v. County of Los Angeles, 46 Cal.App. 148, 154, 189 P. 462.

[3, 4] Appellants' second ground of appeal asserts that appellant Fish, the driver of the truck belonging to defendant Dart Transportation Company, was not negligent as a matter of law. The argument in support of this contention is simply that the evidence indicates that Fish was not negligent. Appellants assert that under the facts Fish was confronted by sudden peril and acted as a reasonably prudent person should have acted under the same circumstances. Respondent, by way of answer, points out various warning signs or indications which he alleges Fish should have seen or could have seen had he been vigilant. Respondent argues that had Fish observed these indications as he approached the scene of the accident, he would have had warning of the impending danger. He contends there were lights on vehicles involved in the first collision and on the two trucks which arrived at the scene after the collision but before appellant's arrival. These two trucks were parked to the right of and off the highway

with their lights, including clearance lights, burning. Respondent also argues that reflectors on vehicles stranded on the highway, as well as the color of an aluminum trailer, should have been observed by appellant. In his reply brief Fish argues that such indications of danger were unobservable because of the location of the vehicles and weather conditions. It is readily apparent that the question of appellant's negligence is not a matter of law but a question of fact. It has become axiomatic that where the ultimate determination of the trial court depends upon its interpretation of a factual situation an appellate court will not attempt a re-evaluation of those facts. The applicable rule is expressed in Berniker v. Berniker, 30 Cal.2d 439, at page 444, 182 P.2d 557, 561, as follows:

> "As has so frequently been said, it is the general rule that on appeal an appellate court (1) will view the evidence in the light most favorable to the respondent; (2) will not weigh the evidence; (3) will indulge all intendments and reasonable inferences which favor sustaining the finding of the trier of fact; and (4) will not disturb the finding of the trier of fact if there is substantial evidence in the record in support thereof. (Citing cases.) It is not the province of the reviewing court to analyze conflicts in the evidence. Berger v. Steiner, 72 Cal.App.2d 208, 213, 164 P.2d 559. Rather, when a finding of fact is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will uphold the disputed finding."

The record before us reflects evidence of a substantial nature which supports the verdict of the jury finding appellant negligent.

[5–7] Appellants' third ground of appeal is that the respondent was guilty of contributory negligence as a matter of law. This question is similar to that raised by the second ground of appeal as the ultimate determination is one of fact. The rule defined in Berniker v. Berniker, supra, applies to contributory negligence with the same force as it does to negligence. The question of whether or not respondent was driving too fast under the conditions which prevailed at the time of the accident and whether his speed was a proximate cause of the accident was presented to the jury and decided adversely to appellants. There is one additional aspect of the problem which is peculiar to this particular case. The appellants-defendants offered and the court gave BAJI Instruction No. 144, which reads:

> "The speed at which a vehicle travels upon a highway, considered as an isolated fact and simply in terms of so many miles an hour, is not proof either of negligence or of the exercise of ordinary care.
>
> "Whether that rate of speed is a negligent one is a question of fact, and the answer to which depends on all the surrounding circumstances. * *"

At the time the accident occurred Vehicle Code Section 515, Subdivision (a), Subsection (1) was applicable, and it provided: "(a) No person shall operate upon any highway any of the following vehicles when equipped entirely with pneumatic tires at any speed in excess of 40 miles per hour: (1) Any motor truck and trailer." Therefore, a different type of instruction from BAJI 144 should have been given, but as the error was caused by the appellants, who tendered the instruction, they cannot now complain. Siffert v. McDowell, 103 Cal.App.2d 373, 376, 229 P.2d 388; Bernstein v. Maimes, 126 Cal.App.2d 468, 478, 272 P.2d 529. Hence, the question as it comes to this court is one of fact and not one of law. It is our province simply to determine whether there is substantial evidence to support the verdict of the jury. It would serve no useful purpose to repeat the evidence which supports the verdict. The record does reflect substantial evidence to support the verdict and in view of the authorities hereinbefore cited we will not attempt to reweigh the evidence which supports the verdict as against that opposed to it.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

169 Cal.App.2d 706

Abraham SETZER, Plaintiff and Appellant,

v.

ALL STEEL ENGINES, INC., a Nevada corporation, George A. Selig, also known as G. A. Selig, Mary V. Selig, also known as Mrs. Harry G. Selig, Fred A. Watkins, and Taylor Engines, Inc., a Nevada corporation, Defendants and Respondents.

No. 18043.

District Court of Appeal, First District, Division 1, California.

April 20, 1959.

Rehearing Denied May 13, 1959.

Hearing Denied June 18, 1959.

Action by an attorney based upon a contingent fee contract, for a one-fourth interest in certain corporate properties allegedly acquired by way of settlement of a judgment. The Superior Court, City and County of San Francisco, Thomas M. Foley, J., entered judgment for defendant and plaintiff appealed. The District Court of Appeal, Fred B. Wood, J., held that evidence sustained findings that plaintiff, employed to enforce a certain judgment, after a collection of a portion thereof, dropped the matter and did not do anything toward enforcement thereof, that an exchange of property between client, and judgment debtor, was not the result of performance by plaintiff of his contingent fee contract, and that plaintiff had not fully performed his contingent fee contract, but had abandoned it, and therefore was not entitled to any reimbursement as the result of his client's acquisition of property of debtor, pursuant to property exchange agreement.

Judgment affirmed.

1. Attorney and Client ⚷166(4)

In action by an attorney based upon a contingent fee contract, for a one-fourth interest in certain corporate properties allegedly acquired by way of settlement of a judgment, evidence sustained findings that plaintiff, employed to enforce a certain judgment, after a collection of a portion thereof, dropped the matter and did not do anything toward the enforcement thereof, that an exchange of property between judgment creditor and judgment debtor was not result of performance by plaintiff of his contingent fee contract, and that plaintiff had not fully performed his contingent fee contract, but had abandoned it.

2. Attorney and Client ⚷149

An attorney employed by a judgment creditor to enforce a certain judgment could not stand idly by for three years and then, when his client entered into an agreement with judgment debtor by merging its assets with judgment debtor more effectively to exploit an invention, claim under his contingent fee contract, the fruits of the merger as recovery under the judgment which he was employed to enforce but did not.

3. Appeal and Error ⚷1057(1)

Ruling sustaining objections to offers to introduce copies of various documents would not be deemed prejudicial, if erroneous, where the party was allowed an opportunity to describe activities, by his own testimony, as fully and adequately as the documents would have done.

4. Attorney and Client ⚷150

Where an agreement between a judgment debtor and judgment creditor provided that pending litigation between them be concluded, and declared that the parties were desirous of settling all their differences, agreement would not be deemed to have been settlement contemplated by a contingent fee contract entered into by judgment creditor for collection of a judgment against judgment debtor, but even if such recital were of such import, the agreement would not be binding on the judgment creditor in an action by an attorney for collection of a contingent fee based on such settlement, for such a controversy was not between the parties to the agreement. West's Ann.Code Civ.Proc. § 1856.

◆

George B. White, San Francisco, for appellant.

Fred A. Watkins, Bernard B. Glickfeld, San Francisco, for respondents.

FRED B. WOOD, Justice.

In this action, based upon a contingent fee contract, plaintiff asserts a one-fourth interest in certain properties acquired by All Steel Engines, Inc., and George A. Selig from Taylor Engines, Inc., allegedly acquired as a "recovery" by way of settlement, upon a judgment against Taylor Engines which defendant Fred A. Watkins, as attorney for Selig and All Steel, obtained and plaintiff and Watkins were thereafter employed, as attorneys, to enforce.

The judgment, obtained by All Steel and Selig against Lloyd Taylor, Taylor Engines and certain officers of Taylor Engines, decreed and declared: (1) Selig owns a one-half interest in certain patents; (2) All Steel has an exclusive license to make, use and sell under these patents; (3) Taylor Engines et al. have infringed the rights of Selig and All Steel by entering into a contract with Crosley Motors, Inc., in connection with the invention covered by these patents; (4) a perpetual injunction shall issue restraining further infringement; (5) All Steel to recover damages suffered and profits which Taylor Engines et al. have made by their infringements; (6) that an accounting be had; and (7) that Lloyd Taylor (who had defaulted) pay All Steel $38,500. See All Steel Engines v. Taylor Engines, D. C., 88 F.Supp. 745, decided March 3, 1950; affirmed in 9 Cir., 192 F.2d 171, decided October 26, 1951, rehearing denied December 5, 1951.

Defendant Fred A. Watkins represented All Steel and Selig throughout the course of that litigation.

January 30, 1952, All Steel entered into a contract employing Fred A. Watkins and plaintiff Abraham Setzer, attorneys, "in the matter of the enforcement of that certain judgment" above described "to fully represent us in the recovery of all moneys due us thereunder from said judgment debtors and/or other persons * * * liable or indebted to us by reason of said judgment," including $38,500, with interest, from Lloyd Taylor "and the profits and damages to be ascertained and determined, due from * * Taylor Engines * * *"

In "consideration of services rendered and to be rendered * * * by our said attorneys" All Steel promised to pay them 50% of "the net recovery or recoveries, whether achieved by suit, settlement or otherwise, in money or in kind * * * assigning to our said attorneys so much of the proceeds of any such recovery or recoveries as shall equal their share thereof * * * If there be no recovery or recoveries we are not to be liable, responsible or indebted to our said attorneys for their legal services rendered or to be rendered herein * * *"

In February, 1952, the proceeding for an accounting commenced before a special master and continued until the latter part of 1952, when the master died without a report having been rendered. Proceedings for the collection of the money judgment against Lloyd Taylor were conducted meanwhile, culminating in January, 1953, with the payment of $20,000 by him in satisfaction of the $38,500 award.[1] Plaintiff and Watkins each received his full share (25%) of that recovery.

Thereafter, nothing tangible was done toward enforcing the judgment against the other defendants. There was no resumption of the proceedings for an accounting either before a master or before the court.

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[1] It was expressed in the form of a covenant not to sue, thus avoiding extinction of the obligations of the other defendants.

No such matter was ever brought to the attention of the court for consideration and action. There never was any adjudication of damages against these other defendants. No such steps were taken during the years 1953–1956, inclusive. No money judgment was ever entered against any of the defendants other than Lloyd Taylor even though, as testified by plaintiff, "the very purpose of my employment was to enforce the judgment with regard to those other defendants and to have it reduced to a formal judgment in dollars and cents."

Plaintiff said he wanted these things done and conferred many times with Mr. Watkins and wrote letters to Mr. Watkins urging that they be done. He asserted that any lack of activity in respect to enforcing the judgment was not his fault because Watkins from the beginning instructed plaintiff to confer with Watkins as to every step to be taken. Accordingly, plaintiff submitted his every proposal to Watkins and never received from Watkins carte blanche to carry on in his own way. Because Watkins had been attorney for All Steel for many years, plaintiff felt that he himself was merely an associate in the matter and had no prerogative to act upon his own initiative. Plaintiff said he never had authority from Watkins, before or after the settlement with Lloyd Taylor, to proceed upon his own.

However, Watkins testified that in January, 1953, he advised plaintiff that if the latter wanted to go ahead with these supplemental proceedings he could do so, but that in Watkins' opinion "there was nothing in it in the way of infringement * * *" He said he told plaintiff on many occasions it was plaintiff's job. "I didn't need him to tell me how to conduct my case in court. It was his job. He was a bill collector, to enforce a judgment, and that was what he was hired for, and I told him that many times, and all these letters show a cunning to build up a case some day which he might profit by." Watkins said he told plaintiff it was plaintiff's "job to go ahead and do this thing, not to be bothering me about it. As far as I was concerned, there was nothing more to be recovered * * * After all this money was paid to him [plaintiff's share of the recovery from Lloyd Taylor], he dropped it and he wouldn't do anything, but yet he wrote these letters to me, telling me what to do."

Meanwhile, negotiations were going on for a merger of the interests of All Steel and Taylor Engines in the exploitation of the patents involved. Defendant Alfred Gorman, secretary of Taylor Engines, testified that for over ten years (commencing in November, 1946) he had had discussions with Mr. Watkins, on not less than ten occasions, in respect to the purchase of the interests involved and the taking over by his company of the things ("patent interest and so on") that qualified All Steel and Selig in their suit against Taylor Engines. Asked if they were not discussing settlement of the litigation, he said "That was the basis of our litigation. Without the patents, there would have been no patent infringement claims, and without the license agreement to All Steel Engines, there wouldn't be any claim for damages, therefore, we had to negotiate the fundamental reason for our problems. In other words, we had to acquire those in order to own the patents and the license agreement, free and clear of any problem." The basis of negotiation changed from day to day. "It was give and take. We were trying to buy as best we could and they were trying to sell as best they could." At first "they wanted 90% of the ultimate business to be had, and we finally broke that down to a purchase on approximately a 50-50 basis." The witness added "We had to buy those patents, we had to obtain that license agreement, and ours was merely an exchange of assets. We bought from George Selig his interest in three patents. We bought from All Steel * * * the license agreement" which by including "improvements" affected other patents held by Taylor Engines.

Gorman said the common stock of Taylor Engines "is completely worthless. What its speculative value is is something I can't forecast." He recalled no sales around the time of this agreement. He did not think there was any bid of any kind. During the entire period of 1940 to 1956 Taylor Engines had no income. It was never in the black during any month of that period. The source of its funds had been the sale of its stock and occasional loans from the witness or from someone else interested in the company. But as to the patents, certain engineering reports indicated that the invention has a high potential value. On the books of Taylor Engines this transaction as finally consummated would appear as a $75,000 increase on the liability side ($1 par value of its common stock) and a like increase on the assets side, as the cost of obtaining the patent rights and interests.

These negotiations culminated in an agreement dated February 10, 1956, pursuant to which Selig and All Steel conveyed to Taylor Engines all of their interests in the patents and licenses; Taylor Engines issued to Selig and to All Steel 75,000 shares of its common stock; Taylor Engines agreed that All Steel and Taylor Engines will share equally in any proceeds derived from Crosley Corporation or Crosley Motors, Inc., in respect to license agreements between Taylor and Crosley, after deducting ten per cent for cost of collection. As a part of this transaction Selig and All Steel released Taylor Engines, its officers and agents, from any and all claims of liability (except said one-half share of Crosley royalties), executed satisfaction of the judgment mentioned, obtained dismissal of the perpetual injunction and stipulated for withdrawal of exhibits that had been introduced in evidence. Taylor Engines declared its intention to elect Selig a member of its board of directors.

The trial court found that the issuance of the 75,000 shares of stock and the transfer of the licenses and patents was an exchange of assets, not a recovery by All Steel against Taylor Engines under the contingent fee agreement of January 30, 1952, whereby All Steel employed plaintiff and Watkins as attorneys to enforce the judgment.

The court also found that at the time of this exchange of assets Taylor Engines had no income and no cash and its stock had no value; its patent development was an asset of extremely speculative value; the patents and licenses acquired from All Steel had potential value; this exchange was not the result of performance by plaintiff of his contingent fee contract; plaintiff has not fully performed his contingent fee contract; he took no action or course of conduct to enforce the judgment after January 9, 1953, and on or about said date abandoned said contract.

[1, 2] The evidence furnishes sufficient support for these findings. Watkins' belief that further pursuit of the defendants (after the $20,000 collection from Lloyd Taylor) would be unprofitable and his inactivity after 1952 did not excuse plaintiff's inactivity during that period, did not convert plaintiff's inactivity into performance of his duty toward his principal, All Steel. Moreover, the trial court presumably believed Watkins' testimony that after receiving his fee for collecting the $20,000 from Lloyd Taylor plaintiff "dropped it and * * * wouldn't do anything," despite what he said in his letters to Watkins.

Plaintiff could not thus stand idly by for three years and then, when his client effected a solution of its problem by merging its assets with those of Taylor Engines more effectively to exploit the invention, claim the fruits of the merger as "recovery" under the judgment which he was employed to enforce but did not. Also, we can not say as a matter of law that this was a mere settlement of a lawsuit and that the corporate stock and the right to a portion of the Crosley royalties were not acquired by way of exchange of assets. The amount and collectibility of the Crosley royalties have not been shown. They may be of no real value. Watkins said he thought the royalties had been "outlawed." The patent rights have a potential value. The development of the invention, if successful, appears to furnish the only basis for the shares of stock acquiring any monetary value. It is a fair inference that transfer of the patent interests furnished amply adequate consideration for the corporate stock and the half-interest in the Crosley royalties.

[3] Plaintiff further claims that he was prejudicially hampered in his endeavor to show that his activities in 1952 were not confined to enforcement against Lloyd Taylor but were directed toward enforcement of the judgment against the other defendants as well. He complains particularly of the sustaining of objections to offers to introduce copies of various documents which he prepared and submitted to the court of the special master during the course of the supplemental proceedings. Those rulings, if erroneous, were not prejudicial, for plaintiff later described those activities, by his own testimony, as fully and as adequately as those documents would have done.

[4] Plaintiff attaches considerable significance to a recital in the agreement of February 10, 1956, that "the parties hereto are desirous of settling all their differences to the end that all pending litigation be concluded and that their respective patent interests be commercially exploited to the mutual advantage of all of the parties." He emphasizes the words "pending litigation be concluded" and says that a mere reading of the agreement makes it "self-evident" that the agreement was a settlement contemplated by the contingent fee contract. We are not convinced that it is thus so readily self-evident. Those words should be read in their context. The parties declare they are desirous of settling "all their differences." This they do for the *dual* purpose of bringing "pending litigation" to an end and of commercially exploiting "their respective patent interests * * * to the mutual advantage of all * * *" The trial court, with good reason as we have seen, viewed the latter as the dominant purpose. Moreover, even if this recital in the agreement were of different import the parties to this action would not be bound by it, for the controversy here is not "between the parties" to the contract. Code Civ.Proc. § 1856. See also 18 Cal.Jur.2d 749–750, Evidence, § 264.

During oral argument this court suggested that counsel consider Preston v. Herminghaus, 211 Cal. 1, 292 P. 953, and give us the benefit of their views concerning the applicability of that case to the instant case. That counsel have done. It is our conclusion that the Preston case is not particularly helpful. It differs in important respects. There, it was conceded by the clients that the attorneys had completely performed their part of the contract. It was then a question which of various measures of compensation specified in the contract of employment governed when the client sold the land after condemnation suits had been filed.

The judgment is affirmed.

BRAY, P. J., and HANSON, J. pro tem., concur.

Hearing denied; PETERS, J., not participating.

170 Cal.App.2d 17

Helen JAMES, Plaintiff and Appellant,

v.

J. Leslie SPEAR, Defendant and Respondent.

Civ. 9342.

District Court of Appeal, Third District, California.

April 28, 1959.

Rehearing Denied May 28, 1959.

Hearing Denied June 24, 1959.

Action against physician to recover damages for abrasion of cornea of right eye. The Superior Court, Sonoma County, McGoldrick, J., granted a nonsuit and entered judgment accordingly, and plaintiff appealed. The District Court of Appeal, Van Dyke, P. J., held that the evidence was sufficient to make out a prima facie case for jury under res ipsa loquitur doctrine on question of whether injury was proximately caused by negligence of defendant while examining or treating tear duct.

Judgment reversed.

1. Appeal and Error ⚷927(3)

In testing validity of nonsuit, testimony given by witness for plaintiff on cross-examination must be ignored, in so far as such testimony contradicted or was opposed to plaintiff's evidence.

2. Physicians and Surgeons ⚷18(6, 9)

In action against physician, specializing in eye, ear, nose and throat conditions, to recover damages for abrasion of cornea of right eye allegedly sustained while defendant was examining or treating tear duct, res ipsa loquitur doctrine was applicable and evidence was sufficient, as against motion for nonsuit, to make out a prima facie case for jury on question of whether injury was proximately caused by negligence of defendant.

3. Appeal and Error ⚷843(2)

Where evidence in action against physician to recover damages for abrasion of cornea of right eye was sufficient to make out a prima facie case for jury under res ipsa loquitur doctrine on question of whether injury was proximately caused by negligence of defendant while examining or treating tear duct, on appeal from judgment following nonsuit, it was unnecessary to determine whether evidence made out a case for jury on question of whether injury was caused by negligence of defendant in failing to warn patient, as required by standard practice, not to rub eye, which had been anesthetized, though defendant did not negative patient's testimony that she had received no such warning. West's Ann.Code Civ.Proc. § 2055.

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Philander Brooks Beadle, and Ernest E. Emmons, Jr., San Francisco, for appellant.

Peart, Baraty & Hassard, San Francisco, and F. L. Manker, Santa Rosa, for respondent.

VAN DYKE, Presiding Justice.

Plaintiff and appellant brought this action to recover damages from defendant and respondent (a physician practicing his specialty in eye, ear, nose and throat conditions) for alleged negligence resulting in injury to appellant's right eye. Respondent was granted a nonsuit and the appeal is from the judgment following the order.

Appellant's evidence discloses the following: Respondent undertook to treat a stopped tear duct leading from appellant's right eye so as to permit the duct to perform its function of draining lachrymal fluid from the eye. Appellant visited respondent thirteen times for treatment of the duct. At no time did respondent treat plaintiff for any condition concerning the eyeball nor was there anything wrong with the eyeball. On the occasion of her thirteenth visit to respondent's offices, it was respondent's intention to make a final inspection of the tear duct and, if nothing wrong appeared, to discharge her as cured. Appellant sat in the treatment chair, respondent picked up an instrument, came to her and stood over her, examining her eye with a mirror and light on his head and the instrument in his hand. He had at that time applied no anesthetic to her eye. Appellant had no pain in her right eye. As respondent stood there examining her eye she lapsed into an unconscious state. As she described it, she "blacked out". She had no explanation therefor, but had never had a fainting spell before. Trauma to the eyeball can cause a patient to faint. She was unable to say how long she remained unconscious, but when she regained consciousness she immediately felt a terrible pain in her right eye, which she could not open. With her left eye she saw respondent mopping her face with some tissues and rubbing off water. She was still in the same chair with respondent standing over her. She immediately complained to respondent of the extreme pain in her right eye and he began putting something around the eye to ease the pain. His office nurse ran in with a hypodermic needle and respondent applied an anesthetic to her right eye. She could not see with the eye and it had a dead feeling. Respondent then applied salve to the eye, put dark glasses on her, and helped her out of the chair and to the outer office. She asked him what was wrong with her eye and he said it would be all right in twenty-four hours. Appellant left respondent's office and went to a drugstore nearby and while there the pain in her eye grew worse. She went to a parking lot and sat in her car. The pain became unbearable and she returned to respondent's office. He examined and washed out her right eye and told her "it looks like a piece of steel had taken a cut, a piece off the eye." His examination revealed an abrasion of the cornea, that is, a break in the surface membrane of the eye. A corneal abrasion can be very painful. He injected a pain reliever and gave her prescriptions to lessen the pain. As she was leaving she told the nurse and respondent that she wanted to return. The nurse said "No". Respondent said nothing. She went to the drugstore and got the prescriptions filled. Her eye was swollen shut. She went to her car to rest and by this time the anesthetic had partly worn off and she was again in pain. During the next several hours as she sat in her car she had periods of unconsciousness. She finally drove home. When she arrived her right eye was swollen shut, she had red welts down the side of her face, and she went to bed where she remained two or three days. Five days after the incident in respondent's office appellant was taken to respondent's office by one of her daughters, but as the office was closed she visited another doctor. At this time her eye was badly swollen. The examination by the second doctor revealed the abrasion of the cornea of her right eye. She was treated by the second doctor for about two weeks and then went to see respondent. She told him her husband had been quite angry when she arrived at home with her eye in such condition and respondent remarked he did not blame the husband. He also said he would fit her for glasses free of charge. He evaded answering questions as to what had happened to her eye but he did order glasses for her, adjusted them, and made no charge. After the first incident respondent saw plaintiff five or six times and made no charge for his services. Respondent told Helen Janice Callaway, a daughter of appellant, who was a registered nurse, and who questioned him about what had happened to her mother's eye during the morning visit, that he thought her eye was then well; that when he looked in her eye at that time he "thought he saw something" so he took an instrument to look at it and "that was when it happened." Mrs. Callaway asked to see respondent's charts pertaining to her mother's treatment on that day and the charts brought to her were materially different from those produced by respondent at the trial. The chart for the day the incident occurred showed only a morning visit and not the afternoon visit, of which there was no record entered. Mrs. Callaway asked him why appellant's return visit in the afternoon was not entered on the chart and received no explanation. Respondent changed the subject. He did then tell her, however, that he would make appellant's glasses and that it would not cost appellant anything. There was opinion testimony that the abrasion could have been caused by any trauma, such as a surgical instrument striking the eye.

[1] A physician who treated appellant's eye after the corneal abrasion was suffered testified as a witness for appellant concerning his treatment and gave some opinion evidence. On cross-examination he gave further testimony both as to what he observed and as to what, in his opinion, was the origin of the abrasion. In so far as this testimony contradicted or was opposed to the evidence we have related, it must be ignored in testing the validity of the nonsuit. Karstensen v. Western Transportation Co., 93 Cal.App.2d 435, 438, 209 P.2d 47; Burns v. Jackson, 53 Cal.App. 345, 347, 200 P. 80.

[2] Appellant made out a prima facie case of negligence on the part of respondent, and the judgment of nonsuit must be reversed. From all of the evidence it could have been legitimately inferred by the jury that the abrasion of the cornea of appellant's right eye was proximately caused by a negligent act of respondent while he was standing over her looking into the eye and

using a surgical instrument. The evidence was ample to prove that the abrasion occurred at that time. The appellant's blacking out could be referred to the trauma that caused the abrasion, which in turn caused the extreme pain appellant was suffering when she regained consciousness. From the direct evidence, from opinion evidence and from respondent's admissions it could be inferred that the abrasion to the cornea of the eye, which respondent was not treating, was the result of negligence during his treatment of the accessory tear duct. Stated in terms of the doctrine of res ipsa loquitur, which we hold was applicable, this injury was something which ordinarily does not occur in the absence of someone's negligence; and the jury, under proper instructions, could have found that the abrasion was caused by an instrumentality in the control of respondent and was not due to any action or contribution on the part of appellant. Seneris v. Haas, 45 Cal.2d 811, 291 P.2d 915, 53 A.L.R.2d 124; Wolfsmith v. Marsh, 51 Cal.2d 832, 337 P.2d 70.

[3] Appellant argues that there is another theory under which respondent could have been found to have been negligent in such a way as to proximately cause the abrasion. The theory is dependent upon additional evidence not heretofore related. There was evidence that, contrary to the testimony of appellant, the respondent did anesthetize appellant's right eye before investigating the condition of the tear duct; that standard practice required him, before permitting her to leave, to warn her not to rub her eye, because, as the testimony revealed, it is natural for a person after treatment to the eye to rub the eye, and since the anesthesia results in a weakening of the covering membrane of the eyeball and in a lessening of the sensitivity of it, any rubbing is apt to be violent enough to abrade the membrane. Appellant testified that she received no such instructions and respondent under Section 2055 of the Code of Civil Procedure does not negative the testimony of appellant. We think it unnecessary to discuss this claim of appellant. The evidence on the subject may be quite different upon the next trial and it would be fruitless to discuss the matter now.

The judgment appealed from is reversed.

SCHOTTKY and PEEK, JJ., concur.

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169 Cal.App.2d 825

PEOPLE of the State of California, Plaintiff and Respondent,

v.

David James MACK, Defendant and Appellant.

Crim. 6420, 6421.

District Court of Appeal, Second District, Division 3, California.

April 23, 1959.

Rehearing Denied May 20, 1959.

Hearing Denied June 18, 1959.

Defendant was convicted in Superior Court of Los Angeles County, Otto J. Emme, J., of furnishing heroin to minor, and of forgery, and defendant appealed from orders denying probation and denying new trials. The District Court of Appeal, Vallée, J., held that the orders denying probation were not appealable, that where defendant admitted furnishing heroin many times going back prior to January 8, 1957 and admitted furnishing heroin in September 1957, a time which was within statute of limitations, fact that information charged the defendant furnished heroin on or about October 1, 1957, did not deny defendant due process.

Appeals from orders denying probation dismissed; judgments and orders denying new trials affirmed.

1. Criminal Law ⇐1023(12)

Orders denying probation to defendant were not appealable.

2. Indictment and Information 🔑176

In criminal prosecutions, immaterial variances between alleged time of occurrence of offense and actual time of occurrence should be disregarded, and test of materiality is whether indictment or information so fully and correctly informs defendant of criminal act with which he is charged that, taking into consideration proof which is introduced against him, he is not misled in making defense, or placed in danger of being twice put in jeopardy for same offense. West's Ann.Pen.Code, § 955.

3. Indictment and Information 🔑87(2), 176

In criminal prosecutions, it is ordinarily sufficient if both day named and day on which offense is proven to have been committed are within statute of limitations and prior to filing of information. West's Ann.Pen.Code, § 955.

4. Constitutional Law 🔑265
Indictment and Information 🔑176

In prosecution for furnishing heroin to minor wherein defendant admitted furnishing heroin many times going back prior to January 8, 1957, and admitted furnishing heroin in September 1957, a time which was within statute of limitations, although information charged that defendant furnished heroin on or about October 1, 1957 the variance was not fatal and defendant had not been denied due process. West's Ann.Pen.Code, § 955.

5. Criminal Law 🔑406(1)

In prosecution for furnishing heroin to minor who had no prescription therefor, wherein police officer, who qualified as expert, testified that minor was under influence of heroin, corpus delicti was established, and trial court did not err in admitting extrajudicial statements of defendant that he supplied minor with heroin.

6. Criminal Law 🔑481, 1153(2)

Qualification of person to testify as expert witness is matter within sound discretion of trial court, and court's determination, in absence of clear abuse, will not be disturbed by reviewing court.

7. Criminal Law 🔑478(1)

For one to be competent to testify as expert, he must have acquired such special knowledge of subject matter about which he is to testify, either by study or by practical experience, that he can give trier of facts assistance and guidance in solving problem for which trier's own good judgment and average knowledge is inadequate.

8. Criminal Law 🔑478(1)

Where witness discloses special knowledge of subject on which he undertakes to give his opinion as expert, question of degree of his knowledge goes to weight of his testimony rather than to admissibility.

9. Criminal Law 🔑478(1)

In prosecution for furnishing heroin to minor, who had no prescription therefor, police officer, who had been attached to narcotics division for 10 years, had observed various types of opiate injections, had observed individuals before, during, and after narcotics injections, had studied numerous works on narcotics for 10 years, had attended classes on narcotics, had studied addicts, had taught narcotics at junior college level, and had given instruction on narcotics to police recruits, was qualified to express expert opinion as to whether minor was under influence of heroin.

Morris Lavine, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., and S. Clark Moore, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

In number 6421 defendant was charged in three counts with forgery. On November 9, 1954 he pleaded guilty to count I, was granted probation, and the other counts were dismissed. On January 15, 1958 probation was revoked. The matter was ordered heard with number 6420. Defendant was sentenced to state prison. He appeals from the judgment, from what he terms "the order denying probation," and from the order denying a new trial.

[1] In number 6420 defendant was charged with having furnished heroin to Barbara Burns, a minor of the age of 19 years, "on or about" October 1, 1957, and sentenced to state prison. On May 19, 1958, in a nonjury trial, he was found guilty. He appeals from the judgment, from an order denying probation, and from the order denying a new trial. The orders denying probation are not appealable (People v. Grace, 166 Cal.App.2d 68, 332 P.2d 811) and the appeals therefrom will be dismissed.

Number 6420

On January 7, 1958, about 10 p. m., Officer Allen arrested Barbara Burns, a minor 19 years of age. At the time, Barbara had hypodermic marks which appeared to be recent on her hands; her skin had been punctured by a hypodermic needle; her eyes were sluggish, watery, and red, and reacted slowly to light. Without objection the officer testified "she was under the influence in my opinion of heroin, or barbiturates of some sort."

Officer O'Grady had been attached to the narcotics division of the Los Angeles Police Department about 10 years. During that time he had participated in over 3,000 arrests. He had observed people injecting various types of opiates intravenously, subcutaneously, and intramuscularly. He had observed them before, during, and after the injection of the narcotic in the opiate group; he had also watched them using cocaine and marijuana. For 10 years he had studied numerous works on narcotics, had attended classes on the subject, and had studied narcotic addicts. He holds a certificate to teach narcotics at the junior college level in California; teaches at East Los Angeles Junior College; and gives instruction on narcotics to police recruits. He has given more than 250 lectures to various service groups, nurse training groups, and medical doctors. He has testified as an expert in the field of narcotics more than 20 times.

Officer O'Grady examined Barbara about 12:30 a. m. on January 8, 1958. Her pupils did not react to light; she appeared to be suffering from rhinitus; her tear ducts were flowing; she was perspiring under the nose and on the forehead, neck, and parts of the arms; the palms of her hands were clammy; there were areas on her hands that had been pierced many times, apparently "with a hypodermic needle," almost to the point of sores.

Over objection Officer O'Grady testified that based on his examination he formed the opinion Barbara was going through withdrawal symptoms; she was about in the twentieth hour of such symptoms of an opiate; there was still an opiate in the system; from his examination and conversing with her more than an hour he formed the opinion she was under the influence of heroin; heroin is an opiate derivative.

The records of the Bureau of Narcotic Enforcement did not show any record of a prescription for an opiate having been issued to Barbara.

Defendant was arrested by Officer O'Grady on January 9, 1958. Over objection that the corpus delicti had not been established, the officer testified that at the time of the arrest he read to defendant a statement Barbara had made previously. The statement in substance was: " 'I paid $30 a gram for heroin. I have bought approximately 50 times from David Mack. David Mack has fixed me himself 10 or 12 times, and when I shoot I use his outfit. Sometimes I buy less. I call either *he* or William Bombino. And in turn David brings the narcotics to me.' " Defendant said, " 'She is a damn liar. She didn't pay me $30 a gram, she only paid me $25' "; " 'She is a liar. I didn't give her narcotics 50 times' "; he was just a delivery boy; he was not making any money out of it; William Bombino would usually call him; he had the narcotics "stashed" in various places; when he found out what Bombino said Barbara needed, he would take it to her, get the money, and take the money to

Bombino; for this he would get his own narcotics.

Officer O'Grady testified that about an hour later he had another conversation with defendant. Over objection, also on the ground the corpus delicti had not been established, he testified defendant said he had sold narcotics to Barbara and had charged her $25 a gram; the last time he saw her was "a couple of days ago"; the last time he sold her narcotics was "a couple of months ago." A recording of the second conversation Officer O'Grady had with defendant was played to the court over defendant's same objection. In this conversation a statement Barbara had made to the officer was read to defendant, in which she stated she first met defendant in September 1957 when he sold her a half gram of heroin. Defendant did not deny the fact.

The first assignment of error is that the evidence is insufficient to sustain the charge that defendant furnished Barbara with heroin "on or about" October 1, 1957. Section 955 of the Penal Code reads:

> "The precise time at which the offense was committed need not be stated in the accusatory pleading, but it may be alleged to have been committed at any time before the finding or filing thereof, except where the time is a material ingredient in the offense."

[2-4] "The burden was on the people to prove that the offenses occurred within the period of limitation but they are not required to prove the date with exactness. [Citation.] A variance is immaterial unless time is of the essence of the offense. [Citation.] 'An immaterial variance should be disregarded [citations]. The test of the materiality of a variance is whether the indictment or information so fully and correctly informs the defendant of the criminal act with which he is charged that, taking into consideration the proof which is introduced against him, he is not misled in making his defense, or placed in danger of being twice put in jeopardy for the same offense.'" People v. Amy, 100 Cal.App.2d 126, 127, 223 P.2d 69, 71. In People v. Rice, 73 Cal. 220, 14 P. 851, a prosecution for receiving stolen property, the evidence showed the offense was committed three months before the time alleged in the information. The court held the variance immaterial. In People v. Gatliff, 88 Cal.App. 589, 263 P. 823, a prosecution for unlawfully manufacturing intoxicating liquor, the information charged the offense was committed "on or about the 22nd day of April, 1927." The proof showed it was committed on May 13, 1927. The court said the contention that there was a fatal variance was wholly without merit. It is ordinarily sufficient if both the day named and the day on which the offense is proven to have been committed are within the statute of limitations and prior to the filing of the information. People v. Squires, 99 Cal. 327, 329, 33 P. 1092. The offense in the present case was committed within the applicable period of limitations. It is evident that any variance was not material. Defendant admitted he furnished Barbara with heroin many times over a long period going back several months prior to January 8, 1957. He admitted he furnished her with heroin in September 1957. Defendant was not misled in making his defense; he did not testify or offer any evidence except cross-examination of the state's witnesses. On this record there is no danger of his being twice in jeopardy for the same offense. Defendant's argument that by reason of the variance between the information and the proof he was denied due process is entirely untenable.

[5] The second assignment of error is that the corpus delicti was not established, hence the court erred in admitting the extrajudicial statements of defendant. The testimony of Officer O'Grady with respect to Barbara's condition and his opinion that she was under the influence of heroin was sufficient to establish that someone had furnished her with heroin. Such evidence, together with the fact that no prescription had been issued to her, established the cor-

pus delicti. People v. Waack, 100 Cal.App. 2d 253, 254, 223 P.2d 486.

[6-8] The last assignment of error is that the court erred in permitting Officer O'Grady to testify that in his opinion Barbara was under the influence of heroin. The contention apparently is that the witness was not qualified to express an opinion. The only argument made in this respect is that "the subject of narcotics addiction is a medical matter which should only be testified to by medical men, and that the use of non-medical persons to give their opinions is erroneous and prejudicial." No authority is cited in support of the point. The qualification of a person to testify as an expert witness is a matter within the sound discretion of the trial court; and its determination, in the absence of a clear abuse, will not be disturbed by a reviewing court. (19 Cal.Jur. 2d 23, § 296.) For one to be competent to testify as an expert he must have acquired such special knowledge of the subject matter about which he is to testify, either by study or by practical experience, that he can give the trier of fact assistance and guidance in solving a problem for which his own good judgment and average knowledge is inadequate. People v. Horowitz, 70 Cal.App.2d 675, 689, 161 P.2d 833; Enos v. Montoya, 158 Cal.App.2d 394, 399, 322 P.2d 472. Where the witness discloses special knowledge of the subject on which he undertakes to give his opinion as an expert, the question of the degree of his knowledge goes to the weight of his testimony rather than to its admissibility. Pfingsten v. Westenhaver, 39 Cal.2d 12, 20, 244 P.2d 395; People v. Johnson, 153 Cal.App.2d 564, 567-569, 314 P.2d 751.

[9] We think it patent the witness was well qualified to express an opinion as to whether Barbara was under the influence of heroin.

Number 6421

The only contention in this case is that if the judgment in 6420 is reversed, the judgment in this case should also be reversed because revocation of probation was predicated on the charge in 6420. Since the judgment in 6420 must be affirmed, the judgment in 6421 must also be affirmed.

The appeals from the orders denying probation are dismissed; the judgments and orders denying new trials are affirmed.

SHINN, P. J., and PARKER WOOD, J., concur.

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169 Cal.App.2d 840

SOUTHERN CALIFORNIA GAS COMPANY, a corporation, Southern Counties Gas Company of California, a corporation, Plaintiffs and Respondents,

v.

LOS ANGELES COUNTY FLOOD CONTROL DISTRICT, a body corporate and politic, Defendant and Appellant.

Civ. 23356.

District Court of Appeal, Second District, Division 1, California.

April 24, 1959.

Rehearing Denied May 20, 1959.

Hearing Denied June 18, 1959.

Inverse condemnation action by gas company against county flood control district to recover cost of relocating gas pipe in its right-of-way easement. The Superior Court of Los Angeles County, Clarence M. Hanson, J., entered judgment for gas company and flood control district appealed. The District Court of Appeal, White, P. J., held that there were no natural easements across private property along a ditch or drainway in favor of a flood control district or any other government agency for purpose of constructing public works, and gas company being required by district to move and reconstruct pipeline which had been in and along their own private easement across drainway, district and not gas company should pay cost of removal.

Affirmed.

1. Eminent Domain 🔑84

Navigable Waters 🔑36(1)

Generally, bed of navigable rivers and streams belongs to the state, and if a stream or water course is not navigable the bed is private property of the riparian owners and may not be taken for public use without compensation.

2. Levees and Flood Control 🔑13½

There is no natural easement across private property along a ditch or drainway in favor of a flood control district or any other governmental agency for purpose of constructing public works.

3. Gas 🔑9

Where gas company had a private easement from fee-simple owner and constructed gas pipeline under surface of natural drainway, and company was required by county flood control district to move and reconstruct pipeline in and along their own private easement as result of storm control project, flood control district and not gas company should be required to pay cost of removal of pipe.

4. Eminent Domain 🔑9, 69

County flood control district has power to require obedience to its demands in exercise of its rights of eminent domain, but that power does not relieve district of its obligation to pay for all property taken or damage caused by its construction of public works.

Harold W. Kennedy, County Counsel, Iver E. Skjeie, Deputy County Counsel, Baldo M. Kristovich, Asst. County Counsel, Edward H. Gaylord, Deputy County Counsel, Los Angeles, for appellant.

T. J. Reynolds, L. T. Rice, Allen L. Cleveland, Los Angeles, C. R. Salter, Whittier, for respondents.

WHITE, Presiding Justice.

Southern California Gas Company and Southern Counties Gas Company of California, corporations, hereinafter referred to as the "Gas Companies", brought this action in inverse condemnation against the Los Angeles County Flood Control District, a body corporate and politic, hereinafter referred to as the "District", to recover $6,660.98, the cost of relocating their 30-inch high pressure gas pipe in a 20-year right-of-way easement therefor granted to them by the Pacific Electric Railway, the owner of the fee-simple title to the land since 1906. The District appeals from judgment for the Gas Companies.

August 25, 1953, the District entered into an agreement with the County of Los Angeles, in which it is recited that the issuance of its bonds "for the control of surface waters by the construction of storm drains and drainage channels has been authorized", and the County agreed "to proceed with the work of preparing final construction plans and specifications for the construction of those storm drain projects herein described * * *", including East Whittier Storm Drain Project No. 29, out of which the instant action arose, and to complete and deliver to the District said plans and specifications.

A portion of said County Engineer's undated specifications describes said Project No. 29 as follows: "The work will extend in an easement, following the natural channel of La Canada Verde Creek, from a point approximately 90 feet southerly of Lambert Road to Second Street".

The District's specifications, its contract for construction, and the contractor's faithful performance bond refer to the project as "Construction of Storm Drain".

In 1954, the District advised the Gas Companies that the District planned to widen and deepen the ditch known as "East Whittier Storm Drain Project No. 29", and requested that their pipeline be relocated at their own expense "under the terms of its permit or franchise". The Gas Companies advised the District that the pipeline was within their own private easement. Then the District, by letter dated March 11, 1955, advised the Gas Companies that, although their pipeline is situated in a private easement, "it crosses a natural drain along which this project will be constructed", and that in the case of "natural drains such as this the public enjoys a natural easement which by its nature would predate any private easement", and that consequently the burden of relocating the pipeline was upon the owner of the private easement.

May 24, 1955, pursuant to authorization by the Board of Supervisors, an agreement for "Easement for Storm Drain" across said land belonging to the Pacific Electric Railway Company was signed and acknowledged by the Railway and the District, "subject to all valid existing contracts, leases, liens, or encumbrances which may affect the property and the word 'grant' as used herein shall not be construed as a covenant against the existence of any thereof". The District, as consideration for said easement, promised to reimburse the Railway for any and all costs and expenses incurred in connection with changes required because of the construction of the said storm drain.

The Gas Companies' "Underground Pipe and Ditch Crossing" agreement with the Railway is dated August 31, 1946, and covers the agreed term of twenty years.

The District and the Gas Companies, under date of May 1, 1955, entered into a *status quo* agreement reciting that "the installation by the District of the Storm Drain * * * will necessarily conflict with an existing 30 inch pipeline * * *", and that a controversy exists between them as to which should bear the cost of relocation of said pipeline. Pursuant to said *status quo* agreement, the Gas Companies relocated their pipeline at a cost to them of $6,660.98.

It appears from the photographic exhibits, maps and drawings of the locale, and was found by the court, that Storm Drain Project No. 29 was designed and constructed to "carry off surface rain water run off from the northern slope of the Puente Hills". It was further found that said Project No. 29 is an artificial improvement of a natural watercourse; that, while the stream bed of La Canada Verde Creek is better defined north of Whittier Boulevard than in the vicinity of the Gas Companies' said pipeline, nevertheless, as shown by the U. S. Geological Survey Maps and other evidence including photographs showing railroad trestles over it and culverts and ditches along its course, the portion of the stream bed being considered on this appeal has long been existent; that although the pipeline of the Gas Companies was well below the ground when installed, the flow of waters in said creek so eroded said channel that before its relocation said pipeline was protruding "above the bed or flow line of La Canada Verde Creek"; and that it was necessary that said pipeline be relocated.

The District's justification of its refusal to pay the costs of the Gas Companies in moving their said pipeline is based primarily upon its claim that every owner of land (or of an easement over land) which is a part of, or immediately adjacent to "a natural watercourse or drainway" owns it subject to "a natural right of the public to utilize such natural facility", to there construct "reasonable artificial improvements for the drainage" of domestic waters and from time to time to deepen and improve such channel for that purpose; and subject to the requirement that any improvements placed by such owner upon said land or easement must from time to time be altered at his own expense as required by public agencies "in aid of the drainage of domestic waters in the drainway"; that the obligation and duty on the part of such owners of land and easements has been enforced as "a part of the retained sovereign or police power of the public exercisable by jurisdictional bodies or agencies, of which appellant is one"; that the public always owned the right to the unrestricted drainway and to enlarge it when and if such enlargement is needed and all private ownership is subject to that right of the public.

That, if the state, of which appellant is the agent in the instant action, ever owned such an easement, it could not have been lost either by nonuser or by the agreement with the Railway for the "Easement for Storm Drain" hereinbefore described.

Therefore, the first issue to be considered on the instant appeal is the nature of appellant District's rights in the land belonging to Pacific Electric Railway Company and the easement granted by said Railway to the Gas Companies. Is such right as stated in the grant of the "Easement for Storm Drain", subject to the Railway's prior valid and existing contract with the Gas Companies for "Underground Pipe and Ditch Crossing", or, is it, as urged by appellant, superior even to the rights of all riparian owners—including the Railway?

[1] "Generally speaking, the bed of navigable rivers and streams belongs to the state * * *. If a stream or watercourse is not navigable, the bed is the private property of the riparian owners, and may not be taken for public use without compensation * * *." 25 Cal.Jur. 1046–1048; Freeman v. Bellegarde, 108 Cal. 179, 185, 41 P. 289; and People ex rel. Ricks Water Co. v. Elk River Mill & Lumber Co., 107 Cal. 221, 224, 40 P. 531.

Appellant, in its opening brief, cites the following decisions of the California courts as authority for its statement that "the rule is universal that lands located in or along a watercourse are subject to a natural easement or servitude to receive all water naturally arising within the watershed or drainage area served and all of such waters may be directed into such watercourse by artificial means * * *."

In San Gabriel Valley Country Club v. Los Angeles, 182 Cal. 392, 188 P. 554, 9 A.L.R. 1200, judgment for plaintiff for damage caused by the erosion of its property was reversed on appeal. A conduit constructed by the defendant in a natural wash carried water to a point over a mile above plaintiff's property and there returned said water to the wash which crossed plaintiff's land. At page 406 of 182 Cal., at page 559 of 188 P., the court said: "It is apparently contended on behalf of the plaintiff that, even if the injury be *damnum absque injuria* as between private parties, yet, when the injury is inflicted by an improvement made by public authority, it must be compensated for under the provision of our Constitution (Article I, § 14) that private property shall not be taken or damaged for a public use without just compensation. But the contrary has been directly decided since the filing of the original briefs in this case in Gray v. Reclamation District No. 1500, 174 Cal. 622, 163 P. 1024."

The San Gabriel case, supra, Gray v. Reclamation District, cited therein supra, Archer v. City of Los Angeles, 19 Cal.2d 19, 119 P.2d 1, and Bauer v. County of Ventura, 45 Cal.2d 276, 289 P.2d 1, cited in appellant's opening brief, concern temporary flooding, or probable flooding, of lower lands riparian to a stream in which changes were made or planned by defendants for the purpose of flood prevention. They involve no taking or damaging of private property as part of the actual construction of public works. Not one of said above-cited cases lends credence to appellant's claim that the Flood Control District has a "natural easement" along every natural drainway or ditch, which may be deepened, widened, cemented, covered, opened or changed at will, regardless of and without payment for damage to or destruction of any prior improvements over, across or near said drainway or ditch.

In the instant action, plaintiffs' 30-inch high pressure gas pipe had been installed in their own private easement below the bed of the natural drainway. Appellant District, for the improvement of said drainway, required plaintiffs to, and they did, permit defendant to build a cement conduit across the easement of respondent Gas Companies, wider and deeper than said drainway had been. In connection with the construction of said conduit, said gas pipe was necessarily removed from its then position beneath the bed of said drainway and reconstructed across the top of said cement conduit and beneath the surface of the ground. Said relocation was done pursuant to defendant's demands in connection with its construction of said "East Whittier Storm Drain Project No. 29".

In the Bauer case, supra, where plaintiff sought to recover damages to her riparian property caused by defendant's changing of the height of its ditch on property above that of plaintiff, judgment of dismissal was reversed with directions. At page 292 of 45 Cal.2d, at page 5 of 289 P.2d, the court said:

> "California Constitution, Article I, section 14, provides: 'Private property shall not be taken or damaged for public use without just compensation having first been made to, or paid into court for, the owner * * *.' The taking of private property by the state for a public use is universally recognized as one of the indisputable attributes of sovereignty * * * But the state must, except under special circumstances not here present, follow the constitutional procedure which requires the payment of compensation before the private owner is dispossessed of his property. When this requirement is not fully satisfied, an action will lie against the state to recover the value of the property so taken * * *
>
> "Section 14, however, is designed not to create new causes of action but only to give the private property owner a remedy he would not otherwise have against the state for the unlawful dispossession, destruction or damage of his property. The state is therefore not liable under this provision for property damage that is *damnum absque injuria.* If the property owner would have no cause of action against a private citizen on the same facts, he can have no claim for compensation against the state under section 14 * * *
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> "* * * Hence it is clear that the ordinary taking of private property for the purpose of constructing storm drainage systems is a taking for a public use. The reasons for such a taking are obviously to provide adequate normal drainage, to control flood waters and to provide irrigation waters. The public becomes principally entitled to the use and enjoyment of the private property taken for such purposes." (45 Cal.2d at page 284, 289 P.2d at page 5.)
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> "* * * It follows that the taking or damaging of private property for the maintenance of an existing public improvement involving a deliberate act which has as its object the direct or indirect accomplishment of the purpose of the improvement as a whole constitutes a taking or damaging of property for a public use and the owner of such property is entitled to compensation.
>
> "* * * Had the bank been raised during the original construction it would have been part of the overall project and hence within the rule of Clement v. State Reclamation Board, supra, 35 Cal.2d 628, 220 P.2d 897, and House v. Los Angeles County Flood Control District, supra, 25 Cal.2d 384, 153 P.2d 950; * * *." (45 Cal.2d at page 285, 289 P.2d at page 7.)

The House and Clement cases, cited in the portion of the Bauer decision last above quoted, are both based upon the premise that "The construction of the public improvement is a deliberate action of the state or its agency in furtherance of public purposes. If private property is damaged thereby the state or its agency must compensate the owner therefor * * *". Clement v. State Reclamation Board, 35 Cal.2d 628, 641, 220 P.2d 897, 905.

[2] We are satisfied that there is no "natural easement" across private property along a ditch or drainway in favor of a Flood Control District or other governmental agency for the purpose of constructing public works.

[3, 4] The Gas Companies having been required by appellant District to move and reconstruct their pipeline in and along their own private easement across said drainway, appellant District and not the Gas Companies should pay the cost of such removal. Appellant District, under the Act by which it was created, has the power to require obedience to its demands in its exercise of its right of eminent domain. That power, however, does not relieve said District of

its obligation to pay for all property taken or damages caused by its construction of public works.

None of the facts appearing in the record in the instant action require or warrant any exercise by the District of the police power of the state.

Having determined that appellant was not the owner of its claimed "natural easement", the rights claimed by it as incidental to such "natural easement" become immaterial.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

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169 Cal.App.2d 818

Jerrold J. KESSLER, Jr. and Don S. Levin, Plaintiffs,

v.

Maxwell SAPP, David M. Sapp et al., Defendants.

Jerrold J. KESSLER, Jr. and Don S. Levin, Respondents and Appellants,

v.

Maxwell SAPP, David M. Sapp and Sapp Bros. Construction Co., a partnership, Appellants and Respondents.

Civ. 23529.

District Court of Appeal, Second District, Division 3, California.

April 23, 1959.

Action for specific performance of an agreement for the sale of unimproved realty for subdivision purposes. The defendants filed a cross complaint for declaratory relief and to quiet title. Defendants' motion to exclude evidence was granted and judgment entered in their favor and plaintiffs' motion for new trial was granted and the defendants appealed from an order in the Superior Court of Los Angeles County, Clarence M. Hanson, J., and Bayard Rhone, J., granting plaintiffs new trial and plaintiffs appealed from the judgment. The District Court of Appeal, Shinn, P. J., held that the contract was too uncertain to be enforceable; that the amended complaint entitled the purchasers to relief with respect to the amount paid the vendors and their agents, and that plaintiffs were entitled to amend to state additional facts with respect to the amount paid by plaintiffs in obtaining approval of the subdivision and the amount claimed as the value of their personal services.

Order affirmed and appeal from judgment dismissed.

1. New Trial 🔑24

A new trial may be had because of error in entering judgment adverse to plaintiffs upon sustaining of demurrer without leave to amend. West's Ann.Code Civ. Proc. § 657, subd. 7.

2. Appeal and Error 🔑863

Where defendants' motion to exclude evidence was tantamount to a general demurrer, question on defendants' appeal from new trial order for plaintiff was whether, under the facts pleaded, the amended complaint stated the substance of a cause of action on any theory. West's Ann.Code Civ.Proc. § 657, subd. 7.

3. Specific Performance 🔑28(2)

A contract for the purchase of unimproved property for subdivision purposes was too indefinite to support specific performance thereof by the purchasers, where the escrow instructions provided for the subordination of a trust deed to a first trust deed to be obtained by the purchasers and only one term thereof was set out in the instructions, and the rate of interest, the amount of monthly payments, and period of debt, were left to future agreement of the parties.

4. Vendor and Purchaser 🔑334(1)

A purchaser paying a portion of the purchase price under a contract for sale of realty which is void for uncertainty may recover his payments in an action of assumpsit.

5. Specific Performance ⚷128(1)

In an action for specific performance of a contract for the sale of unimproved realty for subdivision purposes where the agreement was void for uncertainty, purchasers were entitled to recover the amount paid to the vendors or their agents.

6. Vendor and Purchaser ⚷341(5)

Generally, a purchaser entitled to restitution may in addition to the sums paid under void contract recover the reasonable value of any improvements made or for services rendered pursuant to the agreement which are of material benefit to the vendor.

7. Appeal and Error ⚷1201(3)

In action for specific performance of an agreement to convey realty which was void for indefiniteness, where it did not appear with respect to the amounts spent by purchasers in obtaining approval of a subdivision and for the value of their personal services, defendants received any benefit from such expenditures or were under a duty to reimburse the purchasers but the question had been insufficiently developed, plaintiffs were entitled to an opportunity on remand to amend their complaint to state additional facts.

◆

Horowitz & Howard by Alvin F. Howard, Los Angeles, for plaintiffs, respondents and appellants.

Theodore J. Elias and Harold Easton by T. J. Elias, Los Angeles, for defendants, appellants and respondents.

SHINN, Presiding Justice.

Plaintiffs agreed in writing to purchase from defendants a parcel of unimproved property for subdivision purposes. Upon the latters' refusal to convey the property, plaintiffs brought an action for specific performance. Defendants filed a cross-complaint for declaratory relief and to quiet title. At the trial, defendants objected to the introduction of any evidence upon the ground that the complaint did not state a cause of action for specific performance; their objection was sustained by the court and plaintiffs were allowed to file an amended complaint in which they sought damages for breach of contract. When the matter again came on for trial, defendants moved to exclude evidence upon the ground that the written agreement was too uncertain to give rise to a cause of action for damages for breach of contract. Defendants' motion was granted and judgment was entered in their favor. Plaintiffs then made a motion for new trial, which was granted by the court. Defendants appeal from the order granting plaintiffs a new trial and plaintiffs appeal from the judgment.

[1, 2] It is now settled that a new trial may be had because of error in entering judgment adverse to the plaintiffs upon the sustaining of a demurrer without leave to amend. Code Civ.Proc., sec. 657, subd. 7; Carney v. Simmonds, 49 Cal.2d 84, 315 P.2d 305. Since defendants' motion to exclude evidence was tantamount to a general demurrer, our question on their appeal from the new trial order is whether, under the facts pleaded, the amended complaint states the substance of a cause of action on any theory. Byson v. City of Los Angeles, 149 Cal.App.2d 469, 472, 308 P.2d 765, and cases cited.

The contract, which was set out in the complaint and the amended complaint, consisted of written escrow instructions dated January 20, 1956, as supplemented by a letter agreement of January 24th and an amendment to the escrow instructions dated April 4th. The original instructions contemplated a sale of the property to plaintiffs for $115,000. The escrow was to close April 5, 1956. Plaintiffs were to deposit $50,000 in installments of $2,000, $10,000 and $38,000 and a trust deed securing their promissory note for $65,000, payable 18 months after the date of the note. By a special provision, which we have set out in the margin, the parties agreed to subordinate the deed of trust to a first trust deed securing a construction loan to be obtained by plaintiffs.[1]

We have likewise set out in the margin the letter agreement dated January 24th.[2] It provided in substance that the costs of the subdivision in excess of $15,000 were to be deducted from the $50,000 to be paid to defendants through the escrow; that plaintiffs were to furnish defendants with bids for the subdivision and improvement work from three reputable contractors; and that an additional sum equal to 10% of plaintiffs' expenditures for the subdivision and improvement work would be allowed as an item of subdivision costs as the value of their personal services.

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[1] "This Deed of Trust is to file concurrently with a first trust deed to be obtained by the purchaser; terms of said first trust deed to be approved by Sapp Bros. Construction Co., a partnership, prior to recording. The Deed of Trust securing the above described Note shall contain the following Subordination Agreement: The Beneficiary on behalf of his or her heirs, administrators and assigns hereby agree and consent that during the life of said Deed of Trust the Trustors or their successors in interest may obtain a loan from a Bank, Insurance Company, Savings and Loan Association or Mortgage Company, securing a note for construction and/or permanent financing to be secured by a deed of trust which will be and remain at all times a lien on the property herein described and superior to the lien of this deed of trust. As a matter of record only, the Seller agrees to accept the Deed of Trust securing the above described Note on subject property described as individual parcels or lots instead of acreage if the buyer has completed subdivision and obtained correct legal description describing the property by Lot and Tract. The Seller agrees to subordinate the Deed of Trust which will become a second deed of trust to a first trust deed to be filed concurrently or after close of escrow, and said first trust deed not to exceed in the amount equal to $6.50 per square foot exclusive of garages, stairways and porches."

[2] "January 24, 1956.
"Sapp Brothers Construction Company
"5133 West Washington Boulevard
"Los Angeles, California
"Gentlemen:

"We are writing this letter for the purpose of supplementing the escrow instructions signed by us at the Bank of America on January 20, 1956. The agreement between us, in addition to the terms set forth in the escrow instructions, is as follows:

"If the improvement and subdivision costs exceed $15,000.00 then we are to be allowed a deduction from the $50,000.00 required to be deposited by us in escrow in an amount equal to the sum by which these costs exceed $15,000.00. In order to assure you that all work will be done as economically as possible, we shall supply you with at least three bona fide bids from reputable contractors capable of being bonded for completion, for all work done in connection with the subdividing and improving of the property. In fixing the costs for subdividing and improvements, a sum equal to ten per cent of the actual amounts paid or incurred by us shall be added and allowed as a cost for our own personal services rendered in connection with such work.

"It is our understanding that the subdivision and improvement costs shall include all costs incurred in connection with the subdivision of the property in accordance with the requirements of the County of Los Angeles for such subdivisions. In addition to costs of actual construction for labor and material, all other costs incurred in connection with the improvement and subdivision of the property shall be allowed on the basis set forth above including, but not limited to, fees, bonds, permits, engineering costs, fill and compaction reports, costs for the acquisition of rights of way or easements, whether on site or off site, so that all necessary work may be done to subdivide the entire property into individual lots in conformity with the requirements of all governmental organizations to which the property is subject.

Finally, if a first trust deed is not placed on the property in accordance with the escrow instructions before the close of escrow, and if, thereafter, a lender or lending institution so requires, you will reconvey the deed of trust and accept in its place another identical deed of trust to be filed concurrently with the filing of a first trust deed to which your trust deed is to be subordinate in accordance with the escrow instructions.

If this is in accordance with your understanding of our agreement, please so indicate by signing a copy of this letter for our files.

"Very truly yours,
"(s) Don S. Levin
"(s) Jerrold J. Kessler, Jr.
"Sapp Brothers Construction Company
"(s) Maxwell Sapp"

The amendment to the escrow instructions extended the escrow until July 5th. Plaintiffs were to deposit $8,000 in addition to the $12,000 already in the escrow and they agreed to the immediate release to defendants of $17,500, the balance of $2,500 to be released to defendants' real estate brokers as payment of one-half of their commission on the sale.

The amended complaint alleged the execution of the above-mentioned instruments and incorporated them by reference. Plaintiffs alleged that they performed all the conditions of the agreement to be performed by them, that they demanded a deed to the property and that defendants refused to make the conveyance. It was alleged in the amended complaint that plaintiffs released the $20,000 to defendants and their agents; expended the sum of $4,000 for the services of engineers and lawyers in the preparation of a subdivision plan; obtained the authorities' tentative approval of a subdivision plan and tract map; furnished defendants with a copy of the proposed tract map, and deposited in escrow three bids from reputable contractors showing that the cost of the subdivision and improvement work would be $56,856. Plaintiffs alleged that the reasonable value of their personal services in connection with the subdivision was $5,168. The prayer seeks recovery of the $20,000 released from the escrow, the $4,000 expended by plaintiffs, $5,168 as the value of their services, and substantial damages on account of defendants' failure to convey the property.

The answer denied the material allegations of the amended complaint. Defendants alleged as affirmative defenses to the action that they received no consideration for the alleged contract, that plaintiffs failed to perform any of the conditions of the agreement other than the payment of the $20,000, and that their own assent thereto was procured through mistake and through the representations of the real estate broker (who was the agent for both parties in the transaction) that the subdivision costs would not substantially exceed $15,000, although plaintiffs and the broker knew that the costs would be substantially in excess of $15,000. By way of cross-complaint, defendants sought upon the same grounds as set forth in their answer to quiet title to the property and to obtain a declaration of the nullity of the agreement.

[3] As we have said, the court ruled that the amended complaint did not state a cause of action for damages for the reason that the contract pleaded therein was too uncertain to be binding. This construction was a correct one and it is not disputed by the parties on the appeal. The escrow instructions of January 20th provided for the subordination of the trust deed to a first trust deed to be obtained by the purchasers; only one term of the contemplated deed of trust was set out in the instructions, namely, that the amount of the encumbrance was not to exceed $6.50 per square foot "exclusive of garages, stairways and porches" (evidently relating to buildings to be constructed); the rate of interest, the amount of the monthly payments and the period of the debt were left to the future agreement of the parties. This radical uncertainty as to a material feature of the sales agreement not only rendered it incapable of specific enforcement (Gould v. Callan, 127 Cal.App.2d 1, 273 P.2d 93), but also rendered unmaintainable an action for damages for its breach. Burgess v. Rodom, 121 Cal.App.2d 71, 262 P.2d 335.

[4, 5] The question is, however, whether the amended complaint contains allegations of facts which would entitle the purchasers to some relief. Plaintiffs contend that they have sufficiently stated a cause of action for the recovery of the $20,000 paid to defendants and their agents, the $4,000 they expended for engineers and lawyers, and for $5,168 as the value of their personal services on a theory of unjust enrichment. We agree, at least with respect to the $20,000.

The facts alleged in the amended complaint, if proved, would clearly establish plaintiffs' right to recover the $20,000. A purchaser who has paid a portion of the purchase price under a contract for the sale of real property which is void for uncertainty may recover his payments in an action in assumpsit. Poetker v. Dyck, 83 Cal. App. 771, 257 P. 185; Harwell v. Reiniger, 123 Cal.App. 485, 11 P.2d 421. Defendants argue that a party may not rely upon an unjust enrichment theory where he has pleaded an express contract. The argument would have been meritorious had the agreement been enforceable. But, as we have seen, the agreement was not an enforceable one.

[6, 7] With respect to the $4,000 spent by plaintiffs in obtaining approval of a subdivision and the $5,168 claimed as the value of their personal services, the facts alleged do not place these claims in the category of purchase money paid or permanent improvements made upon the land. As a general rule, a purchaser who is entitled to restitution may, in addition to the sums paid under a void contract, recover the reasonable value of any improvements made, or for services rendered pursuant to agreement, which are of material benefit to the vendor. (Rest. Restitution, sec. 53; Williston on Contracts, Rev.Ed., Vol. 5, page 4133 (sec. 1479); 92 C.J.S. Vendor & Purchaser § 571, p. 611.) It does not necessarily follow from the facts alleged in the amended complaint that defendants received any benefit from the expenditures or services or were under a duty to reimburse plaintiffs. But the question whether they ought, in equity and good conscience, to reimburse plaintiffs under the theory of unjust enrichment is one to be determined from the evidence developed upon a trial. Obviously, we cannot anticipate what facts may or may not be developed. If plaintiffs wish to amend their complaint to state additional facts, they should be permitted to do so.

Since the amended complaint stated the substance of a cause of action, it was error to grant defendants' motion to exclude evidence and enter judgment in their favor. The court properly granted plaintiffs' motion for new trial.

The order is affirmed and the appeal from the judgment is dismissed, plaintiffs to recover costs.

WOOD and VALLÉE, JJ., concur.

169 Cal.App.2d 862

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Charles Frederick UNDERHILL, Daniel Martin Wynn, and Rita Irene Wynn,
Defendants and Appellants.
Cr. 1393.

District Court of Appeal, Fourth District,
California.
April 24, 1959.
Rehearing Denied May 22, 1959.
Hearing Denied June 18, 1959.

Prosecution for unlawful possession of marijuana. From adverse judgment of the Superior Court, San Diego County, William A. Glen, J., and from an order denying a new trial, the defendants appealed. The District Court of Appeal, Griffin, P. J., held that where deputy sheriff had informed two police officers that Mexican border patrol had chased a fellow they believed had thrown some narcotics over international fence and had lost him and that such man was wearing a striped brown and white shirt and police officers, upon apprehending defendants during nighttime for failure to stop at a stop sign, flashed light on one of defendants and saw that he was wearing a brown and white striped shirt, search of automobile resulting in discovery of marijuana under driver's seat was authorized.

Judgment and order affirmed.

Searches and Seizures 🔑7(20)

Where deputy sheriff had informed two police officers that Mexican border patrol had chased a fellow they believed had thrown some narcotics over international fence and had lost him and that such man was wearing a striped brown and white shirt and police officers, upon apprehending defendants during nighttime for failure to stop at a stop sign, flashed light on one of defendants and saw that he was wearing a brown and white striped shirt, search of automobile resulting in discovery of marijuana under driver's seat was authorized. West's Ann.Health & Safety Code, § 11500.

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Thomas Whelan, San Diego, for appellants.

Stanley Mosk, Atty. Gen., John Huntington, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

Defendants and appellants Charles Frederick Underhill, Daniel Martin Wynn, and Rita Irene Wynn were charged with the unlawful possession of a narcotic (marijuana) on June 20, 1958, in violation of section 11500 of the Health and Safety Code. Defendant Underhill was charged with five prior felonies, 1 and 2, altering United States money orders; 3, grand larceny, second degree; 4 and 5, White Slave Traffic Act Conspiracy. They pleaded not guilty to the offenses charged. Underhill admitted prior felony conviction (No. 3) and denied the others. Defendant Daniel Wynn admitted a prior felony conviction of possession of a narcotic. Each individually waived a trial by jury, and the result was a conviction of all defendants on the offenses charged. It was found that defendant Underhill had been previously convicted of felonies 1, 3 and 4 above mentioned. Underhill and Daniel Wynn were committed to State's prison. Rita Wynn was granted probation. Motions for new trial were denied.

Facts.

About 4 a. m. on January 20, 1958, two police officers were stationed on an access road leading to the main highway about one mile north of the Mexican border. Sergeant Anson saw a 1948 or 1949 Plymouth car, license No. HYG–812 approaching the main highway near a stop-sign intersection. The vehicle did not stop. It crossed through at about 25 miles per hour. The officers pursued with the red lights on their car burning. Defendants did not then stop but did slow down. After about one-quarter mile chase they stopped and the officer flashed his light in the car and saw the occupants. Defendant Underhill was driving. Mr. Wynn was seated in front with him. Mrs. Wynn was in the rear seat. Mr. Wynn was wearing a brown and white, or dark and white striped shirt. Prior to this time Sergeant Anson had received information from a deputy sheriff Bonder, stationed at the border, involving an individual wearing a brown and white striped shirt. Bonder told Sergeant Anson that the border patrol had chased a fellow they believed had thrown some narcotic over the international fence and had lost him, and that the man was white, young, had short hair, and wore a striped shirt (brown and white). When he flashed the light on him in the car he said he thought defendant Wynn might be this person. He was wearing a brown and white striped shirt. The officer admitted they originally pursued defendant's car because of his failure to stop at the intersection, but testified that after defendants stopped an officer flashed his light in the car window and Underhill got out and came back and wanted to know what the trouble was; that he said: "You know what the trouble is" and Underhill said "he knew he ran the stop sign"; that he then said to him: "Who is the fellow in the car with the striped shirt?" and that defendant answered they were friends of his; that the officer then asked him if he could take a look through the car and Underhill said "Yes"; that he then went up to it and started talking with defendant Wynn and his wife; that all of them appeared to be very nervous and it was quite noticeable; that the men began to perspire, even though it was a very cold night, and the perspiration ran down their foreheads; that he then asked

Wynn to step out and he pressed the glove compartment and found it was locked; that Underhill gave him the key to it but it would not open; that Underhill then took the key and opened it and nothing was found; that about that time all defendants were glancing at each other, appearing very nervous, looking down toward the cushion at the driver's seat; that as the officer reached in that direction Underhill said: "I don't know anything about that stuff"; that he lifted up the seat and found a large package about the size of a loaf of bread wrapped with cellulose tape; that he tore it open and found what he believed to be and was subsequently proved to be marijuana; that he asked him who owned it and Mrs. Wynn and Underhill both said they knew nothing about it; that Mr. Wynn made no comment; that the officer remarked it appeared to him to be marijuana and he was arresting them for possession of it; that defendants made no comment; that he asked who owned the car and Underhill said it belonged to his step-son and wanted to know if the package proved to be marijuana whether the car would be confiscated. Some tickets were found in the car and Underhill was asked if he had been to Tijuana. He remarked that he had been there a couple of times. Wynn told his wife to keep her mouth shut.

As evidence that Wynn had previous knowledge of and had used marijuana, the prosecution offered a witness who testified that Wynn, on a previous occasion, had been shown some marijuana by him and that Wynn told him he had been a user of it for several years and had pleaded guilty to a charge of possession of marijuana in Los Angeles. In reference to the present charge, defendant Mr. Wynn told an officer that the three defendants had been in Tijuana that night, came across the border, had some argument between them, and went back and then returned; that they were stopped for failure to make a boulevard stop and the package was found under the seat; that Wynn stated he didn't know anything about this package or marijuana in general, but admitted that in 1954 he had smoked it; that the dark and white striped shirt he was wearing was his and no other person had worn it; that the clothing worn by Underhill and Mr. and Mrs. Wynn that morning was shown to them; that he removed debris from this clothing and Mrs. Wynn's purse, had it analyzed, and that each article showed the presence of particles of marijuana.

At the trial, in defense, Underhill testified they had been to Tijuana, had taken the wrong road on returning, and were trying to get back on the main highway. He denied giving the officer permission to search the car; claimed the officer demanded the keys to it and stated that no furtive glances were exchanged between the defendants before the marijuana was found; denied making any statement to the officers about any "stuff" being under the seat and said he was not perspiring, because it was cold that night.

All three defendants testified on the question of reasonableness of the search and what they claimed took place at the scene. They denied any consent of Underhill to search the car; and testified that although Mr. Wynn was wearing a dark and white striped shirt, it was covered by a dark colored jacket he was wearing at the time. At the trial Underhill, for the first time, admitted ownership of the marijuana and said he purchased it in Tijuana. He claimed the Wynns (who did not testify on the subject) were not present when he purchased it. However, according to an officer, Underhill previously told him that after the officer stopped them that night, one officer was very interested in the appearance of Wynn, seated in the front seat; that this officer asked Underhill if it was all right to search the glove compartment of the car and he gave the officer a key to it and told him to go ahead; that almost immediately thereafter, they found the package under the seat and that it appeared to him the officers had been looking for some one who looked like Daniel Wynn. On his appeal Underhill's defense is predicated upon the claimed ground of illegal search and seizure. He cites such authority as People v. Molarius, 146 Cal.App.2d 129, 303 P.2d 350; People v. Kitchens, 46 Cal.2d 260, 294 P.2d 17; People v. Blodgett, 46 Cal.2d 114, 293 P.2d 57; and People v. Gale, 46 Cal.2d 253, 294 P.2d 13. Defendants Wynn include that particular ground with the additional claim of lack of knowledge that the marijuana was in the car or that Underhill had purchased or had possession of it, citing People v. Antista, 129 Cal.App.2d 47, 276 P.2d 177; and People v. Romero, 156 Cal.App.2d 48, 318 P.2d 835.

Underhill argues that it would be unreasonable to believe he consented to the search of the car because he was then on parole from a state's prison and accordingly he naturally would not have consented; that he was afraid of officers in general and when the officers demanded the keys he turned them over to them. While this may have been a logical factual argument, the evidence on the subject of consent was in conflict. The trier of fact was authorized to hold there was a consent to search the car. In addition, the officers were reliably informed that a person dressed in a white and brown shirt was previously involved in some possible smuggling of a package of some description across the border. Upon apprehension the officers noticed such a described person seated in the car coming from the direction of the border. The actions of this person, when considered in connection with the actions of the other occupants, might well indicate guilty knowledge of the possession of some narcotic which would put a prudent officer on further inquiry in this respect. Under all the circumstances related the search was authorized. People v. Melody, 164 Cal.App.2d 728, 331 P.2d 72; People v. Hood, 150 Cal.App.2d 197, 200, 309 P.2d 856; People v. Jackson, 164 Cal.App.2d 759, 331 P.2d 63; People v. Weathers, 162 Cal.App.2d 545, 328 P.2d 222; People v. Hanley, 156 Cal.App.2d 544, 546, 319 P.2d 706; People v. Lujan, 141 Cal.App.2d 143, 147, 296 P.2d 93; People v. Torres, 158 Cal.App.2d 213, 215, 322 P.2d 300; People v. Garnett, 148 Cal.App.2d 280, 283, 306 P.2d 571.

There is testimony that while Underhill and Mr. Wynn occupied separate jail cells, after their arrest, Mr. Wynn wrote a note to Underhill threatening to kill him if he did not assume the entire blame for the possession of the marijuana that night. When confronted with this evidence Underhill said he did not pay much attention to the note because Mr. Wynn was "all shook up". The Wynns' conduct, actions, and the presence of particles of marijuana on their clothing and in Mrs. Wynn's purse might well indicate knowledge on their part that marijuana was present in the car at the time. People v. Hood, 150 Cal.App.2d 197, 202, 309 P.2d 856; People v. Basco, 121 Cal.App.2d 794, 796, 264 P.2d 88; People v. Arnold, 199 Cal. 471, 495, 250 P. 168; People v. Robarge, 151 Cal.App.2d 660, 668, 312 P.2d 70; People v. Torres, 98 Cal.App.2d 189, 193, 219 P.2d 480.

Judgment and order affirmed.

MUSSELL and SHEPARD, JJ., concur.

169 Cal.App.2d 771

PEOPLE of State of California, Plaintiff and Respondent,

v.

Ernest RODRIGUEZ, Defendant and Appellant.

Cr. 6511.

District Court of Appeal, Second District, Division 1, California.

April 22, 1959.

Rehearing Denied May 14, 1959.

Hearing Denied June 18, 1959.

Prosecution for sale of heroin. The Superior Court of Los Angeles County, Richard C. Fildew, J., entered judgment of conviction and defendant appealed. The

District Court of Appeal, Lillie, J., held that evidence sustained conviction and record disclosing that open court prosecutor asked defendant if he wished to have a jury trial and defendant answered that he wanted to submit case on transcript, showed that defendant voluntarily waived trial by jury.

Affirmed.

1. Criminal Law 🔑260(11)

Where prosecution was tried before judge without a jury, it was within the discretion of trier of fact as to whether he should believe a substantial portion of informer's testimony parallel with that of police officers and disbelieve informer on the only material point in which his testimony conflicted with such officers.

2. Criminal Law 🔑1144(13)

On appeal, evidence which supports the judgment must be accepted as true.

3. Poisons 🔑9

Corroborative testimony is not necessary to support testimony of police officer in a narcotics case. West's Ann.Code Civ. Proc. § 1844.

4. Criminal Law 🔑566

On issue of identity, testimony of one competent witness who had identified defendant as the perpetrator of crime is sufficient to sustain a guilty verdict.

5. Criminal Law 🔑260(11)

Trier of fact is the sole judge of the weight and worth of evidence and the credibility of witnesses and before court on appeal may set aside a judgment for insufficiency of evidence it must clearly appear that upon no hypothesis is there sufficient evidence to support it.

6. Poisons 🔑9

Evidence was sufficient to sustain conviction for sale of heroin. West's Ann. Health & Safety Code, § 11500.

7. Criminal Law 🔑633(1)

Although right to jury trial is guaranteed to every person charged with a felony and it is the responsibility of the trial court to see that this right is protected, there is nothing in the statutes which requires trial judge personally to advise an accused that he is entitled to trial by jury nor is there anything to preclude the practice of district attorney in presence of trial judge and in an open court of advising defendants of their right to a jury trial.

8. Jury 🔑29(6)

Where defendant was charged with sale of heroin and prosecuting attorney in the presence of trial judge and in open court advised defendant of right to trial by jury and defendant, who was represented by counsel, stated that he wished to submit case on transcript, there was a proper waiver of jury trial by defendant. West's Ann. Const. art. 1, § 7.

9. Jury 🔑29(6)

Although to effectuate the waiver of a jury in a criminal case, procedure prescribed by constitution must be strictly adhered to, all it requires is that a jury may be waived by consent of the parties in open court by defendant and his counsel, and that defendant personally express in open court his consent to waiver in a manner leaving no question of misinterpretation, doubt or uncertainty. West's Ann.Const. art. 1, § 7.

10. Jury 🔑29(6)

While a defendant's waiver of right to trial by jury in a criminal case cannot be inferred, no particular language is necessary as long as the words actually employed disclosed in their ordinary meaning defendant's intention to submit case to court without a jury. West's Ann.Const. art. 1, § 7.

11. Criminal Law 🔑635

In prosecution for sale of heroin where legal discussion was had respecting lack of foundation for impeachment of witness and court announced a recess and counsel went into chambers and argument was apparently resumed, but no objection was ever made by defendant or his counsel to any proceeding had outside of defendant's hearing, there was nothing to show that defendant was deprived of a public trial and he was in no position to claim prejudice.

12. Criminal Law ⚷635

Where neither defendant nor his counsel made any objection to discussion in chambers at preliminary hearing, on trial or on defendant's motion for new trial, defendant waived right to complain that he had been deprived of a public trial.

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Ernest Rodriguez, appellant, in pro. per.

Stanley Mosk, Atty. Gen., Norman H. Sokolow, David B. Allen, Deputy Attys. Gen., for respondent.

LILLIE, Justice.

Defendant pleaded not guilty to two counts of an information charging sale of heroin on August 31 and September 3, 1957, in violation of Section 11500, Health & Safety Code; and denied two prior felony convictions alleged therein. He waived his right to a trial by jury and by stipulation submitted the cause to the court on the reporter's transcript of the preliminary hearing, each side reserving the right to offer additional testimony. The trial judge convicted him on both counts, made no finding on the alleged prior convictions, denied probation and sentenced him to the state prison. His motion for a new trial was denied and he appeals from the judgment of conviction.

Appellant, making no pretense of following the rules relating to appellate briefs (Rule 13, Rules on Appeal) presents the following points: even though the informant testified for the prosecution, because of the nature of his testimony, the People actually neither identified nor produced an informer against him "as required by law"; there was no corroboration of the officer's testimony; the evidence was insufficient to support the judgment; there was no proper waiver by him of a jury trial; and he was denied a public trial because of a discussion in chambers outside of his presence.

Viewing the evidence in a light most favorable to the prosecution, the following is a brief summary of the pertinent facts: In connection with count 1, Deputy Burley on August 31 went to the home of informer Womack, whom he searched finding no money or narcotics on his person, and with whom he drove to 41st Street and Compton to meet defendant and buy heroin. At approximately 11 a. m., defendant drove up in a 1951 or 1952 green Ford and they both entered his car. After a conversation between defendant and Womack wherein defendant said of Burley "this man doesn't use," he let the deputy out of the car saying, "We will leave him on the corner and I will go around the corner and give him (Womack) the stuff." When he left the car, Womack walked with him to the other side of the street where the deputy gave him $125 of county funds. Womack returned to defendant's car and they drove away. As Burley waited on the street for their return, Deputy Sells drove by, picked him up and proceeded into the neighborhood, where on 33rd Street off of Compton they observed defendant and Womack talking. Sells returned to the original location, let Burley out and again drove around. About ten minutes later, defendant and Womack drove up and the latter got out of the car. Defendant left immediately and Womack handed the deputy a blue rubber balloon containing heroin.

On August 31 around 11 a. m., Deputy Sells saw Burley standing on the street, picked him up and drove around. He twice observed defendant and Womack on 33rd Street off of Compton, conversing on the sidewalk. About ten minutes after letting Burley out at the location he saw defendant drive Womack back to where Burley was waiting at 41st and Compton in a 1952 green Ford, drop him off and drive away. He also observed the informer hand Burley a blue rubber balloon containing white powder.

Deputy Vacio had Burley under his surveillance on August 31, and around 11 a. m. observed Burley alone and at times with Womack and Sells.

In connection with count 2, Womack communicated with Burley on September 3 and he went to Womack's home where he listened to a telephone conversation on an extension. A male voice asked Womack if he was ready to do business and said "meet me at 41st and Compton around 11 o'clock." Burley searched Womack, found no narcotic on his person, and under the surveillance of deputies Vacio and Guindon, went together to the location. Defendant drove up in a 1953 or 1954 Mercury with two small children. The deputy gave Womack $125 from county funds, the latter entered defendant's car and they drove away. Soon they returned, Womack got out of the car and handed Burley a small wax paper containing heroin.

At approximately 11 a. m. on September 3, Deputy Vacio saw Burley and Womack at 41st and Compton.

At 6. p. m. on the same day Burley went alone to the corner of 57th and Central to pay the balance of the money due on the 11 a. m. transaction. He waited ½ hour for defendant to appear. As he drove up in a Mercury, Burley said "Rod, I didn't think you would make it," to which defendant replied that of course he would because he had come to pick up his money. Burley handed him $92 and defendant told him he owed him $5 more, but could give it to him later. This made up the total of $225 paid to defendant for one ounce of heroin.

The informer, Alex Womack, called by the prosecution at the preliminary hearing, testified that he knew Burley, they had met a man at 41st and Compton on August 31, had met no other person on that date, and he bought heroin from him; that he got into the car with the man, leaving Burley at the street corner; and that the "man he and Burley contacted there and from whom he bought the heroin was the same person" on both the August 31 and September 3 sales. However, after testifying substantially the same as Burley—that he made two narcotic purchases at the instance of the deputy in the same manner described by Burley including even the amount of money paid and the amount owing on the second purchase—Womack denied defendant was the man who sold him the heroin on both occasions, naming him as "Roy" (last name unknown), not "Rod".

Defendant testified he neither drove nor owned a green Ford or Mercury, did not know Womack on August 31 or September 3, did not know Burley until the preliminary hearing, never had a transaction involving narcotics, and was in New Orleans at the time in question. He admitted the two previous felony convictions charged in the information.

Concerning his first two contentions, appellant argues that although Womack was identified as the informer and testified, actually, no "informer" was disclosed and none testified against him, because Womack denied defendant was the person from whom he purchased the heroin; and the People being bound by his testimony, there was insufficient evidence to sustain the conviction because the deputy's testimony was not corroborated.

Considering the nature of the informer's testimony and that of deputies Burley, Sells and Vacio, and having in mind the rule that it is within the discretion of the trial judge to accept as true a portion of a witness' testimony and reject the balance as not worthy of belief, we deem appellant's position without merit.

The record discloses a close parallel between the testimony of deputy Burley and that of the informer on all material matters except the identity of the person from whom the heroin was purchased. Their testimony is similar in substantial respects regarding the events that took place on both dates: they both said they knew each other, met at Womack's home, went together to 41st and Compton to buy heroin and Burley gave Womack $125 on each occasion; on each date they met the same man at 41st and Compton at 11 a. m., who drove Womack away in his car and shortly thereafter returned him to Burley to whom the informer handed heroin in a balloon on August 31, and in a wax paper on September 3; and this man was the same who sold Womack narcotics on both occasions and on the last transaction he was not paid the total amount for the heroin purchased—only $153. Burley testified he met defendant at 6 p. m. on the same evening and paid him the balance due with the exception of $5. The only material conflict in their testimony relates to the identity of the seller. Although Womack testified the man's name was "Roy," defendant was definitely identified by two witnesses, deputy Burley, who repeatedly testified the man with Womack on both occasions was the defendant, and deputy Sells, who testified he saw Womack and defendant at 33rd street just off of Compton on August 31 and later saw Womack talk to Burley.

[1, 2] Whether the trial judge wanted to bind the People with the informer's denial of defendant's identity by accepting that limited portion of his testimony as true; or not do so, by believing the substantial portion of Womack's testimony parallel with that of deputies Burley, Sells and Vacio, and rejecting Wormack's denial of defendant's identity, the only material point of conflict in the testimony of the four, as worthy of belief, was solely within his discretion as the trier of the fact (Stoner v. Bisno, 162 Cal.App.2d 164, 327 P.2d 922). He had the right to accept a portion of the testimony of a witness if he believed it to be true and reject the balance even if he believed he had wilfully sworn falsely as to a material point (People v. Shannon, 147 Cal.App.2d 300, 305 P.2d 101). On appeal that which supports the judgment must be accepted as true. People v. Thomas, 103 Cal.App.2d 669, 229 P.2d 836; People v. Bahara, 159 Cal.App.2d 160, 323 P.2d 453. It is obvious that the trial judge believed the testimony of deputies Burley, Sells and Vacio, as against that portion of Womack's testimony exculpating defendant as the seller, and that of defendant. Even disregarding the informer's testimony there is ample competent and substantial evidence to establish defendant's identity as the seller and Womack as the buyer. It is not difficult to understand why the trial judge believed the bulk of Womack's testimony concerning the transactions and disbelieved that relating to the seller's identity. The record discloses Womack, then serving time in Folsom, was evasive and biased against Burley who had arrested him. At the very outset of his testimony, even before he was questioned concerning either transaction, and not in response to any query, Womack spoke up: "You got the wrong man. That ain't the man I met." He then testified the man's name was "Roy," although he was the only man he and Burley met on each occasion. Asked if he ever saw defendant before, Womack testified, "Not exactly. I haven't never seen the man before, not to know him"; then whether he ever saw him before he came to court, he said, "Sure, I seen him in the courtroom—down in the locker part today." Questioned if he saw him "before today" he said: "I couldn't see him. I have been in Folsom. * * *" Womack admitted, however, that he saw defendant in the county jail before being sent to Folsom, and in response to the question if he saw defendant before that, he testified "Had I seen the man, no. I told you I didn't know nothing about that man. I don't know nothing about him." Asked if he knew deputy Burley, Womack said, "Well, he got me to buy dope for him, that is one, and then he arrested me, that is two. He had sales on me." For purposes of impeachment, the prosecutor asked him if he gave a statement to a Federal agent on June 11, 1958, in which he admitted purchasing heroin from Rodriguez with money obtained from Burley. He answered in the affirmative, and in the statement said he saw two children in the car driven by Rod. Later in his testimony, however, Womack insisted that the name he gave was "Roy," not "Rod."

[3, 4] Nor do we find merit to appellant's argument that there must be corroboration of Burley's testimony. Corroborative testimony is not necessary to support that of the officer in a narcotics case (Section 1844, Code of Civil Procedure; People v. McCrasky, 149 Cal.App.2d 630, 309 P.2d 115; People v. Jones, 153 Cal.App.2d 41, 314 P.2d 93); and as to identity the testimony of one competent witness who identified defendant as the perpetrator of a crime is sufficient to sustain a guilty verdict (People v. Ferlito, 100 Cal.App.

355, 280 P. 136; People v. Oliver, 102 Cal. App. 29, 282 P. 813). Actually, the substantial portions of Burley's testimony were corroborated by Womack; and Sells' testimony corroborated the identity of the defendant as the man he saw talking to Womack on August 31.

[5, 6] Appellant, in his Supplemental Opening Brief, contends that the evidence is not sufficient to support his conviction, the evidence connecting him with sales being based on hearsay. He argues that the passing of heroin to Womack took place out of the deputy's presence, and in view of his (defendant's) testimony he sold no narcotics and that of the informer that he was not the seller, the evidence is insufficient to sustain the verdict. It has long been the established rule on appeal that the trier of the fact is the sole judge of the weight and the worth of the evidence (People v. Hills, 30 Cal.2d 694, 185 P.2d 11), and the credibility of the witness (People v. Lyons, 50 Cal.2d 245, 324 P.2d 556), and before this court may set aside a judgment for insufficiency of evidence it must clearly appear that upon no hypothesis is there sufficient evidence to support it (People v. Newland, 15 Cal.2d 678, 104 P.2d 778). Obviously, the trial judge was not impressed with the verity of defendant's testimony or that portion of Womack's testimony relating to the identity of the seller, and accepted in lieu thereof the testimony of the other witnesses. We have already reviewed the evidence appearing in the record before us and it is apparent that even without the testimony of Womack, it reasonably justified the inference of defendant's guilt.

Appellant argues there was no proper waiver of a jury trial because the deputy district attorney usurped the duties of the trial court by advising him of his right to a jury, and prevented the court from determining whether he understood his right and wished to waive it.

The record discloses that when the case was called for trial, defendant was present with his counsel, A. C. Bernay. The deputy district attorney told defendant in the presence of his counsel and the trial judge: "You are entitled to have a jury of 12 people here and determine this matter. Counsel has indicated to this court you wish to waive your right to a jury and have the court hear this matter sitting without a jury. Is that what you want to do?" Defendant responded: "I want to submit the transcript." The deputy district attorney repeated: "Submit it on the transcript?" to which defendant stated "That's correct." Defendant's counsel, who was standing beside him, replied: "Counsel joins in the waiver," to which the prosecutor added: "People join," and then offered the stipulation that the court may read and consider the testimony taken at the preliminary hearing, and all exhibits offered and received at that time, reserving the right of both parties to offer additional testimony. Defendant's counsel then stated: "We will accept the stipulation other than the latter part of additional testimony. Neither side will present any additional testimony." The court said, "All right," and the prosecutor stated: "In other words, the stipulation with the exception that either side may put on additional testimony?" Counsel for defendant responded: "Yes."

[7] The record reveals that whatever proceedings were had between the deputy district attorney, defendant and his counsel, relating to a jury trial, were had in the presence of the judge in open court. In advancing his position that it was the duty of the trial judge to personally advise an accused of his right to a jury trial and determine whether he understood his right and desired to waive it, he relies on Article 1, section 7, California Constitution, which reads in pertinent part as follows: "the right of trial by jury shall be secured to all, and remain inviolate * * * A trial by jury may be waived in all criminal cases, by the consent of both parties expressed in open court by the defendant and his counsel * * *" Although the right to a jury trial is guaranteed to every person charged with a felony (People v. Hall, 199 Cal. 451, 249 P. 859) and it is the responsibility of the trial court to see that

this right is protected, we find nothing in the statutes or law which requires the trial judge personally to advise an accused that he is entitled to a trial by jury; nor are we aware of any rule which precludes the well-known practice of the district attorney in the presence of the trial judge and in open court, of advising defendants of their right to a jury trial. Certainly defendant can neither successfully deny that he knew he was entitled to be tried before a jury nor claim he was unaware that he was being asked if he wanted the matter tried by a jury or by the court. Nor do we find anything in the law which prohibits counsel for the People from questioning the defendant in open court concerning his desire to waive a trial by jury; or requires the court to personally put such questions eliciting the waiver to the defendant.

[8–10] Although to effectuate the waiver of a jury in a criminal case, the procedure prescribed by the Constitution must be strictly adhered to (People v. Pechar, 130 Cal.App.2d 616, 279 P.2d 570), all it requires is that a jury may be waived by consent of the parties expressed in open court by defendant and his counsel (Art. 1, sec. 7, California Const.) and that defendant personally express in open court his consent to the waiver in a manner leaving no question of misinterpretation, doubt or uncertainty, by any word that clearly indicates to the court the defendant's desire to waive a jury. Although a defendant's waiver cannot be inferred and "language must be used," no particular language is necessary as long as the words actually employed disclose in their ordinary meaning the defendant's intention to submit the case to the court without a jury (People v. Bastio, 55 Cal.App.2d 615, 131 P.2d 614).

In the case at bar, defendant, when asked by the prosecutor in the presence of his counsel and in open court if he wanted to waive his right to a jury and have the court hear the matter sitting without a jury, said he wanted "to submit the transcript." To be certain that there was no misunderstanding, the prosecutor immediately repeated: "Submit on the transcripts?" to which the defendant replied, "That's correct."

In the case of People v. McDaniel, 157 Cal.App.2d 492, 321 P.2d 497, the point was raised that the defendant did not express waiver of jury trial. At that time he was asked "Do you want a Court or jury trial?" to which defendant replied "I'll accept a Court trial." Upon the commencement of the testimony, defendant contended he did not expressly say he waived trial by jury and stated "He (the trial judge) never asked me did I waive right to a jury trial. I said Court trial would be sufficient. I never waived the right to a jury trial." The court stated, 157 Cal.App.2d at page 497, 321 P.2d at page 501: "The effectiveness of a jury waiver does not depend upon the use of any particular form of words by an accused; he need only use language that, in its ordinary meaning, expresses an intention to submit the matter to the court sitting without a jury. People v. Beckworth, 151 Cal.App.2d 842, 312 P.2d 270. In our opinion, defendant's statements were clearly sufficient as an expression of such an intention and they constituted a valid waiver of a jury trial."

In People v. Beckworth, 151 Cal.App.2d 842, 312 P.2d 270, the defendant entered a plea of not guilty by reason of insanity and stipulated that the issue be submitted on the doctor's reports. The record showed that when this was done, the trial court asked defendant "is that satisfactory to you?" to which he replied, "yes, sir." The court held, 151 Cal.App.2d at page 843, 312 P.2d at page 271: "This constitutes an express waiver of a jury trial and fully complies with the requirement stated in People v. Barnum, 147 Cal.App.2d 803, 305 P.2d 986, and cases there cited, to the effect that the consent of the defendant to a trial before the court without a jury must be expressed by him personally and may not be implied. As was said in People v. Bastio, 55 Cal.App.2d 615, 131 P.2d 614, 616; 'Article 1, section 7, of the Constitution of California provides that trial by jury may be waived in criminal cases by the consent of both parties, expressed in open court when such consent is given by both defendant and his counsel. No stereotyped language expressing such waiver need be used by the parties, it being necessary only that the words used in their ordinary meaning show an intention to submit the case to the court without a jury.'" It is clear from the authorities in this state that, although defendant's consent must be expressed in open court, if it is expressed "by the use of language," such verbal expression will suffice even though the exact words "I waive a trial by jury" are not used, as long as the words disclose in their ordinary meaning the defendant's intention to submit the case to the court without a jury. The only reasonable inference one could draw from the defendant's statement "I want to submit the transcript," after being told that his counsel indicated to the court that he (defendant) wished to waive his right to a trial by jury and have the court hear the matter sitting without a jury and asked if that was what he wanted, is that he desired to submit his case to a court without a jury.

No provision of the law requires the judge to personally advise an accused of his right to a trial by jury and that he may waive that right, or requires him to make any finding defendant understands the waiver. As a matter of fact, the record discloses the trial judge was not only aware of the proceedings had before him, but personally assented to the stipulation to submit the matter to the court without a jury on the transcript of the preliminary hearing. Obviously, the trial judge, having conferred his approval and affirmance of the stipulation to submit the matter, reasonably indicated that he found the waiver to be valid and to be properly understood by both defendant and his counsel.

The last contention of appellant, also without merit, is that he was deprived of a fair trial because the judge and counsel had proceedings in chambers outside of his presence. The record shows that at the preliminary hearing when it was obvious to the prosecutor that the informer would continue to insist defendant was not the seller, he made an effort to impeach him. A legal discussion regarding a lack of foundation for impeachment ensued between counsel. During the argument on this point, the court volunteered: "Let's take just a few minutes recess. Will counsel come in chambers?" A recess was taken and after the court session was resumed, the prosecutor, after the court overruled the pending objection, proceeded to inquire of Womack concerning a prior conversation he had with the Federal agent.

[11, 12] Neither counsel asked for the recess—they were requested by the court to go into chambers. The record does not disclose that defense counsel was not present, what was said in chambers, or that any matter relating to the issue of guilt was discussed, nor does defendant even speculate concerning it. We can only assume that there continued in chambers the legal argument concerning the foundation necessary for the impeachment of Womack. However, the record is clear that no objection was ever made by defendant or his counsel at any time in the court below to any proceedings had outside of defendant's hearing. Defendant in no practical sense was deprived of a public trial and is in no position to claim prejudice (People v. Justice, 167 Cal.App.2d 616, 334 P.2d 1031; People v. Teitelbaum, 163 Cal.App.2d 184, 329 P.2d 157). Since neither the defendant nor his counsel made any objection to the discussion in chambers at the preliminary hearing, on the trial or on his motion for a new trial, appellant has waived his right to now complain. People v. Tugwell, 32 Cal. App. 520, 163 P. 508; People v. Teitelbaum, 163 Cal.App.2d 184, 329 P.2d 157. Since it is for the appellant to show any prejudice resulting to him (People v. Isby, 30 Cal.2d 879, 186 P.2d 405; People v. Baker, 164 Cal.App.2d 99, 330 P.2d 240), and has failed to do so, we find his contention without merit. Appellant, in his closing brief, discusses at length the attempted impeachment of Womack. Of course, the matter before us does not involve the issue of whether the trial court's ruling on the

objection of lack of foundation was proper. The only question before us relates to whether defendant was prejudiced by the proceedings had out of his presence. We find that he was not.

For the foregoing reasons the judgment is affirmed.

WHITE, P. J., concurs.

FOURT, Justice (concurring).

The information in this cause charged that the defendant had been convicted of grand theft in 1944, in Los Angeles county, and that he had served a term in prison therefor; and it further charged that in 1954, the defendant was convicted of violating the Dangerous Weapon's Control Law, Penal Code, § 12000 et seq. (an ex-convict with a gun), and that he had served a term in prison for that offense. The prosecution introduced into evidence proper documents and evidence, including certified copies of the commitment papers, fingerprint records and pictures of the defendant, which show without question the dates when the defendant was received at the prison, the length of his terms and the dates when he was discharged from parole. It was stipulated that the defendant was the person named and referred to in the prior commitment papers.

The defendant stated on direct examination, in answer to questions put to him by his own attorney, that he had previously been convicted of a felony. On cross-examination the defendant admitted that he had previously been convicted of the offenses named as to the priors alleged in the information, and that he had served a term in prison for each of such offenses.

At the conclusion of the testimony the court found the defendant guilty as charged in the information, and then asked the defendant, "Do you wish to file an application for probation?" The defendant's attorney stated, "The defendant is not eligible for probation, your honor." The judge indicated that he was going to have such an application filed in any event, whether the defendant was eligible or not, and the defendant's attorney then said, "I am wondering if we are not asking the defendant to spend a lot of dead time here?"

At the time the matter came on for further proceedings, within a few days, the attorney for the defendant pointed out to the judge that the defendant was ineligible for probation, and thereupon sentence was imposed. The judge said, "I will make no determination as to his priors * * *." As a consequence the defendant has now gone back to the state prison, not as a third offender which he is in fact, but as a first offender.

The original file also reflects that the defendant was charged in another information filed about a week before the present case with possessing certain narcotics on June 8, 1958, and that case was dismissed "in the interests of justice" after the conviction in the present case now on appeal.

Penal Code section 1158 provides in part as follows:

> "Whenever the fact of a previous conviction of another offense is charged in an accusatory pleading, and the defendant is found guilty of the offense with which he is charged, the jury, or the judge if a jury trial is waived, *must* unless the answer of the defendant admits such previous convictions, *find whether or not he has suffered such previous conviction.* * * * If more than one previous conviction is charged a separate finding must be made as to each." (Emphasis added.)

Disregard of the statutes, in my opinion, deprives the public of that to which it is entitled, brings the Court system into disrepute and hampers the administration of justice.

169 Cal.App.2d 785

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, State of California, Plaintiff and Respondent,

v.

ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD, State of California; the Hallwell Company, a California Corporation dba 353 Club, Defendants,

Alcoholic Beverage Control Appeals Board, State of California, Appellant.

Civ. 23539.

District Court of Appeal, Second District, Division 3, California.
April 22, 1959.

The Department of Alcoholic Beverage Control filed an accusation against a licensee and a 15-day suspension was recommended. The Department petitioned the Superior Court for a writ of prohibition to prevent the board from considering the licensee's appeal. From a judgment of the Superior Court of Los Angeles County, Bayard Rhone, J., the Beverage Control Appeals Board appealed. The District Court of Appeal, Vallée, J., held that the filing of a notice of appeal with the Department constituted a filing with the board and that policy of the Appeals Board with respect to consideration of appeals was not contrary to any constitutional provision.

Reversed.

1. Appeal and Error ⇨417(1)

A notice of appeal is to be construed liberally so as to preserve the right of appeal and the policy of the law favors the preservation of the right of appeal. West's Ann.Rules on Appeal, rule 1.

2. Intoxicating Liquors ⇨108(10)

In a proceeding for suspension of a licensee's general on-sale liquor license, documents filed by the licensee with the Department of Alcoholic Beverage Control constituted a valid notice of appeal. West's Ann.Bus. & Prof.Code, § 25602.

3. Intoxicating Liquors ⇨108(10)

The 40-day period prescribed by statute within which an appeal to the Alcoholic Beverage Control Appeals Board from a decision of the Department of Alcoholic Beverage Control revoking a license for sale of alcoholic beverages may be filed was extended by the time allowed under the statute providing that when service is made by depositing in mail, if within a given number of days after such service a right is to be exercised or an act is to be done, the time for exercising that right or performing that act is extended. West's Ann. Code Civ.Proc. § 1013; West's Ann.Bus. & Prof.Code, § 23081.

4. Administrative Law and Procedure ⇨387

An administrative agency may not under the guise of its rule-making power abridge or enlarge its authority to exceed the powers given to it by the statute, which is the source of its power, but the Board has authority to adopt reasonable regulations deemed necessary to an efficient exercise of the powers expressly granted.

5. Intoxicating Liquors ⇨108(10)

The filing of a notice of appeal with the Department of Beverage Control from a 15-day suspension of a licensee's general on-sale liquor license constituted a "filing" with the Board, requiring denial of motion to dismiss the appeal, under the Board's policy to consider appeals mailed to the Department as received by and filed with it on the date the notices of appeal were received by the Department and that all notices of appeal received within 40 days from the date the decisions of the Department are mailed to the parties are heard by the Board, since there is no statutory requirement that notice of appeal be filed with the Board in the sense used in connection with appeals from and to the various courts. West's Ann.Bus. & Prof.Code, §§ 23077, 23081, 25602; West's Ann.Code Civ.Proc. § 1013.

See publication Words and Phrases, for other judicial constructions and definitions of "Filing".

6. Appeal and Error ⇨775

Appeals should be heard on the merits whenever possible.

7. Intoxicating Liquors ⟹108(10)

The policy of the Alcoholic Beverage Control Appeals Board to consider appeals in license suspension cases mailed to the Department as received by and filed with it on the date the notices of appeal are received by the Department and that all notices of appeal received within 40 days from the date the decisions of the Department are mailed to the parties are heard by the Board is a reasonable one to carry out the functions of the Board and is not contrary to any provisions of the constitution creating the Board and prescribing its powers and duties, or with any provisions of the enabling legislation. West's Ann.Bus. & Prof.Code, §§ 23077, 23081, 25602; West's Ann.Code Civ.Proc. § 1013; West's Ann.Const. art. 20, § 22.

8. Intoxicating Liquors ⟹108(10)

Alcoholic Beverage Control Appeals Board would not be prevented from acquiring jurisdiction in a license suspension case because a notice of appeal did not state the grounds upon which review was sought and because no transcript had been requested, since compliance with such provisions is not jurisdictional. West's Ann. Bus. & Prof.Code, §§ 23077, 23081, 25602; West's Ann.Code Civ.Proc. § 1013; West's Ann.Const. art. 20, § 22.

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Charles P. Just, Chief Counsel, Alcoholic Beverage Control Appeals Board, Sacramento, for appellant.

Stanley Mosk, Atty. Gen., and Edward M. Belasco, Deputy Atty. Gen., for respondent.

VALLÉE, Justice.

The Department of Alcoholic Beverage Control filed an accusation against the Hallwell Company, a corporation, charging violation of section 25602 of the Business and Professions Code. A hearing was held and the hearing officer recommended a 15 day suspension of Hallwell's general on-sale liquor license. The department adopted the hearing officer's recommendation, and the decision of the department was mailed to Hallwell by certified mail on October 3, 1957.

On October 29, 1957, Hallwell mailed a letter to the department in Sacramento which stated that it was enclosing two copies of the following documents: 1. Request for reconsideration of decision; 2. Request for hearing before the director of the department; 3. Notice of appeal of said decision. The letter also said:

> "I talked to Mr. Green, attorney for your local office, and he advised me the law states that my clients have thirty days to petition for reconsideration of the decision, and forty days in which to file an appeal from the date of the decision; but that these two dates run concurrently. But I hope and trust that the herewith Notice of Appeal will not preclude a careful reconsideration of the hearing officer's decision."

The letter with enclosures was received and filed by the department on October 31, 1957.

Only one document was enclosed with the letter. In the first paragraph this document states that Hallwell "petitions for reconsideration of the proposed decision * * *." The second paragraph reads in part: "Said request for reconsideration shall be based upon the following grounds:[1] * * * 6. That in behalf of said Licensee a Notice of Appeal is filed herewith."

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[1] The grounds stated were: "1. That the findings of the said Hearing Officer are contrary to the facts developed at the said hearing on September 25th, 1957;

"2. That said hearing record reflects the uncontradicted statement of the bartender that he furnished the bottle of beer in question to one Joe Fontes, a customer, and not to the alleged customer Rosemary McAulay;

"3. That the said Rosemary McAulay was well known to the bartender because he had refused her drinks on several occasions previously on the same date;

The department denied the petition for reconsideration and so notified Hallwell by certified mail on November 5, 1957. On November 18, 1957, Hallwell mailed a letter to the appeals board which included a copy of the petition for reconsideration previously filed with the department. These documents were received by the board on November 19, 1957, and on the same day the board sent the attorney for Hallwell a letter, which reads:

> "Your communication of November 18, 1957, together with documents dated October 29, 1957, have been received. The documents have been assigned file number AB-849.
>
> "Your motion to have this Board consider said documents as a notice of Appeal is placed on the calendar for oral argument on December 11, 1957, at 2:00 p. m. in Room 918, Mirror Building, Second and Spring Streets, Los Angeles, California."

On December 11, 1957, a hearing was held. The board rendered its decision on April 4, 1958, determining that the documents filed by Hallwell with the department on October 29, 1957, constituted a valid notice of appeal and that the appeal was timely.[2]

The department petitioned the superior court for a writ of prohibition to prevent the board from considering Hallwell's appeal. The parties stipulated it was the policy of the board to consider appeals mailed to the department as received by and filed with the appeals board on the date the appeals are received by the department, and all appeals received by the department within 40 days from the date the decisions of the department are mailed to the parties are heard by the appeals board on their merits.

After a hearing the court found the above facts to be true and that Hallwell did not prepare a notice of appeal in writing stating the grounds on which the review from the decision of the department was sought and did not file such a document with the board within 40 days from the date the decision of the department was mailed; Hallwell did not mail a copy of such document to the department; Hallwell did not request the department to prepare a transcript of the administrative proceedings or offer to pay or pay the costs thereof. The court concluded the depart-

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"4. That the said charge herein, namely having furnished an alcoholic beverage to someone obviously intoxicated, was dismissed by the City of Los Angeles in People v. Morrie Dalliner, case No. 65659;

"5. That in behalf of the Licensee, a hearing is requested personally before the Honorable Russell S. Munro, Director of the Department of Alcoholic Beverage Control, at a time and place to be set by him."

[2] The decision of the board reads: "The motion of the Appeals Board to determine whether certain documents filed by the appellant constituted an appeal from the decision of the Department came on for oral argument on December 11, 1957, at 2:00 p. m. in Room 918, Mirror Building, Second and Spring Streets, Los Angeles, California.

"By letter dated October 29, 1957, the attorney for The Hallwell Company mailed a document to the Department of Alcoholic Beverage Control which requested a reconsideration of a fifteen day suspension and the last paragraph thereof recited that the licensee appealed from said decision. The transmittal letter of this document recited that the matters transmitted were (1) request for reconsideration, (2) request for a hearing before the Director and (3) Notice of Appeal from said decision. The transmittal letter also recited that it was hoped that the 'herewith Notice of Appeal will not preclude a careful reconsideration of the hearing officer's decision.'

"We have concluded that the document constitutes a Notice of Appeal to this Board, and that the appeal is timely. An interpretation of the document and the transmittal letter indicates that the appellant combined in one document a Petition for Reconsideration and a Notice of Appeal. While this procedure is confusing and not recommended, the policy of the law is that Notices of Appeal should be liberally construed to the end that litigants may have their appeals heard on the merits. Appellant is instructed to request the Department for preparation of transcript."

ment was not and is not an agency of the board for the purpose of accepting service of documents or receiving and filing appeals; Hallwell failed to file an appeal with the board as provided in section 23081 of the Business and Professions Code. Judgment followed, ordering that a writ issue prohibiting the board from hearing and deciding "the appeal." The board appeals.

The board contends: 1. The documents filed by Hallwell constituted a notice of appeal. 2. The policy and rule of the board that a notice of appeal forwarded to the department is deemed filed with the board is a valid exercise of the powers vested in the board. 3. The petition for a writ of prohibition is premature; the department has not exhausted its administrative remedies and is not aggrieved by the decision of the board.

[1, 2] We have no doubt that the documents filed by Hallwell with the department constituted a valid notice of appeal. The first document, a letter, gave the number of the proceeding and stated there was enclosed a "Notice of Appeal of said decision." The letter stated Hallwell had 40 days in which to file an appeal from the date of the decision, and "I hope and trust that the herewith Notice of Appeal will not preclude a careful reconsideration of the hearing officer's decision." The document enclosed with the letter stated "That in behalf of said Licensee a Notice of Appeal is filed herewith." The documents unmistakably referred to the appealable decision of the department and in effect stated that Hallwell appeals therefrom. A notice of appeal is to be construed liberally so as to preserve the right of appeal. 3 Cal.Jur.2d 668, § 182. The rules on appeal provide, "A notice of appeal shall be liberally construed in favor of its sufficiency." Rules on Appeal, Rule 1. The policy of the law favors the preservation of the right of appeal and the hearing of appeals on their merits. Pesce v. Dept. of Alcoholic Bev. Control, 51 Cal.2d 310, 333 P.2d 15. Applying these elementary rules of law, we are of the opinion the documents filed with the department constituted a notice of appeal from its decision and that the board correctly so decided. Cf. In re Estate of Damke, 133 Cal. 433, 434, 65 P. 888; Adams v. Talbott, 20 Cal.2d 415, 417, 126 P.2d 347; Nelson v. Angel, 94 Cal.App.2d 136, 139, 210 P.2d 256; Crane v. Livingston, 98 Cal.App.2d 699, 702, 220 P.2d 744; Karrell v. Watson, 116 Cal.App.2d 769, 772, 254 P.2d 651, 255 P.2d 464, in which it is said that the right of a litigant to have the record of his cause reviewed by an appellate court is "sacred."

A comparable situation was before the court in Kellett v. Marvel, 6 Cal.2d 464, 58 P.2d 649. There were three judgments in cases numbered D–57350, D–92871, and 306434. The notice of appeal was entitled and filed in D–57350. It specified the appeal was taken from the order denying the plaintiff's motion to resist the defendant's motion for a final decree "entered and rendered * * * on the 19th day of March, 1931, and entered in Book 787, page 112, on the 27th day of March, 1931." The order was actually made on March 26. No order was made on March 19, 1931. The date, book, and page of entry recited in the notice of appeal were those of the final judgment in number D–57350. No notice of appeal was filed in D–92871 or in 306434. Construing the notice of appeal as from the final judgment in D–57350 and from the judgments in D–92871 and 306434, the court stated (6 Cal.2d at page 472, 58 P.2d at page 653):

> "While it is true that the filing of a notice of appeal is a jurisdictional requirement and cannot be waived, the absence of prejudice and the efficacy of the things done to give notice to the other party that the appeal has been taken may be considered in determining whether there has been a sufficient compliance with the requirement of section 940 of the Code of Civil Procedure that a notice stating the appeal from the judgment or order be filed with the clerk of the court in which the judgment or order is entered. * * Under the circumstances, where all the

> cases were consolidated, if only for the purpose of trial, and are bound to be considered together upon appeal, if only for the reason that the evidence taken applied to all, the entry in the register under the number of each case with a reference to the place where the notice itself was to be found in the files, can have resulted in no prejudice to the respondent and must be considered a substantial compliance with the requirement that the notice of appeal be filed in each case. Any other conclusion would be out of line with the rule of liberal construction of notices of appeal where the imperfections have not misled or prejudiced the respondent."

[3] The next question is whether filing the notice of appeal with the department constituted filing with the board under the latter's policy to consider appeals mailed to the department as received by and filed with it on the date the notices of appeal are received by the department, and that all notices of appeal received by the department within 40 days [3] from the date the decisions of the department are mailed to the parties are heard by the board. If this question is answered in the affirmative, the appeal was timely; if it is answered in the negative, the appeal was not timely.

Section 23077 of the Business and Professions Code provides that the appeals board "may adopt such rules pertaining to appeals and other matters within its jurisdiction as may be required." Section 23081 reads:

> "Within 40 days after the decision of the department is delivered or mailed to the parties, any party aggrieved by a final decision of the department may appeal to the board from such decision. The appeal shall be in writing and shall state the grounds upon which a review is sought. A copy of the appeal shall be mailed by the appellant to each party who appeared in the proceeding before the department, including the department which shall thereafter be treated in all respects as a party to the appeal."

The board has adopted as part of its administrative code rules governing appeals the following:

> "183. Preparation and Filing of Record. At least 20 days before the last day upon which an aggrieved party may file an appeal with the board or at the time of filing an appeal, if such date occurs first, the appellant shall request the department to prepare the transcript and the record of all the proceedings before the department * * *." Cal.Adm.Code, Title 4, c. 1.1.

[4] "It is true that an administrative agency may not, under the guise of its rule making power, abridge or enlarge its authority or exceed the powers given to it by the statute, the source of its power. [Citations.] However, 'the authority of an administrative board or officer, * * * to adopt reasonable rules and regulations, which are deemed necessary to the due and efficient exercise of the powers expressly granted, cannot be questioned. This authority is implied from the power granted.'" California Drive-in Restaurant Ass'n v. Clark, 22 Cal.2d 287, 302–303, 140 P.2d 657, 665, 147 A.L.R. 1028. "'Courts should let administrative boards and officers work out their problems with as little judicial interference as possible. * * * Such boards are vested with a high discretion, and its abuse must appear very clearly before the courts will interfere.' [Citations.] 'To narrowly proscribe the rule-making power of the [board] * * * would be to overlook one of the fundamental purposes of the policy of delegation of powers and to deprive the Legislature and the people of the state of one of the

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[3] The 40-day period is extended by the time allowed under section 1013 of the Code of Civil Procedure. Pesce v. Dept. of Alcoholic Bev. Control, 51 Cal.2d 310, 333 P.2d 15; Silva v. Dept. of Alcoholic Bev. Control, 51 Cal.2d 885, 333 P.2d 18.

major benefits thereof. The essentials of the legislative function are the determination and formulation of the legislative policy. Generally speaking, attainment of the ends, including how and by what means they are to be achieved, may constitutionally be left in the hands of others. The Legislature may, after declaring a policy and fixing a primary standard, confer upon executive or administrative officers the "power to fill up the details" by prescribing administrative rules and regulations to promote the purposes of the legislation and to carry it into effect, and provision by the Legislature that such rules and regulations shall have the force, effect, and sanction of law does not violate the constitutional inhibition against delegating the legislative function.'" Nelson v. Dean, 27 Cal.2d 873, 881, 168 P.2d 16, 21, 168 A.L.R. 467. "Administrative rules and regulations are presumed to be reasonable in the absence of proof to the contrary and courts will not substitute their judgment for that of the administrative agency unless it is clearly shown that the regulation is so unreasonable as to be arbitrary or capricious, or in excess of the authority vested in the agency." Bess v. Park, 144 Cal.App.2d 798, 804, 301 P.2d 978, 983.

In Silva v. Dept. of Alcoholic Bev. Control, 51 Cal.2d 885, 333 P.2d 18, the department rendered two decisions: one numbered 9560 which ordered a license revoked; the other numbered 1166 which suspended the license for 15 days. The decisions were mailed to the licensees on October 18, 1956. On November 28, 1956, the 41st day after notice of the department's decisions were mailed to the licensees, the licensees delivered a notice of appeal to the board. The notice stated that an appeal was taken from the decision in number 1166. On January 16, 1957, some three months after the department mailed its decision in number 9560, the licensees filed a "Correction and Clarification of Notice of Appeal." They alleged failure to include in the notice of appeal the number 9560, in which proceeding their license was revoked, was the result of a typographical error and inadvertence. The board dismissed the appeals. "The superior court ordered the board to set aside its order dismissing the appeals in both proceedings; to hear and determine the suspension order in number 1166 on its merits; to hear and determine the application for relief from the alleged inadvertence in omitting number 9560 from the caption of the notice of appeal, and to hear that appeal on the merits if such relief be granted." On appeal the court held that section 1013 of the Code of Civil Procedure and section 23081 of the Business and Professions Code are to be read together, and under such construction the notice of appeal was timely. The judgment was affirmed. Implicit in affirmance of the judgment is a ruling that the board had the power to hear and determine whether the omission of number 9560 from the notice of appeal was inadvertent and, if it did so determine, to hear the appeal from that decision on the merits.

[5] That the controverted policy of the board is a reasonable one to carry out the functions of the board seems clear. The filing of the notice of appeal gives the board jurisdiction. 3 Witkin, California Procedure, 2287, § 114. Section 23081 does not say that the notice of appeal shall be filed with the board. It says that "any party aggrieved by a final decision of the department may appeal to the board from such decision." Section 23081 expressly provides, "A copy of the appeal shall be mailed by the appellant to each party who appeared in the proceeding before the department, including the department which shall thereafter be treated in all respects as a party to the appeal." There is no requirement that the notice of appeal be filed with the board in the sense used in connection with appeals from the superior court to the Supreme Court or to a District Court of Appeal in which the notice must be filed with the court from which the appeal is taken. The section is silent in this respect. The procedure being partially, if not completely, absent, a construction should be adopted which allows the filing

of an appeal, not one which precludes the hearing of an appeal on the merits.

[6, 7] The policy of the board is not contrary to any of the provisions of the Constitution creating the board and prescribing its powers and duties or with any of the provisions of the enabling legislation. On the contrary, the policy conforms to the general rule that appeal should be heard on the merits whenever possible.[4] Formerly the board of equalization administered the Alcoholic Beverage Control Act. Recently, by constitutional amendment, the powers formerly exercised by the board of equalization were vested in the department, and the appeals board was created. Const. art. XX, § 22. The board is one of the first state administrative appellate agencies. Generally the law requires that notices of appeal be filed with the court from which the appeal is taken. Confusion has naturally resulted from the requirement that in the case of an appeal to an administrative appellate agency the notice must be filed with the appellate agency rather than with the agency from which the appeal is taken.[5] An appeal merely taken to the wrong reviewing court is transferred by that court, not dismissed. Gore v. Bingaman, 20 Cal.2d 118, 124, 124 P.2d 17. There is nothing in the law to prevent the board from transferring and entertaining an appeal where the notice is sent to the department.

[8] The department asserts the board did not acquire jurisdiction because the notice of appeal did not state the grounds on which a review was sought and because no transcript had been requested. Compliance with these provisions is not jurisdictional. These requirements are in the same category as the provisions of the rules on appeal with respect to the preparation of the record on appeal and the time limitations for obtaining the record, which provisions and time limitations are not jurisdictional. 3 Witkin, California Procedure, 2308, § 132; 17 So.Cal.L.Rev. 290. Cf. Mercer-Fraser Co. v. Industrial Accident Commission, 40 Cal.2d 102, 127–129, 251 P.2d 955. The board may dismiss an appeal for failure to comply with these requirements or it may grant relief for good cause, as it did in the present case. Cf. Jarkieh v. Badagliacco, 68 Cal.App.2d 426, 156 P.2d 969; Haskins v. Crumley, 152 Cal.App.2d 64, 312 P.2d 276. Furthermore, the board may reasonably consider the grounds stated in the petition for reconsideration in which the notice of appeal was incorporated as the grounds of appeal.

In view of our conclusion, it is unnecessary to consider the board's further contention that the department has not exhausted its administrative remedies and is not aggrieved by the decision of the board.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

169 Cal.App.2d 868

PACIFIC NATIONAL BANK OF SAN FRANCISCO, a national banking association, Plaintiff and Respondent,

v.

COVINGTON INVESTMENT COMPANY, Nathan Smooke and Marion Smooke, Defendants and Appellants.

Civ. 18166.

District Court of Appeal, First District, Division 1, California.

April 27, 1959.

Rehearing Denied May 25, 1959.

Hearing Denied June 25, 1959.

Action on contract of guaranty. The Superior Court, City and County of San Francisco, Preston Devine, J., entered an order denying defendants' motion for change of venue, and defendants appealed. The District Court of Appeal, Bray, P. J., held that for purposes of statutory subdivision, West's Ann.Code Civ.Proc. § 395, subd. 1, providing for trial in county in which contract was entered into, where place of performance thereof is not specified, contract of guaranty of payment of loans to be made by bank subject to approval of guarantor was entered into in county in which loans were to be and were made and payable.

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[4] See 3 Op.Atty.Gen. 189.

[5] An appeal to the California Unemployment Insurance Appeals Board may be delivered or mailed to the principal office of the appeals board, to an area referee office, or to an office of the Department of employment. Title 22, Cal. Adm.Code, §§ 6001, 6004.

Order affirmed.

1. Appeal and Error ⚷1024(3)

On appeal from order denying motion for change of venue, reviewing court was bound by trial court's determination of the facts as to which there was any conflict, where such determination was supported by substantial evidence.

2. Corporations ⚷666

Written guaranty of payment of loans to be made by bank subject to approval of guarantor and written guaranty by officers of guarantor corporation of performance of such guaranty, solicited by prospective borrower, were mere offers of guaranty so far as bank was concerned, and for purposes of statutory subdivision providing for trial in county in which "contract was entered into", where place of performance is not specified, contract of guaranty was entered into in county in which such loans were to be and were made and payable. West's Ann.Code Civ.Proc. § 395, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Contract Was Entered Into".

3. Contracts ⚷145

The "place of making a contract" is the place where the last act necessary to its validity was performed, which is usually the act constituting acceptance of offer. West's Ann.Code Civ.Proc. § 395, subd. 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Place of Making Contract".

Levoy, Miller & Salinger, Beverly Hills, Thelen, Marrin, Johnson & Bridges, Los Angeles, for appellants.

Cooley, Crowley, Gaither, Godward, Castro & Huddleson, San Francisco, for respondent.

BRAY, Presiding Justice.

Defendants appeal from an order denying their motion for change of venue from San Francisco to Los Angeles.

Question Presented.

Sufficiency of evidence to support court's finding that the contract was entered into in San Francisco.

Record.

Plaintiff's complaint alleged that its principal place of business is in San Francisco; that in consideration of making loans to Pacific Ports Industries, Inc., defendant Covington Investment Company executed a guaranty in plaintiff's favor, and in consideration of plaintiff's acceptance of Covington's guaranty the individual defendants executed to plaintiff a special guaranty of Covington's performance. In reliance upon said guaranties plaintiff made loans to Pacific Ports upon which there is an unpaid balance of $88,337.57 plus $3,519.61 interest. The complaint alleges that the obligations of defendants were incurred and to be performed in San Francisco.

Defendants moved for change of venue to Los Angeles upon the grounds that the individual defendants are residents of Los Angeles; that Covington's principal place of business is there, and that the contracts sued upon were entered into and to be performed there.

[1] Affidavits and counter affidavits were filed. There is very little conflict in the facts, although the parties draw different inferences from them. Where there is conflict, the trial court resolved that conflict in favor of plaintiff. As there is substantial evidence to support the trial court's determination, we are bound by it. Crofts & Anderson v. Johnson, 1950, 101 Cal.App.

2d 418, 225 P.2d 594; Hale v. Bohannon, 1952, 38 Cal.2d 458, 241 P.2d 4; Clapp v. Kramer, 1958, 162 Cal.App.2d 237, 238, 328 P.2d 510. Pacific Ports' principal place of business is in Alameda County; Covington's is in Los Angeles. Defendants Smookes are officers of Covington and residents of Los Angeles. Burkhim and DeMarcus are officers of Pacific Ports. In Los Angeles DeMarcus acting on behalf of Pacific Ports solicited Covington and the Smookes to guaranty any loans by plaintiff to Pacific Ports. Two instruments of guaranty were signed, one by Covington, the other by the Smookes. The Covington guaranty provided that in consideration of loans by plaintiff to Ports, Covington guarantied their payment provided that notes of Ports to plaintiff must first be approved by Covington. The Smookes' guaranty provided that in consideration of the acceptance by plaintiff of the Covington guaranty the Smookes guarantied the performance by Covington of its guaranty. Both instruments were signed in Los Angeles and handed to DeMarcus there. One of plaintiff's officers had stated to DeMarcus that the form of the documents was satisfactory to plaintiff and told DeMarcus to take them to Los Angeles for the Smookes' signatures. The consents of Pacific Ports to the guaranties were signed in Alameda County. Covington's approval of the Pacific Ports notes to plaintiff was signed in Los Angeles and mailed to plaintiff at San Francisco, where its only place of business is. Neither the letter of approval nor either of the guaranties provide for performance by defendants in San Francisco nor any place of performance. DeMarcus delivered the guaranties to plaintiff in San Francisco. Plaintiff claimed and the court found that DeMarcus was not an agent of plaintiff nor did he receive the documents for the bank. The court found that as between plaintiff and the defendant guarantors the contracts were entered into in San Francisco by plaintiff making loans to Pacific Ports, thereby accepting defendants' guaranties. The court found that there was a third contract, this one between Pacific Ports, Covington and Burkhim relating to guaranty in which it was agreed that performance of any acts under that agreement was to be in Los Angeles County (defendants refer to it as a "guaranty assistance" contract), but plaintiff was not a party thereto nor did its officers know its contents nor was it a part of the transaction with plaintiff. (There is a conflict in the affidavits as to plaintiff's knowledge of the existence of this contract. However, the court resolved that conflict in favor of plaintiff.)

Where Were the Contracts Entered Into?

[2] We are concerned here not with this question as it appertains to the rights between Pacific Ports and the guarantors, but between the guarantors and plaintiff. Plaintiff was not a signatory to either contract. So far as plaintiff is concerned the guaranties were mere offers to guaranty performance by Pacific Ports in the event that plaintiff should see fit to make loans to Pacific Ports based on the guaranties. Those loans were to be and were made and payable in San Francisco. The acceptance of the offers was made in San Francisco by the making of the loans thereby guarantied. Thus the contract between plaintiff and defendants was entered into in San Francisco, bringing the case within that provision of section 395, subdivision 1, Code of Civil Procedure, which provides that the place of trial where there is nothing in the contract stating the place where it is to be performed (see Dawson v. Goff, 43 Cal.2d 310, 314, 273 P.2d 1) is "the county * * * in which the contract in fact was entered into * * and the county in which such obligation is incurred shall be deemed to be the county in which it is to be performed * * *".

[3] We adopt the following portion of the excellent opinion by the trial judge, Honorable Preston Devine:

> "The place of making a contract is the place where the last act necessary to its validity was performed. (Rawson v. J. C. Forkner Fig Gardens, Inc., 206 Cal. 4, 6 [272 P. 1057]; Ward

Mfg. Co. v. Miley, 131 Cal.App.2d 603 [281 P.2d 343]; Marchese Bros. v. A. Lyon & Sons, supra, [123 Cal.App.2d 193] at [page] 198 [266 P.2d 556]; Johnson v. Banta, 87 Cal.App.2d 907, 909 [198 P.2d 100].) The last act usually is the act constituting the acceptance. (Witkin, Calif. Procedure, vol. 1, p. 734, sec. 223 (1954 Ed.).)

"It is the contention of defendants that the act of signing and handing the guaranty contracts to DeMarcus in Los Angeles constituted acceptance, and it is the contention of plaintiff that acceptance was the action of the Bank in making the loans in San Francisco.

"It is my conclusion that Bank's position is the correct one. No doubt it seems to Smookes that theirs was the last act, because the guaranty contracts were complete as to form when they were asked to sign. Their signature and delivery, when they were requested to sign, seems, at first glance, to partake of the nature of acceptance rather than of offer, and must, in the light of the circumstances, continue, in the eyes of the guarantors, to be the giving of consent, rather than the inviting of acceptance by another. But this results from the fact that the solicitation of the guaranty by DeMarcus was on behalf of Ports. So far as Bank was concerned, Smookes were *offering* to guaranty loans which might or might not be made. Bank still a) must have Covington's approval before any loans would be guaranteed; and b) could refuse to make any loan that would be applied for.

"When the documents, signed by Smookes, were handed to DeMarcus, there was as yet no performance required of either party. Bank was not obliged to lend, and until Bank should lend, Smookes had no obligation to do anything. It was the making of the loans, after approval by Covington, which made effective the promise of Smookes.

"In Hickey Pipe [& Supply] Co. v. Fitzgerald, 3 Cal.App.2d 389 [39 P.2d 472], an offer of guarantee was held to have been accepted by the furnishing of the goods. Although it was not a venue case, nevertheless the principle relating to acceptance applies.

"That a guaranty is a mere offer to pay a prospective debt if the promisee extends the credit appears from Herron Co. v. Flack, 46 Cal.App. 374 [189 P. 294], and Murphy v. Luthy Battery Co., 74 Cal.App. 68, 76 [239 P. 341].

"The case of Dawson v. Goff, supra [43 Cal.2d 310, 273 P.2d 1] is to be distinguished in this respect: In that case, the option agreement was accepted in San Diego County by the optionee—both parties signed there. Consideration was not expressed, but was presumed because the contract was in writing. In the case before me, the consideration was the acceptance of the Covington guaranty by Bank. There was no acceptance thereof in Los Angeles. The acceptance occurred when the loans were made in San Francisco."

Defendants cite cases like Carr v. Howell, 154 Cal. 372, 97 P. 885; Kelly v. Woolsey, 177 Cal. 325, 170 P. 837; Herman v. Mortensen, 72 Cal.App.2d 413, 164 P.2d 551, and Neely v. Buster, 50 Cal.App. 695, 195 P. 736, for the proposition that delivery of deeds or contracts to one for the benefit of another, implies acceptance by the latter. However, those cases deal with deeds or completed agreements. They do not deal with agreements of the type involved here where there was no completed agreement at the time of delivery to DeMarcus and where, as here, the decision to take on certain burdens has not yet been made by the promisee. In such cases acceptance cannot be held to follow from the mere handing of the documents to a third person who is not authorized to act for the person who must determine whether or not to accept the burden required by the contract.

The order is affirmed.

FRED B. WOOD, J., and HANSON, J. pro tem., concur.

Hearing denied; SCHAUER, SPENCE and McCOMB, JJ., dissenting.

DOOLING, J. pro tem., participating in place of TRAYNOR, J.

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169 Cal.App.2d 655

LOS ANGELES CITY HIGH SCHOOL DISTRICT OF LOS ANGELES COUNTY, Plaintiff, Respondent, and Cross-Appellant,

v.

Heiji KITA, Kiyoko Kita, Bank of America National Trust and Savings Association, a corporation, Continental Auxiliary Company, a corporation, County of Los Angeles, Misao Kita, Ume Kita, Shigeo Kita, Sanaye Kita, William Tetsuo Yamamoto, Doe One to Doe One Hundred, Inclusive, All Persons Unknown Claiming Any Title In And To The Property, Defendants,

Heiji Kita, Kiyoko Kita, Misao Kita, Ume Kita, Shigeo Kita and Sanaye Kita, Defendants, Appellants, and Cross-Respondents.

Civ. 23377.

District Court of Appeal, Second District, Division 3, California.
April 16, 1959.

Proceedings in eminent domain. Judgment of condemnation and on motion of plaintiff, new trial was granted. From a judgment of the Superior Court of Los Angeles County and from an order granting a new trial, John J. Ford, J., both parties appealed. The District Court of Appeal, Vallée, J., held that where document read to plaintiff's expert testifying as to value with an authorization to brokers to make an offer for 33 acres of similar property adjoining one of the parcels sought to be condemned, was made more than a year after the date of valuation and was contingent on satisfactory soil tests, permitting defendants to read the document to the witness in the presence of the jury and to interrogate him with respect thereto was error, and that the trial court properly granted a new trial where the testimony as to the value of property sought to be condemned was in irreconcilable conflict.

Order granting a new trial affirmed.

Appeal from the judgment dismissed.

1. Evidence ⚷558(8)

An expert as to value may be cross-examined in order to test the accuracy and worth of his opinion provided such examination is not unreasonable.

2. Evidence ⚷558(8)

Evidence of offers to purchase similar property may properly be presented on cross-examination of experts for the purpose of testing the weight to be accorded his opinion as to value.

3. Evidence ⚷558(2)

The trial court has a large discretion in allowing cross-examination of an expert witness.

4. Witnesses ⚷267

General rule that scope of permissible cross-examination rests to a considerable extent in the discretion of the trial court prevails in condemnation proceedings.

5. Evidence ⚷142(1)

If the evidence of offers to purchase similar property in condemnation proceedings is of slight weight, judge is justified in excluding it entirely because of its prejudicial effect, especially if there is reason to believe that the real object in offering it, is to get before the jury, declarations of other points for which it is not competent evidence.

6. Evidence ⚷142(1)

In condemnation proceedings, unaccepted offers to buy similar property are a species of indirect evidence of the opinion of the offerer as to the value of the land, and if evidence thereof is to be received, it is important to know whether the offer was bona fide and made by man of good judgment acquainted with the value of the property, and whether made with reference to market value or to supply a particular need or to gratify a fancy.

7. Eminent Domain ⚷224

Granting of a motion for new trial in condemnation proceedings rests within the discretion of the trial judge and a reviewing court will not interfere therewith in the absence of a clear abuse of discretion.

8. Appeal and Error ⚷854(6), 933(1)

On appeal from an order granting a new trial, all presumptions favor the order and it will be affirmed, if it may be sustained on any ground.

9. Appeal and Error ⚷867(2), 978(1)

When a new trial is granted because of an error of law occurring at the trial, the order will not be reversed unless the ruling was an abuse of discretion, and if the error can possibly have been prejudicial the trial court must consider its probable effect and decide the motion for a new trial accordingly.

10. Appeal and Error ⚷854(6), 977(1)

The determination of a motion for new trial rests so completely within the trial court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears, and the order will be affirmed if it may be sustained on any ground although the reviewing court might have ruled differently in the first instance.

11. Eminent Domain ⚷224
Evidence ⚷558(8)

In condemnation proceedings, where document read to plaintiff's expert testifying as to value with an authorization to brokers to make an offer for 33 acres of similar property adjoining one of the parcels sought to be condemned was made more than a year after date of valuation and was contingent on satisfactory soil tests, permitting defendants to read the document to the witness in the presence of the jury and to interrogate him with respect thereto was error, and the trial court properly granted a new trial, where the testimony as to the value of property sought to be condemned was in irreconcilable conflict.

Hodge L. Dolle, John Y. Maeno, and Earle K. Stanton, Los Angeles, for appellants.

Harold W. Kennedy, County Counsel, and A. R. Early, Deputy County Counsel, Los Angeles, for respondent.

VALLÉE, Justice.

Proceeding in eminent domain. A jury found the market value of the property sought to be condemned. Judgment of condemnation followed. On motion of plaintiff a new trial was granted. The order reads:

> "Plaintiff's motion for a new trial as to Parcels 1 and 2, heretofore submitted, is now by the court granted on the ground of error in law, occurring at the trial and excepted to by the plaintiff, and particularly error in permitting enquiry on cross-examination of an expert witness for plaintiff as to an offer to purchase certain property as embodied in Defendants' Exhibit L."

Defendants appeal from the order. Plaintiff appeals from the judgment.

The complaint was filed August 30, 1956. Plaintiff sought to condemn two parcels, called I and II. Adjoining parcel II there were about 33 acres not sought to be condemned, similar to the property being condemned, and owned by some of the defendants. Plaintiff called one Evans, a real estate expert, who testified to his opinion of the market value of the property sought to be condemned. On cross-examination, over plaintiff's objection,[1] counsel for defendants was permitted to question Evans with respect to a document, sometimes called an "offer" in the record,[2] made September 16, 1957, with respect to the 33 acres, and to read the document to Evans in the presence of the jury. The document was not addressed to the owners of the 33 acres but to two real estate brokers.[3] Counsel for defendants assured the court he proposed to show the offer

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[1] The objection was on these grounds: the offer was made a year and a half after the filing of the complaint; "it pertains not to the subject property

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but to the remainder of the original 60-acre tract exclusive of the portion being taken by the school"; "it is not a firm offer. It has a condition in it"; "it is not a fair test neither of the witness's opinion of value and his testimony is not properly to be considered by the jury in arriving at their opinion of market value"; "an offer was made in one year after the date of valuation and it was made for other property; it is not an unconditional offer, the acceptance of which would ripen into a contract binding on both parties"; "the asking of questions on this merely leads us into collateral matters, one of which is the bona fideness of the offer itself."

[2] While the document is not an offer but an authorization to make an offer, for convenience we will refer to it as an offer as was done below.

[3] The offer reads:

"The Rothschild Investment Company
"333 South La Cienega Boulevard
"Los Angeles 48, California
"Oleander 5-6440 OLympia 2-9097
"September 16, 1957

"Richard T. St. John Co.
"8664 Wilshire Boulevard
"Los Angeles, California
"Spitzer Company
"5225 Wilshire Blvd.
"Los Angeles 36, Calif.
"Realtors

"Gentlemen:

"This will authorize you to purchase on our behalf that certain property situated in the County of Los Angeles, south of Braddock Street and east of McConnell Avenue now owned by a Mr. or Messrs. Kita, the total land parcel being approximately sixty (60) acres. Our purchase to be that portion of the sixty (60) acre parcel which shall be remaining after removing from same that portion which is now being purchased or which is pending condemnation for use as a public school. The exact property to be determined by survey and a legal description satisfactory to buyer and seller to be established.

"We agree to purchase this property at a gross price of Twenty-Thousand ($20,000.00) Dollars per acre, of which total price we agree to pay twenty-five per cent (25%) in cash through an escrow to be opened at the Title Insurance and Trust Company main office for a period not to exceed ninety (90) days. Said escrow to be opened within ten days of the signed approval by the sellers of this purchase agreement, during which ten day period we shall have the right to make soil tests at our expense, with the further right that this offer is contingent upon those tests being satisfactory to us; if not satisfactory we shall be privileged to withdraw from this agreement without liability.

"At the close of said escrow in which twenty-five per cent (25%) of the total purchase price had been paid in cash, twelve and one-half per cent (12½%) of the total land area shall be transferred through grant deed free and clear of any encumbrances to the purchasers. Further parcels of land shall be released from encumbrances on payment of sums calculated at the rate of Twenty-five Thousand ($25,000.00) Dollars per acre to be released.

"The trust deed to be executed at the close of the escrow for seventy-five per cent (75%) of the total purchase price which calls for five (5) equal annual installments including interest at five per cent (5%) on the unpaid balance, at the end of which five year period the total shall have been paid. The before-mentioned Twenty-five Thousand ($25,000.00) Dollars per acre payment to secure accelerated land releases shall apply and be part of the annual payments due on the trust deed described above. Said trust deed shall provide that the total amount may be paid at any time without penalty.

"The seller shall further agree that for such land as may be required for dedication to the City or County for street improvements, providing the purchasers assume all costs for such street improvements, the seller shall join with the buyer in such street dedication without further land payment being required for such joint dedication, but this action shall in no way diminish or reduce the gross land price to be paid for the property purchased as determined by original survey.

"This offer is contingent upon the seller's ability to furnish a clear and marketable title insured by the Title Insurance and Trust Company. Any conditions, covenants or restrictions of record shall was delivered to the owners of the 33 acres. At this point the court instructed the jury as stated in the margin.[4] Counsel for defendants then read the offer to the witness Evans in the presence of the jury. Evans, in response to questions by counsel for defendants, testified: he first saw a copy of the offer "about three weeks or a month ago"; he did not talk to the offerer at the request of one of the brokers named in the document, or to defendants, or to their attorney; he did not give it any consideration; it was a contingent offer, with two contingencies. On redirect Evans gave a number of reasons why he did not give any consideration to the offer. Counsel for defendants introduced the written offer in evidence.

The next expert called by plaintiff testified on direct: in preparation for coming to court, he heard about the offer and investigated it but not in connection with his appraisal; he talked to one of the persons to whom the offer was addressed; the property referred to in the offer was not owned by defendants; it had no influence on his opinion of the market value of the land.

No evidence was ever offered to prove that the offer had been delivered to the owners of the 33 acres or to their attorney or that the owners or their attorney were made aware that the offer had been made. Among the instructions given at the close of the evidence was one that offers to buy other properties are not competent evidence of market value and may not be considered as evidence of the fair market value of the properties sought to be condemned.

It is clear from the order granting the new trial, and the parties appear to agree, that the sole ground on which a new trial was granted was that the court erred in permitting counsel for defendants to read the so-called offer in the presence of the jury and in permitting him to question the witness Evans with respect to it. Defendants assert the court did not err in this respect and therefore it was error to grant a new trial on that ground. They argue that the offer was tendered in evidence not for the purpose of establishing value but for the sole purpose of testing the reliability and credibility of the witness' testimony, that the court so instructed the jury, and that the evidence was admissible for that purpose.

Plaintiff argues extensively, citing numerous authorities, that offers to purchase similar land are not admissible to show the value of the land taken. That is not the question. The question is simply: Did the trial court abuse its discretion in granting a new trial because it considered it had abused its discretion and therefore had erred to the prejudice of plaintiff in permitting counsel for defendants to read

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be subject to the approval of the buyer, and if not so approved the buyer may withdraw from the purchase without liability. The purchase shall further require that land taxes shall be prorated as of close of escrow. The purchase to be made subject to the present zoning. Land to be purchased in an 'as is' condition and delivered free and clear of any lien or encumbrances other than that described above.

"As evidence of firm intention we attach hereto our check in the amount of Fifteen Thousand ($15,000.00) Dollars to be deposited in escrow when said escrow is opened.

"This offer shall be valid for only seven (7) days from this date. If not accepted in writing by 6 P. M. Monday, September 23, 1957 it shall be null and void and of no further affect.

"The Rothschild Investment Co.
[Signature illegible]"

[4] "I will instruct the jury now any offer to which inquiry is made of this witness is not to be considered by the jury as any evidence of market value whatsoever but it is proper to inquire of the witness with respect to his knowledge and consideration of the offer and which consideration about to be made is for one limited purpose only, namely, insofar as it bears upon the credibility of the witness, that is the weight to be given to his testimony. Again, it is not evidence of market value and cannot be considered for that purpose but it is limited to the sole purpose as it bears upon the credibility of the witness and the weight to be given his testimony."

the so-called offer to the witness Evans in the presence of the jury and to interrogate him with respect thereto?

[1, 2] An expert as to value may be cross-examined in order to test the accuracy and worth of his opinion provided such examination is not unreasonable. City of Los Angeles v. Deacon, 119 Cal. App. 491, 494, 7 P.2d 378; County of San Mateo v. Christen, 22 Cal.App.2d 375, 379, 71 P.2d 88; City of San Diego v. Boggeln, 164 Cal.App.2d 1, 330 P.2d 74; 98 C.J.S. Witnesses § 390, p. 161. People v. La Macchia, 41 Cal.2d 738, 264 P.2d 15, holds that evidence of offers to purchase similar property may properly be presented on cross-examination for the purpose of testing the weight to be accorded an opinion as to value. The court stated (41 Cal.2d at page 747, 264 P.2d at page 22):

> "Another asserted violation of the rule prohibiting evidence as to offers to purchase occurred during the cross-examination of the owners' witness Challen. A question of counsel for the state was, '[S]o do I understand that in your opinion this highway frontage on these parcels would be around seven, eight thousand dollars an acre if placed upon the open market for sale?' Challen replied, 'I investigated one parcel here that I had heard an offer had been made on * * *, as a matter of fact, Mr. Pelliccione was offered $7,000 for 200 feet.' In denying a motion to strike out the statement upon the ground that it was not responsive, the court said, '[I]t's explanatory of his answer.'
>
> "In its briefs the state challenges this testimony upon the sole ground that it violates the rule against the admission of offers to purchase. But the questioning was upon cross-examination, and evidence of an offer may properly be presented at such time for the purpose of testing the weight to be accorded an opinion as to value. Under the circumstances shown by the record the trial court properly refused to strike the testimony."

People, Acting By and Through the Department of Public Works v. Union Machine Co., 133 Cal.App.2d 167, 284 P.2d 72, follows People v. La Macchia, supra, 41 Cal.2d 738, 264 P.2d 15, and holds that an expert may be cross-examined with respect to specific offers for the property sought to be condemned which he has not investigated. It also holds that it is proper to exclude evidence relating to an offer which included the land to be condemned and other land which was not sufficiently specified and of the specification of which the witness had no personal knowledge.

In Pao Ch'en Lee v. Gregoriou, 50 Cal. 2d 502, 326 P.2d 135, a son of the defendant Mrs. Gregoriou offered in open court to purchase the property involved for $26,000 and tendered a cashier's check for $10,000 in part payment. The court stated (50 Cal.2d at page 505, 326 P.2d at page 137):

> "The check and offer were properly received as evidence of the present value of the property. (County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680.) However, it was not conclusive on the court, since the weight of such evidence and the bona fides of the offer were questions of fact for the determination of the trier of fact. [Citation.] In the instant case the trier of fact may well have concluded, in view of the offeror's relationship to one of the defendants, that the offer was a mere attempt to accomplish restitution by indirection, thus avoiding the payment of damages for the fraud, and that it did not represent the true value of the property."

[3, 4] The trial court has a large discretion in allowing cross-examination of an expert witness as to value since the object of such examination is principally to test the knowledge and competency of the witness and whether he has taken into consideration all the elements of value in arriving at his conclusion. Laguna Salada

Union Elementary School Dist. v. Pacific Development Co., 119 Cal.App.2d 470, 475, 259 P.2d 498. The general rule that the scope of permissible cross-examination rests to a considerable extent in the discretion of the trial court prevails in condemnation proceedings. (17 Cal.Jur.2d 701, § 135.)

People ex rel. Department of Public Works v. Murata, 161 Cal.App.2d 369, at page 375, 326 P.2d 947, at page 951, says:

> "[W]e interpret the Faus decision [County of Los Angeles v. Faus, 48 Cal.2d 672, 312 P.2d 680] as holding also that a 'wide discretion' must be granted the trial judge in determining the admissibility of evidence of other sales; that the laying of appropriate foundations should be required to keep the admission of such evidence 'within safeguarding limits' and that evidence of the price paid by a condemner should be admitted as evidence of value only after the trial judge has been satisfied 'that the price paid was sufficiently voluntary to be a reasonable index of value.'"

[5] If the evidence in question is of slight weight, the judge is justified in excluding it entirely because of its prejudicial or dangerous effect, especially if there is reason to believe that the real object in offering it is to get before the jury declarations of other points for which it is not competent evidence. (18 Cal.Jur.2d 567, § 126.)

[6] Much has been said about the propriety of receiving in evidence unaccepted offers to buy similar property. An offer to pay a certain amount does not necessarily involve an estimate that such is its full value and should have been taken into consideration in forming an opinion of market value. At best, such offers are but expressions of opinion. They are a species of indirect evidence of the opinion of the offerer as to the value of the land. An unaccepted offer places before the jury an absent person's declaration or opinion of value while depriving the adverse party of the benefit of cross-examination. The offerer may have such slight knowledge on the subject as to render his opinion of no value. He may have wanted the land for some particular purpose disconnected with its value. Pure speculation may have induced the offer, a willingness to take chances that some new use of the land might later prove profitable. The person making the offer may not have been competent in a legal sense to express an opinion on the subject. Offers may be glibly made without serious intention or the required resources. The offer may contain contingencies, as in the present case. The area for collateral inquiry is far broader than in the case of consummated sales, as is also the opportunity for collusion and fraud. The assertion that the offerer tendered his money might give such hearsay opinion more weight with the jury than an opinion given by a witness before them, not thus supported. If evidence of an unaccepted offer is to be received, it is important to know whether the offer was bona fide and made by a man of good judgment acquainted with the value of the property, and whether made with reference to market value or to supply a particular need or to gratify a fancy. Unaccepted offers are unsatisfactory, easy of fabrication, and even may be dangerous in their character.[5] In the recent case of Sacramento and San Joaquin Drainage Dist. v. Jarvis, 51 Cal.2d 799, 804, 336 P.2d 530, 533, it is said, "The

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[5] See Sharp v. United States, 191 U.S. 341, 24 S.Ct. 114, 48 L.Ed. 211, 213; New Jersey Turnpike Authority v. Bowley, 27 N.J. 549, 143 A.2d 558, 562; Hine v. Manhattan R. Co., 132 N.Y. 477, 30 N.E. 985, 986, 15 L.R.A. 591; Sherlock v. Chicago, B. & Q. R. Co., 130 Ill. 403, 22 N.E. 844, 845; City of St. Louis v. Gerhart Realty Co., 328 Mo. 103, 40 S.W. 2d 661, 663; Baynham v. State Highway Department, 181 S.C. 435, 187 S.E. 528, 535; Chicago, M. & P. S. Ry. Co. v. True, 62 Wash. 646, 114 P. 515, 517; Commonwealth, by State Highway Commission v. Combs, 229 Ky. 627, 17 S.W. 2d 748, 749; 84 L.Ed. 249; 4 Nichols on Eminent Domain, 3d ed., 72, § 12.3113 [3].

rule is settled that in a condemnation proceeding a witness cannot state his *opinion* of the value of neighboring land."

[7–9] The granting of a motion for a new trial in condemnation proceedings rests within the discretion of the trial judge, and a reviewing court will not interfere with the decision of the trial court in the absence of a clear abuse of discretion. City and County of San Francisco v. Tillman Estate Co., 205 Cal. 651, 654–656, 272 P. 585; 18 Cal.Jur.2d 64, § 333. On an appeal from an order granting a new trial all presumptions favor the order; the order will be affirmed if it may be sustained on any ground. Mazzotta v. Los Angeles Ry. Corp., 25 Cal. 2d 165, 169, 153 P.2d 338. When a new trial is granted because of an error in law occurring at the trial the order will not be reversed unless it can be said the ruling was an abuse of discretion. Nance v. Fresno City Lines, Inc., 44 Cal.App.2d 868, 872, 873, 113 P.2d 244; Middleton v. California Street Cable Ry. Co., 73 Cal.App.2d 641, 646, 647, 167 P.2d 239; Jones v. Scurlock, 96 Cal.App.2d 201, 203, 214 P.2d 599.

[10] If the error can possibly have been prejudicial, the trial court must consider its probable effect and decide the motion for a new trial accordingly. Brown v. George Pepperdine Foundation, 23 Cal.2d 256, 262, 143 P.2d 929. "The determination of a motion for a new trial rests so completely within the court's discretion that its action will not be disturbed unless a manifest and unmistakable abuse of discretion clearly appears, and the order will be affirmed if it may be sustained on any ground, although the reviewing court might have ruled differently in the first instance." Shaw v. Pacific Greyhound Lines, 50 Cal. 2d 153, 159, 323 P.2d 391, 394; Balthrop v. Atchison, T. & S. F. Ry. Co., 142 Cal. App.2d 823, 826, 299 P.2d 341.

[11] The document which was read to plaintiff's expert, Evans, in the presence of the jury was not in fact an offer. It was an authorization to two real estate brokers to make an offer for 33 acres of similar property adjoining one of the parcels sought to be condemned, owned by some of the defendants. It was made more than a year after the date of valuation. It was to be contingent on satisfactory soil tests. The offer was to be for the payment of 25 per cent of the purchase price in cash and the balance in five equal annual installments with 5 per cent interest, secured by a deed of trust with the privilege of paying the total amount at any time; and the seller was to give releases of 12½ per cent of the total area on payment of $25,000 an acre. The proposition was to be "valid" for seven days from September 23, 1957. There was no evidence that any such offer was ever made to the owners of the 33 acres.

The values given by the experts were:

	Parcel I		Parcel II	
	Total	Per Acre	Total	Per Acre
Plaintiff's Experts				
Evans	$175,000.00	$15,600.00	$260,000.00	$16,250.00
Welborne	145,600.00	13,000.00	240,000.00	15,000.00
Defendants' Experts				
Seeley	$247,347.00	$22,054.76	$352,653.00	$22,054.76
Ross	252,500.00	22,500.00	360,000.00	22,500.00
Verdict	$236,565.00	$21,009.36	$343,914.00	$21,508.07

The so-called offer was at a gross price of $20,000 per acre.

In view of what has been said, the learned trial judge reasonably may have concluded he abused his discretion and therefore erred to the prejudice of plaintiff in permitting counsel for defendants to read the document to Evans in the presence of the jury and to interrogate him with respect thereto. The testimony as to the value of the property sought to be condemned was in irreconcilable conflict. The effect of the cross-examination was to get before the jury the hearsay declaration of a third party as to value, not supported by oath, and without opportunity for cross-examination. The verdict was slightly higher than the offer. While theoretically the evidence was proffered solely for the purpose of testing the witness' opinion as to value and the jury was so instructed, the trial judge may have reasonably concluded that it had been accepted by the jury as affirmative evidence of value. He may have felt the jury was confused and misled. He may have felt that confusion was inevitable when the jurors heard the evidence and were then told they could not base the value of the property on that evidence. He may have felt that the offer, made more than a year after it was known the adjoining property was to be condemned, could not affect the accuracy or worth of Evans' opinion by reason of the adjoining property's having risen in value after it become known the condemnation proceeding was in progress. (See Page v. Oklahoma City, 129 Okl. 28, 263 P. 448, 451; Department of Public Works and Buildings v. Finks, 10 Ill.2d 15, 139 N.E.2d 267, 269; City and County of Denver v. Lyttle, 106 Colo. 157, 103 P.2d 1, 3, 4.)

The trial court here has determined it abused its discretion and thus erred in permitting the reading of the so-called offer to the witness Evans in the presence of the jury and in permitting cross-examination of Evans with respect thereto, and that such error prejudiced plaintiff's cause. This court cannot ascertain or determine what weight the evidence had with the jury. The trial judge has determined it had great weight. We cannot say, in light of the record, that he was wrong in so holding.

The order granting a new trial is affirmed. The appeal from the judgment is dismissed.

SHINN, P. J., concurs.

PARKER WOOD, J., did not participate.

51 Cal.2d 875

PEOPLE of the State of California et al., Appellants,

v.

CITY OF LONG BEACH, Respondent.

L. A. 25119.

Supreme Court of California,
In Bank.
April 22, 1959.

Action by a city, to which the state had granted tidelands and submerged lands lying within city's boundaries in trust for certain uses and purposes connected with development of harbor, to secure declaration of city's right to use trust funds to construct a building to be leased to a charitable institution organized and conducted for promotion of moral and social welfare of seamen, naval officers and enlisted men and other persons engaged in and about the harbor and commerce. The Superior Court, Los Angeles County, A. Curtis Smith, J., entered judgment approving the proposed expenditures and lease and the state appealed. The Supreme Court, Traynor, J., held that the expenditure of trust funds to construct building to be leased at nominal rent to such private organization was permissible under the trust agreement and would not violate constitutional provision prohibiting donation of public property or gift of public money.

Affirmed.

1. Navigable Waters ⚷37(8)

Where state granted to city tidelands and submerged lands within city in trust for establishment and maintenance of harbor and necessary or convenient related facilities for promotion and accommodation of commerce and navigation, 1935 amendment authorizing leasing or use of trust property to promote the moral and social welfare of seamen, naval officers and enlisted men and other persons engaged in and about the harbor was consistent with basic trust purpose and justified use of trust income for such purpose. St.1911, p. 1304 as amended; St.1935, p. 794.

2. States ⚷119

Use of oil and gas revenues from submerged lands, granted by state to city in trust to establish and maintain a harbor and necessary or convenient related facilities, for construction of building to be leased at nominal rent to private organization, conducted for promotion of moral and social welfare of members of United States armed forces, merchant seamen and other persons engaged in and about harbor on condition that it carry out trust purposes for public benefit under city's supervision would not violate constitutional provisions prohibiting donation of property by state or gift of public money. St.1911, p. 1304 as amended; St.1935, p. 794; West's Ann.Const. art. 4, §§ 22, 31.

3. Municipal Corporations ⚷873

The performance of a bona fide contract between a public body and a private organization is not the making of a gift nor is it for the purpose or benefit of the private contractor so as to be within the constitutional provision prohibiting donation of public property for benefit of private corporation. West's Ann.Const. art. 4, § 22.

4. Municipal Corporations ⚷79

Where state granted to city tidelands and submerged lands within city in trust for establishment and maintenance of harbor and necessary or convenient related facilities for promotion and accommodation of commerce and authorized leasing or use of trust property for limited purposes for construction, maintenance and operation of nonprofit benevolent and charitable institutions organized for promotion of moral and social welfare of seamen, naval officers and enlisted men, lease of building constructed by city with trust funds at nominal rent to such a private organization would not violate civil service provisions of city charter, since administration of tidelands trust for benefit of all people of state was not a municipal affair. St.1911, p. 1304 as amended; St.1935, p. 794.

◆

Stanley Mosk and Edmund G. Brown, Attys. Gen., Leonard M. Friedman, Asst. Atty. Gen., and F. G. Girard, Deputy Atty. Gen., for appellants.

Theodore R. Gabrielson, Los Angeles, as amicus curiae on behalf of appellants.

Walhfred Jacobson, City Atty., Long Beach, O'Melveny & Myers and Pierce Works, Los Angeles, for respondent.

TRAYNOR, Justice.

In 1911, the State of California granted to the City of Long Beach the tidelands and submerged lands lying within the city's boundaries in trust for certain uses and purposes connected with the development of Long Beach Harbor. Stats.1911, ch. 676, p. 1304. The original grant stated "That said lands shall be used by said city and by its successors, solely for the establishment, improvement and conduct of a harbor, and for the construction, maintenance and operation thereon of wharves, docks, piers, slips, quays, and other utilities, structures and appliances necessary or convenient for the promotion and accommodation of commerce and navigation, and said city, or its successors, shall not, at any time, grant, convey, give or alien said lands, or any part thereof, to any individual, firm or corporation for any purpose whatsoever; *provided,* that said city, or its successors, may grant franchises thereon, for limited periods, for wharves and other public uses and purposes, and may lease said lands, or any part thereof, for limited periods, for purposes consistent with the trusts upon which said lands are held by the State of California and with the requirements of commerce or navigation at said harbor * * *." Stats.1911, ch. 676, p. 1305. The terms of the original trust were amended by the Legislature in 1925 (Stats.1925, ch. 102, pp. 235–236) and 1935. (Stats.1935, ch. 158, pp. 793–795.)

Following the discovery of oil under the tidelands in 1937, it was determined in City of Long Beach v. Marshall, 11 Cal. 2d 609, 82 P.2d 362, that the city had the right to produce oil and gas from these lands, and in City of Long Beach v. Morse, 31 Cal.2d 254, 188 P.2d 17, that the oil and gas revenue could be used only for trust purposes. In 1951, the Legislature found that approximately fifty percent of the oil and gas revenue was no longer needed for trust purposes and declared such part of the revenue free from the public trust for navigation, commerce, and fisheries. Stats.1951, ch. 915, pp. 2444–2445. In Mallon v. City of Long Beach, 44 Cal.2d 199, 282 P.2d 481, it was determined that the state, not the city, was entitled to the revenue freed from the trust by its partial revocation.

Thereafter the state brought an action against the city to recover the funds to which it was entitled under the decision in the Mallon case. In 1956 the Legislature took note of this litigation and concluded that the public interest would best be served by its prompt settlement. Accordingly, it authorized a settlement dividing the oil and gas revenue between the state and the city, and provided that the latter's share should continue to be held in trust and expended for trust purposes. It set forth a nonexclusive list of trust purposes that were declared to be matters of state, as distinguished from local, interest and benefit, and it expressed its belief "that the Attorney General and said city should seek judicial determinations further defining said city's rights and duties in the premises." Stats. 1st Ex.Sess.1956, ch. 29. Pursuant to this legislation a consent decree was entered settling the main points of dispute between the state and the city, but the trial court reserved jurisdiction to determine whether given proposed expenditures were or were not within the power of the city to make as trustee in possession of its share of the oil and gas revenue.

Thereafter the city commenced the present proceedings to secure a declaration of its right to use trust funds to construct a building to be leased to the National Board of the Young Men's Christian Association. The trial court entered judgment approving the proposed expenditures and lease. The state appeals.

Since 1936 the Y.M.C.A. has been operating a facility known as the Armed Services Y.M.C.A. on tidelands leased from the city at a rental of $1 per year. This facility was erected without cost to the city, and the lease was executed pursuant to the 1935 amendment to the trust terms, which provided "That nothing herein contained shall be so construed as to prevent * * * the leasing or use of such tidelands or submerged lands for limited periods for the construction, maintenance, and operation of nonprofit benevolent and charitable institutions organized and conducted for the promotion of the moral and social welfare of seamen, naval officers and enlisted men, and other persons engaged in and about the harbor and commerce, fishery, and navigation." Stats.1935, ch. 158, p. 794. Owing to freeway construction, the relocation of the Navy Landing, and soil subsidence, the Armed Services Y.M.C.A. requires a new building at a new location if it is to continue adequately to serve its purposes. The city proposes to construct this building on a tideland site with tideland revenue at a cost of over $900,000 and lease it for twenty-five years to the Y.M. C.A. for the continued operation of the Armed Services Y.M.C.A.

The proposed lease provides that the "Lessee shall use the demised premises, together with the building and facilities located thereon, solely and exclusively for the purposes of, and it shall devote its special knowledge and experience to, managing, operating, conducting and maintaining therein and thereon, without compensation for its services in so doing, a rest, recreation and entertainment center for the use and accommodation of, and for the benefit and for the promotion of the moral and social welfare of, members of the Armed Forces of the United States, merchant seamen and other persons engaged in and about the harbor and in commerce and navigation. * * *" It shall provide suitable dormitory and sanitary accommodations; adequate meal service; suitable entertainment; and "such additional services and facilities, including a social room, lounge, game room, lockers, showers, telephone booths, and tailor shop, as are of a nature consistent with the proper operation of a well-conducted rest, recreation and entertainment center according to the knowledge and experience of the Lessee." It must operate the center without discrimination as to race, color or creed. It may make reasonable charges for food and other merchandise sold and for services rendered at prices and rates approved by the city manager. It expressly recognizes that the facilities are subject to the public trust for navigation, commerce, and fishery and agrees that the city retains full powers of supervision to insure that it operates the facility in a manner strictly consistent therewith and fully discharges its obligations under the lease. The rental is $1 per year plus an amount equal to any net profit derived from the operation of the facility, but past experience indicates that no profits will be realized and that the Y.M.C.A. will be required to cover a substantial deficit from its own funds.

[1] We entertain no doubt that the specific purpose set forth in the 1935 statute to promote "the moral and social welfare of seamen, naval officers and enlisted men, and other persons engaged in and about the harbor and commerce, fishery, and navigation," is not only consistent with but in direct aid of the basic trust purpose to establish and maintain a harbor and necessary or convenient related facilities for the "promotion and accommodation of commerce and navigation." Stats.1911, ch. 676, p. 1305. Personnel are as vital to these activities as the ships and other facilities used therein, and no distinction can properly be drawn between providing dormitories and other facilities for maritime personnel and docks for ships, warehouses for goods (City

of Oakland v. Williams, 206 Cal. 315, 331, 274 P. 328), or convention, exhibition, and banquet halls for use by trade, shipping, and commercial organizations. Haggerty v. City of Oakland, 161 Cal.App.2d 407, 413, 326 P.2d 957; see also Ravettino v. City of San Diego, 70 Cal.App.2d 37, 47, 48, 160 P. 2d 52.

It is true that these purposes may also be of sufficient local concern to justify the expenditure of purely municipal funds therefor (see, City of Oakland v. Williams, 206 Cal. 315, 318, 274 P. 328; Haggerty v. City of Oakland, 161 Cal.App.2d 407, 412, 326 P.2d 957; City of Oakland v. El Dorado Terminal Co., 41 Cal.App.2d 320, 330, 106 P.2d 1000), but as purposes of the trust for commerce, navigation, and fishery they are also for the benefit of all of the people of the state (Mallon v. City of Long Beach, 44 Cal.2d 199, 205, 282 P.2d 481; City of Long Beach v. Marshall, 11 Cal.2d 609, 614, 82 P.2d 362), and accordingly trust income may properly be devoted thereto. (Stats. 1st Ex.Sess.1956, ch. 29, p. 347; see also, City of Oakland v. Garrison, 194 Cal. 298, 304, 228 P. 433; City of Los Angeles v. Riley, 6 Cal.2d 621, 623, 59 P.2d 137, 106 A.L.R. 903; City of Long Beach v. Lisenby, 175 Cal. 575, 583, 584, 166 P. 333; Ransom v. Los Angeles City High School Dist., 129 Cal.App.2d 500, 506, 277 P.2d 455.

[2] The state contends, however, that to expend trust funds to construct a building to be leased at nominal rent to a private organization violates sections 22 and 31 of Article IV of the Constitution. It relies on the provisions that "no money shall ever be appropriated or drawn from the State Treasury for the purpose or benefit of any corporation, association, asylum, hospital, or any other institution not under the exclusive management and control of the State as a state institution, nor shall any grant or donation of property ever be made thereto by the State; * * *" (§ 22) and that the "Legislature shall have no power * * * to make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever." (§ 31.) The city contends that neither of these provisions prohibits expenditures of tideland trust funds for public purposes of state-wide concern, even though a private organization may also benefit thereby. (See, Simpson v. City of Los Angeles, 40 Cal.2d 271, 282, 253 P.2d 464; County of Los Angeles v. La Fuente, 20 Cal.2d 870, 877, 129 P.2d 378; County of Alameda v. Janssen, 16 Cal.2d 276, 281, 106 P.2d 11, 130 A.L.R. 1141.

[3] We may assume without deciding that a grant in aid to a private organization is a "gift" to and "for the purpose or benefit of" such organization within the meaning of the constitutional provisions even though the organization is thereby enabled to promote some public purpose. (See, People ex rel. Post v. San Joaquin Valley Agricultural Ass'n, 151 Cal. 797, 800–801, 91 P. 740; County of Los Angeles v. Southern California Tel. Co., 32 Cal.2d 378, 387–388, 196 P.2d 773; Sixth District Agr. Ass'n v. Wright, 154 Cal. 119, 129, 97 P. 144; County of Alameda v. Ross, 32 Cal. App.2d 135, 141, 89 P.2d 460; Frohliger v. Richardson, 63 Cal.App. 209, 217, 218 P. 497; Allen v. Hussey, 101 Cal.App.2d 457, 474, 225 P.2d 674; cf., Simpson v. City of Los Angeles, 40 Cal.2d 271, 282, 253 P.2d 464.) It is clear, however, that the performance of a bona fide contract by a public body is not the making of a gift, nor is it "for the purpose or benefit of" the private contractor within the meaning of section 22, for if it were, the state would be powerless to contract with any organization not expressly exempted from the constitutional limitations.

In the present case, the state contends that the carrying out of the city's plan must be regarded as a gift of the use of a valuable building for twenty-five years to the Y.M.C.A. to enable it to perform its private charitable purposes and that such a gift cannot be justified solely because a public purpose will also be served. The city contends that the benefits derived by the Y.M. C.A. are merely incidental to the public purpose and that the Y.M.C.A.'s performance of its obligations under the lease will constitute full and adequate consideration for its use of the building.

County of Los Angeles v. Southern California Telephone Company, 32 Cal.2d 378, 196 P.2d 773, compels the resolution of these conflicting contentions in favor of the city. In that case the court sustained the grant of a franchise to a public utility pursuant to Civil Code, section 536 and drew a distinction between such a grant and an absolute grant in fee or an appropriation of public money. "A franchise such as is authorized by section 536 is not an absolute grant in fee or an appropriation of money, but is merely a limited right to use the highways and only to the extent necessary for the furnishing of services to the public. Also, the privilege must be exercised 'in such manner and at such points as not to incommode the public use of the road or highway.' (Civ.Code, § 536.) It is obvious that the right acquired by the company is of less substance than the transfers involved in the cited cases which condemn appropriations of money and grants in fee.

"Moreover, the state is assured of a continuing benefit in return for the privileges granted under section 536, whereas this may not be true in transactions involving an outright appropriation or transfer in fee. The company must not only construct a telephone system but it must render service, and if it fails to do so the franchise terminates. Thus the state receives benefits during the life of the franchise, since in order to retain it the company must continue to serve the public. If and when the public benefit ceases and the franchise expires, the state is in as good a position as it was before the limited privilege was granted. The building of a public utility and consequent benefit to the people may not be a sufficient consideration to support a grant in fee, but it does not follow that the benefit received from the construction and continued operation of a telephone system is not an adequate consideration for the use of the highways so long as the public service continues." 32 Cal.2d at pages 387, 388, 196 P.2d at page 779.

In the present case there is also no grant in fee or appropriation of money to a private organization. The Y.M.C.A. receives only the use of the building for 25 years on condition that at all times it carries out the trust purposes for the public benefit under the supervision of the city. When it ceases to do so its rights in the building terminate. Moreover, it can gain no monetary benefit from the lease. Thus, other than the goodwill that it may engender for itself, the sole benefit it will derive is the ability to promote a public trust purpose that happens also to be one of its own. Under these circumstances, the public benefit that will result from the Y.M.C.A.'s operation of the facility at its own expense is clearly sufficient consideration for the Y.M.C.A.'s use of the building and such incidental non-monetary benefits as it may receive.

[4] Finally the state contends that the lease will violate the civil service provisions of the Long Beach city charter on the ground that those provisions require the city to execute the trust purposes itself by means of civil service personnel. There is no merit in this contention. The administration of the tidelands trust for the benefit of all of the people of the state is not a municipal affair, and the statutes creating the trust and regulating its administration expressly authorize leases to promote its purposes. Accordingly, any conflicting limitations in the city charter are inapplicable. Civic Center Ass'n of Los Angeles v. Railroad Comm., 175 Cal. 441, 445, 166 P. 351; City of Pasadena v. Charleville, 215 Cal. 384, 388, 10 P.2d 745.

The judgment is affirmed.

GIBSON, C. J., and SHENK, SCHAUER, SPENCE, McCOMB and PETERS, JJ., concur.

51 Cal.2d 864

Joseph STEPHENS, Petitioner,

v.

Thomas A. TOOMEY, as Registrar of Voters, etc., Respondent.

S.F. 19968.

Supreme Court of California,
In Bank.
April 21, 1959.

Mandamus proceeding to compel registrar of voters to register as an elector petitioner who had judgment pronounced against him on his plea of guilty of robbery, found to be first degree robbery, whose sentence of imprisonment was suspended, and who was still under probation. The Supreme Court, Shenk, J., held that criminal proceeding against petitioner was still outstanding, and judgment might become final, depending upon outcome of probation proceeding, and, therefore, petition for writ of mandate was premature.

Petition dismissed.

Opinion, 323 P.2d 471, vacated.

1. Elections 🔑90

A plea of guilty constitutes a "conviction" within constitutional provision that no person convicted of any infamous crime shall ever exercise privileges of an elector. West's Ann.Const. art. 2, § 1.

See publication Words and Phrases, for other judicial constructions and definitions of "Conviction".

2. Elections 🔑90

First degree robbery is punishable by imprisonment in state prison and is an "infamous crime" within constitutional provision that no person convicted of any "infamous crime" shall ever exercise the privileges of an elector. West's Ann.Const. art. 2, § 1; West's Ann.Pen.Code, § 213.

See publication Words and Phrases, for other judicial constructions and definitions of "Infamous Crime".

3. Elections 🔑90

Word "conviction", when used in connection with constitutional provisions that no person convicted of any infamous crime shall ever exercise privileges of an elector, means a final judgment of conviction. West's Ann.Const. art. 2, § 1.

4. Criminal Law 🔑1023(2)

A judgment is not final if there still remains some legal means of setting it aside, and, in an ordinary criminal case, a judgment becomes final when all available means to avoid its effect have been exhausted.

5. Criminal Law 🔑977(1), 1023(1)

As to offenders who are ineligible for probation, court has no discretion but to sentence them to an appropriate institution for punishment or treatment provided by law, and such judgment is appealable, and its finality must await results of the appeal. West's Ann.Pen.Code, §§ 1203, 1237.

6. Criminal Law 🔑977(1), 1023(1)

In absence of application for probation, court may pronounce judgment on and sentence offenders who are entitled to apply for probation, and such judgment is appealable, and its finality must await results of any appeal. West's Ann.Pen.Code, § 1237.

7. Criminal Law 🔑1026

Judgment entered on plea of guilty is not appealable on the merits.

8. Criminal Law 🔑1134(8)

Where judgment has been entered on plea of guilty, irregularities not going to jurisdiction or to legality of the proceedings will not be reviewed. West's Ann.Pen. Code, § 1237.

9. Criminal Law 🔑980(1), 982.6(5)

If no appeal is taken, judgment entered on plea of guilty becomes final and is effective for all purposes during probation except that incarceration is prevented by reason of the stay order and that compliance with probation order is to be observed under supervision of probation officer. West's Ann.Pen.Code, §§ 1203.1, 1203.2.

10. Criminal Law 🔑982.8

Where, following fulfillment of probation conditions, plea or verdict of guilty is changed to not guilty, criminal proceedings are expunged from record, and criminal prosecution is dismissed, there is no further criminal prosecution pending against offender, and he has, without further showing of rehabilitation, received a statutory rehabilitation and reinstatement to his former status in society except that record in criminal case may be used against him for limited purposes in any subsequent criminal proceeding. West's Ann.Pen.Code, § 1203.4.

11. Elections ⚷90

Where, as to offenders entitled to apply for probation, court pronounces judgment, imposes sentence, suspends execution of sentence, and entertains application for probation, judgment is not a "final judgment" which renders effective constitutional provision that no one convicted of infamous crime shall ever exercise privileges of an elector, but is a provisional or conditional judgment, and its finality depends upon outcome of probationary proceeding. West's Ann.Pen.Code, §§ 1203.1, 1203.2, 1203.4, 1237; West's Ann.Const. art. 2, § 1.

12. Criminal Law ⚷982.6(5)

Where court withholds imposition of judgment, suspends further proceedings on plea or verdict, and places offender on probation on conditions which are reasonable and which are for such time as is authorized by law, no judgment is pending against probationer, and his usual activities are uninhibited except as to terms and conditions of probation order. West's Ann.Pen. Code, §§ 1203.1, 1203.2, 1203.4, 1237.

13. Criminal Law ⚷982.9(1, 7)

If probationer violates conditions of probation order, he is subject to revocation of such order with pronouncement of judgment and sentence to follow, and finality of judgment must await result of any appeal. West's Ann.Pen.Code, §§ 1203.2, 1237.

14. Criminal Law ⚷982.8

If probation conditions are satisfied and the time has expired, probationer is entitled to have his plea or verdict of guilty changed to not guilty, have proceedings expunged from the record, and have the criminal proceeding dismissed. West's Ann. Pen.Code, § 1203.4.

15. Criminal Law ⚷982.8

Upon dismissal of criminal proceedings following satisfaction of probation conditions and expiration of probationary period, offender is in same position as if no prosecution had ever been brought, except that the record in criminal case may be used against him in a subsequent criminal proceeding, and offender has benefit of statutory rehabilitation without further effort on his part. West's Ann.Pen.Code, § 1203.4.

16. Licenses ⚷38

Dismissal of criminal proceedings against member of profession regulated through issuance of licenses by duly authorized public officers, boards, and commissions will not automatically restore or terminate suspension of such a license, and an affirmative showing of rehabilitation, not just statutory rehabilitation following satisfaction of probation conditions and expiration of probationary period, must be made to satisfaction of licensing authority before offender may be restored to his former position as a licensee. West's Ann. Pen.Code, § 1203.4; West's Ann.Bus. & Prof.Code, §§ 4883, 6102; St.1933, p. 2476, § 1.

17. Elections ⚷90

An actual incarceration need not take place before there is a final judgment of conviction within constitutional provision that no one convicted of any infamous crime shall ever exercise the privileges of an elector. West's Ann.Pen.Code, § 1203.1; West's Ann.Const. art. 2, § 1.

18. Criminal Law ⚷982.9(8)

Revocation of suspension of execution of judgment in criminal proceeding brings former judgment into full force and effect, and offender will be remanded to proper officer to serve his sentence. West's Ann. Pen.Code, § 1203.2.

19. Criminal Law ⚷982.9(7)

When judgment is not pronounced against offender, and further criminal proceedings are suspended, there is no judgment against offender, and his activities are limited only by terms of probationary order, under supervision of probation officer, but, upon revocation of probation, offender is entitled to a hearing and to be sentenced before he can be committed to an appropriate institution. West's Ann. Pen.Code, § 1203.2.

20. Mandamus ⚷143(1)

Where judgment had been pronounced against petitioner on his plea of guilty to crime of robbery, found to be first degree robbery, but execution of sentence of imprisonment was suspended, and petitioner was placed on probationary period which had not expired, criminal proceeding was still outstanding, and judgment might become final, depending upon outcome of probation proceedings, and, therefore, petition for writ of mandate to compel registrar of voters to register petitioner as an elector was premature. West's Ann.Pen.Code, §§ 1203.2, 1203.4; West's Ann.Const. art. 2, § 1.

◆

Kenneth C. Zwerin, San Francisco, for appellant.

Dion R. Holm, City Atty., Lawrence S. Mana, Chief Deputy City Atty., and William J. Braun, Deputy City Atty., San Francisco, for respondent.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and Richard S. L. Roddis, Deputy Atty. Gen., amici curiae on behalf of respondent.

SHENK, Justice.

This is a petition for a writ of mandate to compel the registrar of voters of the City and County of San Francisco to register the petitioner as an elector. The registrar refused on the ground that he had been convicted of an infamous crime as contemplated by section 1 of article II of the Constitution of the state and was therefore ineligible to vote.

On October 6, 1954, the petitioner entered a plea of guilty to the crime of robbery, found by the court to be robbery of the first degree, a felony (penalty—five years to life, Pen.Code, § 213). Judgment was pronounced against him and he was sentenced to state prison for the time prescribed by law. He applied for probation which was granted, sentence was suspended and he was placed on probation on certain conditions for the term of five years. The term has not yet expired.

With the foregoing background the petitioner seeks to enforce his right to vote while confronted with section 1 of article II of the Constitution of the State of California which reads in part: "[N]o person convicted of any infamous crime * * * shall ever exercise the privileges of an elector in this State * * *."

The contention of the registrar is that, as provided in the foregoing constitutional provision, the petitioner is under conviction of an infamous crime and therefore ineligible to vote. It is the position of the petitioner that the sentence has been suspended under the probation laws of the state and that he is therefore entitled to exercise the right of an elector during probation.

It is first necessary to determine the meaning and application of the words "convicted of an infamous crime" as used in the above constitutional provision in connection with other laws of the state.

[1-4] A plea of guilty constitutes a conviction. People v. Williams, 27 Cal.2d 220, 228, 163 P.2d 692; People v. Goldstein, 32 Cal. 432, 433; 14 Cal.Jur.2d 493. Robbery of the first degree is punishable by imprisonment in state prison and is an infamous crime. Matter of Application of Westenberg, 167 Cal. 309, 319, 139 P. 674; 14 Cal.Jur.2d 205. The word conviction, used in this connection, must mean a final judgment of conviction. A judgment is not final if there still remains some legal means of setting it aside. There may be ways to avoid its execution, such as a general pardon, but a judgment in an ordinary criminal case, such as we have here, becomes final when all available means to

avoid its effect have been exhausted. Certain means to that end have been made available to an accused. The traditional method was by appeal. The probation laws then intervened. Since the enactment of those laws in 1903, the offender has been brought before the court for judgment on a plea or verdict of guilty under differing and varying circumstances affecting the powers of the court and the rights of the accused. They may be classified as follows:

[5] First: Those who are ineligible for probation. Offenders in that class are, for the most part, enumerated in section 1203 of the Penal Code. Undoubtedly they were excluded from the benefits of probation because of the character of the offenses against the social order. With this class of offenders the court has no discretion but to sentence the defendant to an appropriate institution for such punishment or treatment as is provided by law. That judgment is appealable under section 1237 of the Penal Code and the finality of the judgment must await the results of an appeal.

[6–15] Second: Those who are entitled to apply for probation. In this class are the vast group of offenders against the penal laws of the state, found generally in the Penal Code. Within this group the trial court is given a wide discretion in entertaining and passing upon applications for probation. Included in this group are: (A) Those as to whom the court may, in the absence of an application for probation, pronounce judgment and sentence the defendant as provided by law. This is the judgment. It is appealable (Pen.Code, § 1237) and its finality must await the results of any appeal. (B) Those as to whom the court may pronounce judgment, sentence the defendant, suspend the execution of the sentence, and entertain an application for probation. This application may be denied or be granted on such terms as may be reasonable and for such time as may be authorized by law. The judgment entered on the plea of guilty is not appealable on the merits. The rule is correctly stated with supporting authority in 24 C.J.S. Criminal Law § 1837, pp. 683 and 684: "* * * where judgment has been entered on a plea of guilty, irregularities not going to the jurisdiction or legality of the proceedings will not be reviewed." The judgment on the verdict is appealable under section 1237 of the Penal Code. If no appeal is taken the judgment becomes final and is effective for all purposes during probation except that incarceration is prevented by reason of the stay order and that compliance with the conditions of the order of probation be observed under the supervision of the probation officer as provided by section 1203.1 of the Penal Code. If the conditions of probation are violated the order of probation may be revoked and the commitment be issued forthwith. Pen.Code, § 1203.2. If the conditions of probation are fulfilled the plea or verdict of guilty may be changed to not guilty, the proceedings be expunged from the record and the case dismissed. Pen.Code, § 1203.4. When such an order has been entered there is no further criminal prosecution pending against the defendant. He has then, without any further showing of rehabilitation on his part, received a statutory rehabilitation and a reinstatement to his former status in society insofar as the state by legislation is able to do so, with one exception, namely, that under section 1203.4 of the Penal Code the record in the criminal case may be used against him for limited purposes in any criminal proceeding thereafter brought against him. The judgment in this class is not a final judgment such as to render the prohibitive measure of the Constitution effective. It is a judgment provisional or conditional in nature. It is in the process of becoming final in that its finality depends on the outcome of the probationary proceeding. (C) Those where the court withholds the imposition of judgment, suspends further proceedings on the plea or verdict and places the defendant on probation on such conditions as are reasonable and for such time as is authorized by law. In this class of cases there is no judgment pending against the probationer. He may go about his usual activities, uninhibited by any court order, except the terms and conditions of the order of probation (Pearson v. County of Los Angeles, 49 Cal.2d 523, 319 P.2d 624). In that analogous case it was properly said 49 Cal. 2d at pages 543 and 544, 319 P.2d at page 637 that "* * * inasmuch as no judgment of conviction or 'sentence of imprisonment in a State prison' was ever entered against plaintiff, his civil rights have been at no time suspended. (Pen.Code, § 2600.)" But from the time that the order of probation is made until the case is dismissed the probationer is not a free man. Although there is no judgment pending against him, he is still subject to the restraints of the order of probation and for the duration thereof. If he should violate its conditions he is subject to a revocation of the order of probation with pronouncement of judgment and sentence to follow. Pen.Code, § 1203.2. This judgment is appealable under section 1237 of the Penal Code, and for finality must await the result of any appeal. If the conditions of probation are satisfied and the time has expired the probationer is entitled to have his plea or verdict of guilty changed to not guilty, have the proceedings expunged from the record and the case dismissed. Upon such dismissal here again the defendant is in the same position as if no prosecution had ever been brought against him except as also provided in section 1203.4 of the Penal Code, the record in the criminal case may be used against him in any subsequent criminal proceeding brought against him. Here again the defendant also has the benefit of a statutory rehabilitation without any further effort on his part.

[16] Third: There is still another classification which has to do with the operation of the probation laws and the regulation of certain professions through the issuance of licenses by duly authorized public officers, boards and commissions. Within this group, generally, a high degree of professional skill and fidelity to the public which it serves are required on the part of the licensee. In this class the law will not permit the dismissal of the proceeding in the criminal case to automatically restore or terminate the suspension of the license. With this classification the requirement of rehabilitation is not the statutory rehabilitation provided by section 1203.4 of the Penal Code. An affirmative showing of rehabilitation must be made by the applicant to the satisfaction of the licensing authority before he may be restored to his former position as a licensee.

Thus, the state by legislative and decisional law has made distinctions and has classified offenses and offenders against its laws for the purpose of punishment, discipline and rehabilitation. In the probationary field the Legislature has withheld from the courts the power to grant probation in some groups. With others it has conferred upon the courts a wide discretion in dealing with those to whom the state has thus extended the opportunity for rehabilitation. With reference to the so-called professional class, the Legislature and this court have provided that the statutory rehabilitation is not applicable to the licensee. It was so held in In re Phillips, 17 Cal.2d 55, 109 P.2d 344, 132 A.L.R. 644. That case was decided in January 1941 by a divided court. The majority rule was codified, in the same year by an amendment of the State Bar Act. Bus. & Prof.Code, § 6102, Stats.1941, ch. 1183, § 1, p. 2942. Even a full pardon under the so-called pardon statute of 1933 (Stats. 1933, ch. 945, § 1, p. 2476) could not prevail otherwise. Section 1 of that act was made to provide that a full pardon by the Governor should "* * * operate to restore to such convicted person, all the rights, privileges, and franchises of which he has been deprived in consequence of said conviction or by reason of any matter involved therein. * * *" It was held in In re Lavine, 1935, 2 Cal.2d 324, 41 P.2d 161, 42 P.2d 311, that even the broad language there employed could not operate to reinstate a license to practice law, but that rehabilitation must be established to the satisfaction of this court, acting in cooperation with the Board of Governors of the State Bar.

The same may be said with reference to the discipline of members of the medical profession. In Meyer v. Board of Medical Examiners, 34 Cal.2d 62, at page 65, 206 P.2d 1085 at page 1087, decided in 1949, it was stated: "After the date of the Phillips decision, section 6102 of the Business and Professions Code was amended (Stats. 1941, ch. 1183, sec. 1, p. 2942) to provide for the disbarment 'irrespective of a subsequent order under the provisions of Section 1203.4 of the Penal Code.' Such amendment served to settle the question of legislative intent in conformity with what this court had held was the proper construction of the probation statute as a non-operative factor in relation to a disbarment order as the outgrowth of a disciplinary proceeding." The Meyer case in approving the decision in the Phillips case stated 34 Cal.2d at page 66, 206 P.2d at page 1087: "* * * that the discharge from probation and the dismissal of the criminal proceeding could not obliterate the fact of adjudication of guilt in support of a disciplinary order. * * *" The decision in the Meyer case was also by a divided court. Subsequently the rule there laid down was also codified and is now contained in section 4883 of the Business and Professions Code.

There may be other classifications as they arise. But in matters of regulation and discipline in the license field the process is not the same as provided in section 1203.4 of the Penal Code and requires separate classification and treatment in accordance with law applicable thereto.

[17] The petitioner contends that an actual incarceration must take place in order that the word "conviction" as used in the constitutional provision operates as a final judgment of conviction and that confinement in prison has not been effected in this case. But this is not so. There is a vast difference between the final judgment and the execution of the judgment. Here there has been neither a final judgment nor the execution of any judgment. The effect of the stay order was merely to permit the petitioner to be free from incarceration pending the application for probation, and during probation if granted, during which time he is in the "charge" of the probation officer (Pen.Code, § 1203.1.)

[18, 19] It is asserted by counsel for the petitioner that some trial judges "routinely" suspend the execution of judgment theretofore pronounced and that others suspend the imposition of judgment, implying that, in placing the defendant on probation, trial judges too often fail to distinguish between the forms of the order. It is to be assumed that trial judges observe the differences between the forms of the order in their effect on the probationer's activities during the period of his probation. In the one instance, where judgment is pronounced and sentence suspended, certain consequences flow to circumscribe his rights. The revocation of the suspension of execution of the judgment brings the former judgment into full force and effect and the offender is remanded to the proper officer to serve his sentence. Pen.Code, § 1203.2. When judgment is not pronounced and further proceedings are suspended, there is no judgment against him. His activities are limited only by the terms of the probationary order, under the supervision of the probation officer. Upon revocation of probation the defendant is entitled to a hearing and to be sentenced, before he can be committed to the appropriate institution. In re Levi, 39 Cal.2d 41, 244 P.2d 403.

The petitioner relies on the case of Truchon v. Toomey, 116 Cal.App.2d 736, 254 P.2d 638, 36 A.L.R.2d 1230. That was a mandate proceeding to compel the registrar of voters to enroll the petitioner as an elector. Truchon had pleaded guilty to a violation of section 220 of the Penal Code (assault with intent to commit rape). Judgment and sentence were not imposed, further proceedings were suspended. He was admitted to probation conditioned on serving 90 days in the county jail. Upon completion of probation his plea was changed from guilty to not guilty, proceedings were expunged from the record and the case was dismissed under Penal Code § 1203.4. On that record the District Court of Appeal issued the writ directing that the petitioner be registered as an elector. That case was correctly decided. It is distinguishable from the present case and furnishes no support for the petitioner's position. That case falls within subdivision (C) of the second classification above mentioned. Probation was granted without the imposition of judgment and sentence was suspended. The criminal proceedings had been expunged from that record and the case dismissed at the time Truchon applied for the writ. He had fulfilled the terms of his probation, and there were no criminal proceedings pending against him. In the present case the criminal proceedings are still pending against the petitioner. There is no showing that the terms of probation have been fulfilled for the obvious reason that it is impossible at this time to make such a showing. There is an affirmative showing by the petitioner that the time of probation has not expired.

[20] The petitioner's case falls within subdivision (B) of classification number two. He entered a plea of guilty. Judgment was pronounced against him and he was sentenced to prison. Execution of sentence was suspended and he was placed on probation for five years which have not yet expired. The criminal proceeding is still outstanding against him. The judgment may or may not become final depending upon the outcome of the probation proceedings under Penal Code section 1203.4. If probation be revoked the judgment may be ordered in full force and effect. Pen. Code, § 1203.2. The judgment would then be final and the constitutional provision fully effective. If proceedings be expunged from the record and the case dismissed there will then be no final or any judgment pending against him. It is assumed that he will at that time be entitled to the relief he now seeks. But that time has not arrived and the petition is therefore premature.

The petition is dismissed.

GIBSON, C. J., and TRAYNOR, and SCHAUER, JJ., concur.

SPENCE and McCOMB, JJ., concur in the order.

169 Cal.App.2d 836

Betty BROWN, Plaintiff and Respondent,
v.
NATIONAL ROYALTIES, INC., a corporation, Defendant and Appellant.
Civ. 5669.

District Court of Appeal, Fourth District, California.
April 23, 1959.
Rehearing Denied May 22, 1959.
Hearing Denied June 18, 1959.

Action by assignee to recover from corporate farm owner for purchase price of fertilizer and insecticides sold and delivered to it. The Superior Court of Kern County, Robert B. Lambert, J., entered judgment for assignee and corporate farm owner appealed. The District Court of Appeal, Mussell, J., held that there was sufficient evidence to sustain finding that corporation's farm manager had authority to make purchases involved and that the materials were sold and delivered to corporation and were applied to corporation's land with its knowledge and consent.

Affirmed.

1. Sales 🔑353(1)

Complaint alleging that within the two years last past defendant had become indebted to a certain party for merchandise sold and delivered to defendant in specified amounts and that defendant agreed to pay said sum to seller, was sufficient to allege a common count.

2. Assumpsit, Action of ⚷5

Pleading which is sufficient as a common count is not subject to a general demurrer.

3. Pleading ⚷329

In assignee's action against corporate farm owner to recover for fertilizer and insecticides sold and delivered to corporation, record disclosing depositions of seller's officers to which were attached photographic copies of ledger cards, invoices, credit and delivery slips, showed that court did not deprive corporate farm owner of reasonable opportunity to prepare for trial since there was a substantial compliance with corporation's demand for a bill of particulars.

4. Corporations ⚷432(12)

In action to recover from corporate farm owner for fertilizer and insecticides sold and delivered, there was substantial evidence to show that corporation's farm manager had authority to make purchases involved, that the materials set forth in the bill of particulars were sold and delivered to corporation and that they were applied to corporation's land with its knowledge and consent.

◆

Thomas H. Werdel, Bakersfield, for appellant.

Kendall, Howell & Jelletich, Bakersfield, for respondent.

MUSSELL, Justice.

This is an action brought by plaintiff as assignee of two corporations to obtain a judgment against the defendant for the purchase price of fertilizer and insecticides sold and delivered to it by plaintiff's assignors. In the first cause of action in the amended complaint it is alleged:

> "That within two years last past, defendants became indebted to A. F. C., Inc., a California corporation, for fertilizer and insecticides sold to defendants in the amount of One Thousand Seven Hundred Sixty-eight and 21/100 Dollars ($1,768.21) and that defendants agreed to pay A. F. C., Inc., a California corporation, said sum."

In the second cause of action it is alleged:

> "That within two years last past, defendants became indebted to B. & W., Inc., a California corporation, for fertilizer and insecticides sold and delivered by B. & W., Inc., a California corporation, to defendants in the amount of Three Thousand Four Hundred Ninety-two and 35/100 Dollars ($3,492.35) and that defendants agreed to pay said sum."

Defendant's demurrer was overruled, an answer was filed, and, upon demand, plaintiff submitted a bill of particulars. Defendant filed motions for an order requiring a further bill of particulars and for summary judgment. These motions were denied and the cause was heard by the court without a jury. The pretrial order indicates that the contentions of the defendant are:

> "1. The authority of Carlos Rey to make such purchases on behalf of the defendant;
>
> "2. Whether or not the materials set forth in the Bill of Particulars were actually delivered to defendant;
>
> "3. Whether or not the materials set forth in the Bill of Particulars were actually sold to the defendant;
>
> "4. Whether the merchandise ostensibly sold to the defendant was actually applied to their operation with their knowledge."

The trial court found the allegations of the amended complaint to be true and entered judgment for plaintiff for the amounts claimed to be due by plaintiff. Defendant appeals from the judgment, claiming that the evidence is insufficient and that the court erred in overruling the demurrer, in admitting certain evidence, and in refusing to make findings.

In 1956 the defendant National Royalties, Inc., was farming approximately 320 acres of cotton, 320 acres of alfalfa, 100 acres of sugar beets and about 83 acres of rice, all in Kern county. Carlos Rey, a farmer, was employed by defendant National Royalties to manage its farming operations and in each instance before ordering the fertilizer and insecticides involved for application on defendant's properties Rey called Mr. Smith, president of defendant corporation, on the phone and Smith always gave him the "o. k. to go ahead". Rey farmed some property of his own but all of the fertilizer and insecticides sold by plaintiff's assignors to the defendant were applied to and on the property of the defendant corporation. Plaintiff introduced in evidence the original ledger cards of the defendant with A. F. C., Inc., and B. & W., Inc., which showed the dates of invoice numbers and charges to defendant as set forth in the bill of particulars. Carbon copies of invoices showing delivery dates and the original delivery tickets were introduced in evidence and there was testimony as to actual deliveries of the merchandise on defendant's property. These records, together with other evidence introduced, was sufficient to show that the merchandise sold to defendant by plaintiff's assignors was received by the defendant and applied to its property with the consent, knowledge and authorization of the president of said defendant corporation.

The evidence shows that some of the merchandise furnished by B. & W. Inc., was billed to the company in care of Carlos Rey. Pete Hildebrand, the manager of B. & W., investigated the matter and designated the charges billed to Carlos Rey and subsequently transferred to the account of the defendant.

[1] Appellant contends that the court erred in overruling the demurrer to the first cause of action. This argument has no merit. A common count is alleged in the first cause of action and the demurrer was properly overruled. In American-La France Fire Engine Co. of California v. Bagge, 98 Cal.App. 291, 276 P. 1066, 1068, it was held that a common count is pleaded in the following language:

> "That within two years last past the defendants became indebted to the plaintiff for goods, wares and merchandise sold by the plaintiff to the defendants at their special instance and request in the sum of $73,439.45, no part of which has been paid except the sum of $9889.31." (5 Cal.Jur.2d sec. 3, p. 527.)

[2] A pleading which is sufficient as a common count is not subject to a general demurrer. Miller v. McLaglen, 82 Cal. App.2d 219, 223, 186 P.2d 48.

[3] Appellant claims that it was deprived of a reasonable opportunity to prepare for trial in that the court refused to require plaintiff to supply defendant with a further bill of particulars. However, the deposition of James Bonaventura, president and general manager of A. F. C., Inc., and also vice-president and general manager of B. & W., Inc., taken on April 11, 1957, had attached to it photographic copies of ledger cards, invoices, credit and delivery slips giving defendant full information as to the items sold and delivered to defendant. The record shows a substantial compliance with defendant's demand for a bill of particulars.

[4] There is substantial evidence in the record showing the authority of Carlos Rey to make the purchases involved, to show that the materials set forth in the bill of particulars were sold and delivered to defendant, and that they were applied to the defendant's lands with the knowledge and consent of the defendant.

Appellant's argument that the trial court erred in refusing to make findings is without merit. The record shows that findings were in fact made covering the issues involved and the allegations contained in the pleadings.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

170 Cal.App.2d 10

Arthur A. FAIRCHILD, Plaintiff and Appellant,
v.
Geraldine F. ADAMS, Defendant and Respondent.
Civ. 23491.

District Court of Appeal, Second District, Division 1, California.
April 28, 1959.
Rehearing Denied May 20, 1959.
Hearing Denied June 24, 1959.

Surviving brother's action against surviving sister for the latter's malicious prosecution of contest of deceased sister's will and codicil leaving all deceased sister's property to the surviving brother. The Superior Court, Los Angeles County, Arthur Crum, J., entered judgment for defendant, and the plaintiff appealed. The District Court of Appeal, White, P. J., held that successful will contest on ground of undue influence exerted on deceased sister by surviving brother was conclusive evidence, in absence of fraud, of existence of probable cause for the contest, notwithstanding that on appeal the Supreme Court had reversed the judgment denying probate.

Affirmed.

1. Courts 🔑91(1)

Inferior courts are bound by decisions of the Supreme Court.

2. Courts 🔑89

Under doctrine of stare decisis, authority of Supreme Court decision is limited to the points therein actually involved and actually decided.

3. Malicious Prosecution 🔑25(3)

Where Supreme Court decided that evidence produced at trial of surviving sister's contest of deceased sister's will and codicil giving all deceased sister's property to surviving brother was not sufficient to support judgment that both will and codicil were result of undue influence exerted by brother on deceased sister at exact time of their execution, and surviving brother filed instant malicious prosecution action against surviving sister, the Supreme Court did not have before it and did not determine the issue whether the surviving sister had probable cause for instituting the will contest, and the question of probable cause was not to be determined alone upon the decision of the Supreme Court.

4. Malicious Prosecution 🔑25(3)

Successful will contest on ground of undue influence exerted on testatrix was conclusive evidence, in absence of fraud, of existence of probable cause for the contest, notwithstanding that Supreme Court reversed the judgment denying probate.

5. Appeal and Error 🔑204(1), 230

Where there was no proper and timely objection to admission of evidence, no error of the trial court could be predicated thereon.

6. Malicious Prosecution 🔑64(1)

In surviving brother's action against surviving sister for her malicious prosecution of contest of deceased sister's will and codicil leaving all deceased sister's property to surviving brother, evidence failed to show that perjured testimony was given or presented by the surviving sister in the will contest.

◆

Kenneth M. Liskum, Huntington Park, for appellant.

Austin, Austin, Jones & Chaffee, Irving P. Austin, Compton, for respondent.

WHITE, Presiding Justice.

Plaintiff appeals from the judgment for defendant in his action for malicious prosecution. Plaintiff and defendant are brother and sister of Myrtle Welch, deceased. By the instant action, plaintiff brother seeks to recover for damages allegedly suffered because of defendant's objections to the probate of their sister's will. See In re Welch's Estate, Cal.App., 261 P.2d 18; In re Estate of Welch, 43 Cal.2d 173, 272 P.2d 512.

The Will and codicil offered for probate by appellant were found by a ten to two verdict of the jury in the superior court to have been made under undue influence of the appellant. The judge of the superior court denied appellant's motions for judgment notwithstanding the verdict and for a new trial. On appeal, three justices of the District Court of Appeal said: "The record in this case has been read with care. It shows that the evidence does support the verdict of the jury * * *" In re Welch's Estate, Cal.App., 261 P.2d 18, 20. Hearing was granted by the Supreme Court and Mr. Justice Spence, speaking for that court (with the concurrence of four other justices) reversed the judgment and admitted the will to probate, stating at page 175 of 43 Cal.2d, at page 514 of 272 P.2d, that "* * * it appears that appellant's contention that the evidence was insufficient to support the jury's finding must be sustained".

The Supreme Court's decision reversing said judgment, 43 Cal.2d at page 175, 272 P.2d at page 514 thereof, includes the following language quoted from In re Estate of Arnold, 16 Cal.2d 573, 577, 107 P.2d 25: "* * * Evidence must be produced that pressure was brought to bear directly upon the testamentary act * * * Mere general influence, however strong and controlling, not brought to bear upon the testamentary act, is not enough; it must be influence used directly to procure the will, and must amount to *coercion* destroying free agency on the part of the testator * * * mere opportunity to influence the mind of the testator, even coupled with an interest or a motive to do so, is not sufficient * * *

" 'The unbroken rule in this state is that courts must refuse to set aside the solemnly executed will of a deceased person upon the ground of undue influence unless there be proof of "a pressure which overpowered the mind and bore down the volition of the testator at the very time the will was made" ' * * *"

Myrtle Welch, the deceased sister of plaintiff and defendant, after the death of her husband in January, 1947, decided to move from her Compton home and live with her sister (defendant herein) in her sister's Long Beach home, listed her own home for sale and started packing her belongings, some for storage and some for moving to defendant's home.

About February 1st, while the two sisters were still packing, plaintiff appeared at Myrtle's home and caused a change of plan. He told defendant herein, "Take your things and get out of here. I am going to stay with Myrtle." He cancelled Myrtle's listing for sale of her home. When plaintiff ordered defendant herein to "get out", Myrtle accompanied her into the yard and said: "I have stood all I can stand of fighting. You will just have to do as he says. * * * I will stay here until he gets his things out of the garage, then I will ease him out without fighting".

February 28, 1947, Myrtle willed plaintiff herein all her property, approximately $18,000.00. She was then 68 years old. At approximately the same time, said plaintiff willed Myrtle $25,000.00, which, according to his own testimony, he did not have. December 26, 1949, when Myrtle was 70 years old, she and plaintiff herein exchanged testamentary documents by which each named the other as executor and executrix to act without bond. As said by the Supreme Court, 43 Cal.2d at page 177, 272 P.2d at page 515, "No one except Myrtle and Arthur was present when the wills and codicils were executed.

"Myrtle was of a mild disposition and tried to avoid quarrels with Arthur * * * Arthur systematically excluded Geraldine (defendant herein) and her sons from the house. However, Myrtle surreptitiously visited Geraldine in Long Beach when Arthur was away on his frequent mining trips."

The further testimony mentioned in the decision of the Supreme Court concerns only plaintiff's arrangements about two weeks before Myrtle's death for the cheapest possible disposal of the latter's body without any funeral, his failure to call a doctor or nurse to attend her until a few hours before her death when he was told by the mortician that he would have to procure a doctor's signature on a death certificate or await an autopsy before the body could be disposed of, the filthy, emaciated and unkempt condition of her body, and his failure to attend her funeral. She died December 22, 1951, at the age of 72 years.

The following language is quoted from page 180 of 43 Cal.2d, at page 517 of 272 P.2d of said decision: "At most, the record here shows no more than that Arthur was so situated as to have had an opportunity to unduly influence the mind of Myrtle, and that *his actions and conduct at times might be regarded as suspicious* * * *" (Emphasis added.)

Justices Schauer and Carter dissented, Justice Schauer, 43 Cal.2d at page 180, 272 P.2d at page 517, stating that in his view "the evidence, construed favorable to sustaining the judgment * * * amply supports all essential implied findings of the jury", and Justice Carter, 43 Cal.2d at pages 181 and 182, 272 P.2d at pages 517 and 518, quotes the provision of section 371 of the Probate Code that "Any issue of fact involving * * * the due execution and attestation of the will, or any other question substantially affecting the validity of the will, must be tried by a jury * * *" He then states that "In this case, we have ten jurors rendering a verdict on the issue of undue influence; we have an able and outstanding trial judge denying motions for a nonsuit, directed verdict, judgment notwithstanding the verdict and for a new trial; and three able and eminent jurists of the District Court of Appeal rendering a unanimous decision affirming the judgment, In re Estate of Welch, Cal.App., 261 P.2d 18—holding the evidence sufficient to establish the issue of undue influence. In addition to the above we have Mr. Justice Schauer and myself on this court—a total of six judges in addition to the ten members of the jury—all of the opinion that the evidence is sufficient to support a finding of undue influence."

In the instant action, by the complaint, it is alleged that defendant procured the verdict of the jury and the judgment of the trial court denying probate of the will and codicil of Myrtle Welch, deceased, by perjured testimony, of which five examples are alleged. As to each example the evidence is conflicting and the trial court has found that no perjured testimony was given by defendant and that all testimony given and produced by her at said trial was true.

The court further found and concluded that defendant did no act in connection with the filing and prosecution of her opposition to the probate of the will of her deceased sister "with malice or without probable cause"; and that it is not true that plaintiff has been damaged "in any manner by any action complained of by plaintiff in the said complaint herein".

Appellant's grounds of appeal are stated by him in his opening brief as follows:

"(a) That the Trial Court based its decision on the dissenting opinion of the Honorable Justice Carter set forth in the prior case [In re] Estate of Welch, 43 Cal.2d 173, [272 P.2d 512], rather than on the majority opinion.

"(b) That the Trial Court, in this case, ignored the unfair means and perjured testimony by which Defendant and Respondent procured the decision in her favor in the Trial Court in the prior case.

"(c) That the Trial Court, in this case, ignored the rules or law pertaining to Respondent's defense of 'Advice of Counsel'.

"(d) That the Trial Court, in this case, ignored the rules of law pertaining to Malicious Prosecution of a Civil Action."

Plaintiff, in his complaint in the instant action, cites and quotes from the decision of the Supreme Court in Re Estate of Welch, supra. Defendant, in her answer thereto, admits the allegations of the complaint in that respect and alleges and quotes at length from the dissenting opinion of Justice Carter hereinbefore referred to. The court found both allegations true.

[1, 2] As urged by appellant in the instant action, inferior courts are bound by the decisions of the Supreme Court. 13 Cal.Jur.2d, p. 680, par. 144, and cases there

cited. However, "It is a fundamental qualification of the doctrine of stare decisis that the authority of a decision is limited to the points therein actually involved and actually decided. Thus, such authority does not extend to what may be said in the opinion aside from or in addition to the decided points." 13 Cal.Jur.2d, p. 662, par. 129, and cases there cited.

[3] In the instant action, the judge of the trial court decided that defendant had "probable cause" for opposing the probate of the will of her sister. The Supreme Court in Re Welch's Estate, supra, determined that the evidence produced at the trial in that proceeding was not sufficient to support the judgment that both the will and codicil were the result of undue influence exercised by plaintiff upon decedent at the exact times of their execution. That is a different issue from the one determined by the court in the instant action, to-wit, that the evidence produced by defendant in said will contest and in the instant action was sufficient to cause a reasonable person to believe that defendant had exercised such undue influence.

It cannot be assumed in the instant action that plaintiff, her attorney, ten jurors, the trial judge, three judges of the District Court of Appeal, and two Supreme Court justices were not reasonable persons. They considered the evidence produced at the will contest alone sufficient, not only to justify the commencement of the proceeding, but also to support the judgment that the will and codicil were results of such undue influence. They were declared by the Supreme Court to be in error—but not unreasonable—in their opinions.

The decision of the Supreme Court was not that no undue influence had been used by plaintiff, but that defendant had failed to prove that the testamentary documents were executed by decedent because of undue influence exerted upon her by defendant at the very time of her execution of her will and codicil.

Whether the evidence in the instant action, of which the evidence in the will contest is the major portion, shows *probable cause* for defendant's opposition to plaintiff's petition for probate of their sister's will and codicil presents a different question, and one which is not to be determined alone upon the decision of the Supreme Court upon the will contest, wherein no reference whatever is made to the existence or nonexistence of probable cause for instituting the action challenging the plaintiff's petition for probate of the will and codicil of Myrtle Welch, the sister of plaintiff and defendant.

The holding of the trial court favorable to respondent herein concerning the existence of probable cause for the latter's opposition to appellant's petition for probate of the will may not be disturbed merely upon the ground that the Supreme Court reversed the judgment obtained by her following a jury trial upon the issues framed by her complaint in opposition to probate of the will. The question of probable cause for instituting the opposition to probate of the will was not before or decided by the Supreme Court.

[4] The favorable outcome of the proceedings in the court below is conclusive evidence, in the absence of fraud, of the existence of probable cause for defendant's opposition to plaintiff's petition for probate, notwithstanding reversal by the Supreme Court. Bealmear v. Southern California Edison Co., 22 Cal.2d 337, 340, 139 P.2d 20, and cases there cited.

[5] Appellant's statement in his opening brief that although it was immaterial and highly prejudicial certain testimony was received is not a ground for reversal since no proper and timely objection to said evidence was made and no error of the trial court can be predicated thereon.

[6] Appellant urges that, even conceding the judgment in the original action to be conclusive evidence of probable cause for instituting it, the judgment for defendant in the instant action should be reversed because of "perjury" shown by the inconsistencies in the evidence produced on the part of the defendant herein at the will contest

itself, and calls particular attention to her statement at the trial of the instant action "that she was incapable of judging (her sister's sanity) and needed a psychiatrist herself".

A careful reading of the entire transcript of the evidence in the instant action indicates that it must have been an extremely unpleasant and grueling experience for the elderly defendant to try to remember exactly what she had told her attorney some five or six years before about events and conversations which took place some five years before that, and just what her testimony had been in the will contest. However, her testimony convinces this court, as it did the judge who tried the instant action, that no perjured testimony was given or produced by her.

Our determination that the trial court was correct in holding defendant had "probable cause" for contesting plaintiff's petition for probate of their sister's will and codicil makes it unnecessary to consider the other grounds for reversal urged by appellant.

The judgment is affirmed.

FOURT and LILLIE, JJ., concur.

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169 Cal.App.2d 681

Bernard H. GAINER and Betty M. Gainer, doing business as Betty M. Gainer Trucking, Plaintiffs, Respondents and Appellants,

v.

A. D. STORCK, Individually and doing business as Storck's Garage, Defendant, Appellant and Respondent.

Civ. 9330.

District Court of Appeal, Third District, California.

April 17, 1959.

Rehearing Denied May 8, 1959.

Hearing Denied June 9, 1959.

Action against a truck repairman for upset damage caused plaintiffs' truck by faulty brake repair, and for loss of use. The Superior Court, Napa County, Percy King, Jr., J., entered judgment for plaintiffs and repairman appealed. The District Court of Appeal, Van Dyke, J., held that evidence presented a question for the jury as to whether or not under the circumstances, including plaintiffs' lack of funds, and delay of 88 days in getting their truck back to work, plaintiffs exercised reasonable effort to mitigate damage from loss of use.

Judgment affirmed.

1. Trial 🔑133(6)

In action against a truck repairman for upset damage caused plaintiffs' truck by faulty brake repair, and for loss of use, references to liability insurance which repairman carried would not be deemed prejudicial in view of fact that there was ample proof of liability, court was prompt to admonish jury to disregard anything said about insurance, and trial court denied motion for a new trial based on alleged prejudice due to injection of insurance into the case.

2. Damages 🔑190

Where truck owner, in an action for upset damage and loss of use testified he had been the owner and operator of two trucks engaged in contract hauling, and that he had had the trucks in operation for some time, and that from business experience and from his records he could determine profits that he reasonably could have made by use of the truck that had been damaged, damages measured by loss of profits from use of the truck were properly allowable and such testimony was sufficient to sustain an award for loss of use based on such loss of profits.

3. Damages 🔑139

An award of $500 property damage, plus approximately $5,000 for loss of use of a truck for a period of three and one-half months was not excessive, even though the truck was purchased prior to the date it was damaged for $2,800, in view of uncontroverted testimony that net earnings of the truck for such period would have been approximately $5,000.

4. Damages ⟹208(7)

In action for upset damage to a truck caused by faulty brake repair, and for loss of use, evidence presented a question for the jury as to whether or not under the circumstances, including plaintiffs' lack of funds and delay of 88 days in getting their truck back to work, plaintiffs exercised reasonable effort to mitigate damage from loss of use.

◆

Robert E. Reeser, Harold R. Farrow and Robert R. Barton, Oakland, for appellants.

Appelbaum, Mitchell & Bennett, Oakland, for respondent.

VAN DYKE, Presiding Justice.

This is an appeal from a judgment for plaintiffs in an action for damages resulting from upset damage to a truck caused by faulty brake repair and from loss of use. The contentions of appellant Storck are that he was denied a fair trial through plaintiffs' wrongful injection into the case of the matter of liability insurance, and that damages were improperly proved and were excessive. Since Bernard H. Gainer appears to have been in charge of all activities following the accident and, alone of the two plaintiffs, testified at the trial, we shall refer to plaintiffs in the singular as "Gainer".

Gainer's first amended complaint contained two counts, one against Storck for negligence in repairing the brakes on Gainer's truck, and the second against Storck's insurance carrier for breach of contract. The contract count alleged that one Edmonds, an adjuster employed by Storck's insurance carrier, promised Gainer he would be paid all of the cost of repair and damages for loss of use; that this promise was breached. The amount of damages alleged in each count was identical. A demurrer to the second count was sustained and Gainer filed a second amended complaint. This time Storck's insurance carrier was dropped as a party defendant, but the second count contained allegations that one Edmonds, a named defendant later dismissed from the case, acting as the authorized agent of Storck had admitted the liability of Storck and, for Storck, had promised that Storck would pay for repairs and loss of use; that later this contract obligation had been breached by Storck. As to agential authority of Edmonds to bind Storck, it was Gainer's theory that Edmonds was an employee of Storck's insurance carrier, that the policy of insurance authorized the insurance carrier to act for Storck with regard to plaintiffs' claim, which it did through Edmonds, its claims adjuster, and that Edmonds' dealings with Gainer bound Storck. The cause came on for trial on the second amended complaint and Storck's answer thereto. At the opening of the trial and before evidence was taken Storck moved for summary judgment as to the contract count. The motion was denied. Claiming that the joinder of the insurance carrier in the first instance and the pleading of the contract count in the second amended complaint against Storck only was all sham and pretense for the purpose of injecting insurance into the case to the prejudice of Storck, it is argued here that the denial of Storck's motion for summary judgment on the second count, followed by references to insurance during the opening statement and during the taking of testimony resulted in the trial being so unfair to Storck as to require reversal in the interest of justice.

[1] A study of the whole record has led us to the conclusion that although the record strongly suggests there was on the part of Gainer's counsel a studied effort to try the insurance company instead of Storck the plan did not in fact succeed and that the trial was fair. To begin with, it is not contended on appeal that the evidence of Storck's negligence in repairing the brakes on Gainer's truck was not sufficient to warrant the jury in finding that it was that negligence which caused the overturn of Gainer's truck when put in operation shortly after it had been delivered to him

for use. The evidence upon the matter of negligence and proximate cause is ample and persuasive. Next the references to insurance made in the presence of the jury were few. The trial court appears to have been diligent to prevent unwarranted references to insurance, and prompt to admonish the jury to disregard those that occurred. When plaintiff approached the proof of the contract count the court ruled that agency must be first proved and that proof could not be made through or by reference to the insurance policy. No other proof was attempted and Gainer was nonsuited as to the contract count. The ruling on nonsuit was made out of the presence of the jury.

Storck claims that Gainer's counsel also injected insurance into the case in his opening statement. It is admitted that he did not use the word "insurance" at all, but it is claimed that he secured the same effect by innuendo. Having described the accident, counsel stated that Gainer got in touch with Storck, told Storck about the accident and then went back to San Leandro, where he lived "because he had a policy of insurance on his own truck for collision; $500 Deductible clause; he wanted to get in touch with his own company." This, argues appellant, inferred that there was a second insurance company, to-wit: Storck's company. Counsel then stated that Gainer asked Mr. Reeser, an attorney, to take over, and Mr. Reeser got in touch with the "representative of Storck's". This again, argues appellant, inferred insurance. The statement continued, counsel saying that after Mr. Reeser "got in touch with the representative of Storck's * * * they agreed they would take the truck * * * inspect the brakes, and if they found the brake job was the fault of the accident, then Mr. Gainer would be reimbursed * * *." Counsel said the inspection showed the brakes were faulty and then Mr. Reeser "got in touch with the man who represented Mr. Storck and at that time they talked about the matter and Mr. Edmunds, the agent then of Mr. Storck, said, 'I think that your bids are too high; maybe they should salvage the truck, sell it for junk, it is not worth fixing.'" Counsel further said that finally the agent of Storck told Storck to send the truck to a garage in Oakland, "have it fixed, bring us the bills and we will pay it." That after the repairs and "after the agent had been furnished with information as to how much money was lost per day as a result of not having the truck in the businesss and how many days it was estimated it would be out of use, this agent then said, 'No, we won't pay that. As a matter of fact, we won't even pay to have the truck repaired unless you agree to take only so much money' which was, oh a third, maybe, or a half of what was earlier agreed upon." The allegations of the second count alleging contract liability of Storck for his agent's promise were in issue and we see nothing unfair about the statement nor any justification for Storck's claim that from the statement the jury must have drawn the inference there was an insurance carrier back of Storck. Appellant argues as follows: That although the word "insurance" was not mentioned in plaintiffs' counsel's opening statement, only the most naive and stupid juror would have failed to recognize that the insurance company had been contacted by Attorney Reeser, representing the plaintiffs, when he spoke of plaintiffs getting in touch with Storck's representative and then of Storck getting in touch with his "own company". It may be that the jury, or some jurors, interpreted the statement as indicating Storck was insured. But counsel had a right to speak of the contract count, and did so without any direct reference to insurance. Hence, if any juror jumped to a conclusion about insurance it was not because counsel was guilty of misconduct. He had a right to say what he said.

During the trial there were only two instances in which the matter of insurance was referred to. The first was during the direct examination of Gainer. After the witness had described the accident, the following occurred:

"Q. Now, what did you do after that? A. Well, the truck was crossways of the road, they got it out of there; then I come back in to Storck's Garage and notified them, Mr. Storck's son-in-law, just what had happened, and—

"Q. Tell me this: Did Mr. Storck's son-in-law tell you that he would do anything about it? A. He reported it to his insurance—

"Mr. Farrow [Gainer's Counsel]: Just a moment. Don't say anything—he reported it to someone, is that what you were going to say? A. Yes.

"Q. Did he do anything else about it? A. No." The second reference occurred during the cross-examination of defendant Storck.

"Mr. Farrow: Q. Now, did, on any occasion did someone come to your shop and talk to you about this? A. That is right.

"Q. And did they ask you about the day the truck was put in there for repair work? A. Yes, I knew that.

"Q. Did they ask you what you did? A. That is right.

"Q. They wrote down what happened? A. Can I explain?

"Q. Yes, sir, go ahead. A. Mr. Gainer did come in and tell us about it, and we carried adequate insurance to cover—

"The Court: I don't want the subject of insurance to enter this case at all, and I will instruct the jury that this is an action between Gainer and Storck. No insurance company is involved, nor anybody else in the Second Amended Complaint which we are proceeding on, and mention of insurance companies are to be—an insurance company for Mr. Storck, are to be disregarded by you, and you consider Mr. Storck as the defendant in this action.

"Mr. Farrow: Now, could I ask the Reporter to read the last question and the answer? I think it was not complete. As I understand Your Honor's ruling, Your Honor's statement, it was not that he could not answer this question.

"The Court: That is my ruling.

"Mr. Bennett [Counsel for Storck]: I think the answer was not responsive. He asked if he could make a statement.

"The Court: The answer will be stricken out. The jury is to disregard the answer, without—about any insurance company.

"Mr. Farrow: All right. Mr. Reporter, will you read the last question put to this witness? (Thereupon the Court Reporter does the same.)

"Mr. Farrow: Now, let's put it this way, Mr. Storck: Q. Besides Mr. Gainer, some other persons came to your shop and talked to you about this repair job, didn't they? A. No, not me."

In ruling on the question of prejudice by reference to insurance the following must be taken into consideration. First, there was ample proof of liability. This is not a case where the weight of the evidence on that issue approaches even balance. Next, the references as to insurance in counsel's opening statement are at most inferential and not direct, and the references to insurance during the taking of testimony were volunteer statements by witnesses. The court was prompt to admonish the jury to disregard anything said about insurance. Next the court instructed the jury that they were to disregard such references, that no insurance company was a party to the action, and they were not to consider the case as one other than a case between Gainer and Storck. Finally, prejudice was urged during presentation of a motion for a new trial and the trial court denied the motion. The whole record considered, this court cannot say that defendant was subjected to an unfair trial or that he suffered prejudice through reference to insurance.

Storck contends that the wrong measure of damages was used, that the damages awarded were unreasonable, that Gainer failed to mitigate damages, and that the damages awarded included wrongfully an amount for Gainer's personal services. Gainer sued for the cost of repairs which he was required to pay in the sum of $500 and there is no dispute as to that item. The dispute concerns the amount awarded for loss of use in the sum of $4,880.54. The proof was confined to evidence of the profits which Gainer would have received if his truck had been available for use. Gainer had two trucks of the same hauling capacity and had been using both in contract work for some time prior to the damage to one. He testified that he would have used this truck a total of 88 days during the time it was being repaired, on the same jobs on which the other truck was used; that he kept a record of the earnings and expenses of the other truck during these days; that the gross amount earned by the truck in use was $5,642.64; that the expenses of operating that truck was the amount he testified to for each item of expense and that the net, after deducting all expenses, was the sum of $4,947.64. The jury awarded slightly less. He introduced in evidence his records and books of account and had marked for identification a summary which he prepared therefrom showing the accounting by which he arrived at the net amount of profits he would have received from use of the damaged truck. Appellant introduced no evidence on the subject of damages. He contends here that the only and exclusive measure of damages properly applicable in this case was the rental value of the truck, but he introduced no evidence as to what that rental value was. In Grupe v. Glick, 26 Cal.2d 680, 692–693, 160 P.2d 832, 840, it is stated:

> "* * * [w]here the operation of an established business is prevented or interrupted, as by a tort or breach of contract or warranty, damages for the loss of prospective profits that otherwise might have been made from its operation are generally recoverable for the reason that their occurrence and extent may be ascertained with reasonable certainty from the past volume of business and other provable data relevant to the probable future sales. * * On the other hand, where the operation of an unestablished business is prevented or interrupted, damages for prospective profits that might otherwise have been made from its operation are not recoverable for the reason that their occurrence is uncertain, contingent and speculative. * * * But although generally objectionable for the reason that their estimation is conjectural and speculative, anticipated profits dependent upon future events are allowed where their nature and occurrence can be shown by evidence of reasonable reliability. * * * All of these cases recognize and apply the general principle that damages for the loss of prospective profits are recoverable where the evidence makes reasonably certain their occurrence and extent." See, also, Edwards v. Container Craft Carton, etc. Co., 161 Cal.App.2d 752, 327 P.2d 622; Natural Soda Products Co. v. City of Los Angeles, 23 Cal.2d 193, 199, 143 P.2d 12; Lambert v. Haskell, 80 Cal. 611, 618, 22 P. 327.

[2] We think this was a case where damages, measured by loss of profits from the use of Gainer's truck, were properly allowable and the amount of damage so measured was sufficiently shown by Gainer's testimony. He had been the owner and operator of two trucks engaged in contract hauling, one driven by himself and one by a hired driver. He had had the trucks in operation for some time and he testified from business experience as to the profits that could reasonably be made by the use of the truck that was damaged. The proof he submitted cannot be attacked as being too remote or too speculative to support the jury's award based on loss of profits from loss of use.

[3] Passing from the appropriateness of the measure of damages used, appellant contends that the damages awarded were unreasonable; that they included an amount for Gainer's personal services in driving; that the period of loss of use was excessive and unnecessary; and that Gainer failed in his duty to mitigate damages.

We will discuss these assignments of error together. Storck argues: "It would seem as if something were basically wrong with the judgment for $500 property damage plus $4,880.54 for the loss of use of a truck for a maximum period of three and one-half months, which was purchased less than two months prior to the date it was damaged for $2,800." Elaborating upon this premise, Storck attacks the evidence in various ways and presents arguments that were no doubt addressed to the jury at the trial and to the court on motion for a new trial. However, viewed from the standpoint of a reviewing court on appeal, the evidence substantially supports the award both as regards the amount calculated from Gainer's testimony, the only testimony addressed to the subject, and from the standpoint of reasonableness. Gainer testified as follows: I got the truck back on November 1st and put it to work about a week after that. I computed from my bookkeeping records the amount of days that the truck was out of work as a result of the accident and it was approximately 88 days as I recall. (Witness is shown a document.) I prepared this and I got the information from the work of the other truck which had been working on different jobs that this truck would have worked on if I had had it to work. It would have worked on the same jobs. My figures are based on the rate per hour that the truck worked and the driver's time. While the damaged truck was out of commission the income earned by the other truck amounted to $5,642.64 gross. From that I deducted oil at $5 per month, gasoline at $6.49 per day, tires at $20 per month, Board of Equalization tax at 3% and Public Utilities Commission at one-quarter of one per cent. The total of these deductions from the gross amount that the other truck earned gives me $4,947.64. I did not deduct anything for repairs because the trucks had been repaired fairly well during the period I had them on the job and after I put the damaged truck back to work in November, it did not require any repair work for quite a while. Let's say about three months at which time I put a motor in it. There was introduced in evidence certain bookkeeping records concerning the operation of the companion truck during the time the damaged truck was out of use and Storck entered into a detailed analysis of these figures in an effort to show that Gainer's testimony concerning gross and net income was erroneous. Particularly Storck complained that Gainer was allowed compensation for his personal services and that this sum ought to be deducted. It cannot be said as a matter of law that some allowance could not be made for what might be called Gainer's wages that would have come to him had he been able to have both trucks operating, with himself driving one, as had been his custom. The business was his and although he continued the other truck in operation in charge of a hired driver, the jury could properly hold that included in the loss which proximately flowed from the loss of use was some amount of added income Gainer's business would have enjoyed had his way of doing business not been wrongfully interrupted. We find nothing in the record that justifies a reviewing court in refusing to accept as within the orbit of reasonable damages any part of the sum awarded by the jury and, on motion for new trial, approved by the trial court.

[4] On the subject of Gainer's alleged failure to mitigate damages, Storck argues that a part of the period the damaged truck was out of commission is chargeable to Gainer himself in that for a considerable period after the truck had been repaired he did not pay the repair bill and put the truck back to work. But Gainer testified that the company which repaired the truck refused to release it to him until the repair bill was paid in full; that he was unable to obtain the necessary money until November 1, 1955, at which time he obtained his truck and within a few days thereafter put it to work; that in the meantime he attempted to rent another truck, but found that none was available, whereupon he patched up

an old Chevrolet, which broke down after one trip; that he tried to arrange for his employee driver to drive for someone else in the interim, but was unable to do so without losing his services when both trucks would be available; that he used his best efforts to get his truck repaired and back on the job as soon as possible and that although the second truck was earning the income he testified to this did not supply him with the necessary funds because he had to use that income for keeping the operating truck in fuel, in making payments on the conditional contracts whereunder he was purchasing both trucks and in keeping up insurance on the two trucks. In short, he didn't have the money to redeem the damaged truck from the repairman's bill until November 1st. It cannot be said as a matter of law that respondent did not make reasonable efforts to mitigate damage. Once again the argument on this point was no doubt persuasively addressed to the jury at the trial and to the trial court on motion for new trial and we see no good reason for not accepting their decisions. The evidence discloses a situation comparable to that discussed in Valencia v. Shell Oil Company, 23 Cal.2d 840, 847–848, 147 P.2d 558, 562, wherein the court said:

> "There is ample evidence to support the implied finding that plaintiff lacked the funds and financial ability which in the exercise of ordinary care would have required him to pay the repair bill. The evidence shows that at the time of the accident plaintiff was the owner and operator of a service station costing $5,000 and against which there remained an indebtedness of $500; that he was the owner of a truck and automobile upon which two or three payments of $71.48 each were yet due; and that payments on the truck were completed a few months after the accident, while the service station indebtedness was not fully paid until just before trial of this action on March 18, 1937. Plaintiff testified that what little capital he had after the accident was needed for the operation of his service station. * * *
>
> "It also appears from a finding of the trial court, which is amply supported by the evidence, that plaintiff attempted and was unable to obtain the use of a substitute truck while his truck was being repaired."

We think it was entirely a question for the jury and for the trial court to determine whether or not plaintiff's efforts to mitigate damage by getting his truck back to work were all that were reasonably required under the circumstances.

For the reasons given, the judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

Hearing denied; SPENCE and PETERS, JJ., dissenting.

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170 Cal.App.2d 45

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Elzie Leroy CARSKADDON, Defendant and Appellant.

Cr. 2936.

District Court of Appeal, Third District, California.

April 29, 1959.

Hearing Denied June 24, 1959.

The defendant was convicted under the vagrancy statute for annoying child under age 18. The Superior Court, Sacramento County, Raymond T. Coughlin, J., entered judgment, and defendant appealed. The District Court of Appeal, Schottky, J., held that evidence relating to circumstances under which defendant, who had never met 17-year-old high school girl, overtook her while she was walking home from school by herself and walked beside her and had a conversation with her in which he inquired if she had ever had certain unnatural acts performed upon her warranted conviction.

Affirmed.

1. Vagrancy ⚷3

Evidence relating to circumstances under which defendant, who had never met 17-year-old high school girl, overtook her while she was walking home from school by herself and walked beside her and had a conversation with her, in which he inquired if she had ever had certain unnatural acts performed upon her, warranted conviction under vagrancy statute for annoying child under age 18. West's Ann. Pen.Code, § 647a(1).

2. Vagrancy ⚷1

The primary purpose of statute providing that any person who "annoys" or "molests" any child is a vagrant is protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of the latter; and the quoted words relate to offenses against children with connotation of abnormal sexual motivation on part of offender. West's Ann.Pen.Code, § 647a(1).

See publication Words and Phrases, for other judicial constructions and definitions of "Annoy" and "Molest".

3. Vagrancy ⚷1

The annoyance or molestation which is forbidden by statute providing that every person who annoys or molests any child is a vagrant is not concerned with state of mind of child but with objectionable acts of defendant; and if his conduct is so lewd or obscene that normal person would unhesitatingly be irritated by it, such conduct would "annoy" or "molest" within purview of statute. West's Ann.Pen.Code, § 647a (1).

4. Vagrancy ⚷1

The statute providing that every person who annoys or molests any child is a vagrant does not require a physical act as contrasted to an utterance. West's Ann. Pen.Code, § 647a(1).

Robert O. Fort, Sacramento, for appellant.

Stanley Mosk, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

SCHOTTKY, Justice.

[1] Defendant was charged with a violation of section 647a, subdivision 1, of the Penal Code, the information also alleging two prior convictions of section 288 of the Penal Code. The defendant pleaded not guilty to the crime charged in the information but admitted the prior convictions. Defendant waived a trial by jury, and following a trial the court found defendant guilty as charged. He has appealed from the judgment of conviction, and his sole contention on appeal is that the evidence is insufficient to sustain his conviction.

There is little conflict in the evidence. On the afternoon of April 21, 1958, the complaining witness, an unmarried 17-year-old high school student, was walking home from school by herself. About a block from her house the appellant overtook her and the two exchanged greetings, the appellant speaking first. Prior to this time the complaining witness and the appellant had never met. The appellant fell in beside her and together they walked toward her house. The conversation between them concerned the weather, schoolwork and housework. It is wholly unnecessary to set forth in detail the extremely lewd and obscene questions asked of and comments made to the complaining witness, that is if she had ever had certain unnatural acts performed upon her. For the purposes of this opinion it is sufficient to note that the record in this regard adequately supports the conclusion of the trial court.

The appellant left and walked on down the street. The complaining witness immediately reported the incident to a nearby police officer and the appellant was shortly thereafter placed under arrest.

The complaining witness testified that the conversation with the appellant upset her at first, making her very angry until the humiliation caused her to go home and cry.

The appellant took the stand and admitted that he had asked questions which formed the basis of the complaint and that the complaining witness had appeared upset when he mentioned this to her. He also admitted that when he asked her this he had reference to her private parts.

In answer to a question by his own counsel as to why he had asked the question of the complaining witness appellant answered: "Well, I did twenty-four years in prison and during that time, why, I heard so many guys talking about these things and just out of curiosity, why, I asked the young lady there. I didn't have no intention of wanting to do anything myself but I was just curious, curiosity * * *."

Section 647a, subdivision 1, of the Penal Code provides:

> "Every person who annoys or molests any child under the age of 18 is a vagrant and is punishable upon first conviction by a fine of not exceeding five hundred dollars ($500) or by imprisonment in the county jail for not exceeding six months or by both such fine and imprisonment and is punishable upon the second and each subsequent conviction or upon the first conviction after a previous conviction under Section 288 of this code by imprisonment in the state prison for not less than one year."

[2, 3] As stated in People v. Carskaddon, 49 Cal.2d 423, at page 425, 318 P.2d 4, at page 5:

> "The primary purpose of the above statute is the 'protection of children from interference by sexual offenders, and the apprehension, segregation and punishment of the latter.' People v. Moore, supra, 137 Cal.App.2d 197, 199, 290 P.2d 40, 41; People v. Pallares, 112 Cal.App.2d Supp. 895, 900, 246 P.2d 173. The words 'annoy' and 'molest' are synonymously used (Vol. 27, Molest, p. 430, Words and Phrases, perm. ed.); they generally refer to conduct designed 'to disturb or irritate, esp. by continued or repeated acts' or 'to offend' (Webster's New Inter. Dict., 2d ed.); and as used in this statute, they ordinarily relate to 'offenses against children, [with] a connotation of abnormal sexual motivation on the part of the offender.' People v. Pallares, supra, 112 Cal.App.2d Supp. at page 901, 246 P.2d at page 177. Ordinarily, the annoyance or molestation which is forbidden is 'not concerned with the state of mind of the child' but it is 'the objectionable acts of defendant which constitute the offense,' and if his conduct is 'so lewd or obscene that the normal person would unhesitatingly be irritated by it, such conduct would "annoy or molest" within the purview of' the statute. People v. McNair, 130 Cal.App.2d 696, 697–698, 279 P.2d 800, 801."

[4] Applying the foregoing principles to the record in the instant case, we believe that the statements and conduct of appellant were lewd and obscene and would irritate a normal person. While no case has been reported where the evidence ruled upon was merely spoken words, we do not believe that the statute requires a physical act as contrasted to an utterance. It cannot be doubted that the questions asked by appellant, under the circumstances under which they were asked, would be irritating and annoying to a normal child of the age of 17 years.

We think it could be inferred that appellant's conduct and statments were sexually motivated. The trier of fact could find that despite appellant's denial the utterances were motivated by an abnormal sexual desire on his part. We are satisfied that when all of the evidence is considered along with the age and sex of the child sexual motivation is sufficiently made out.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

169 Cal.App.2d 610

PEOPLE of the State of California, Plaintiff and Appellant,

v.

ONE 1956 CHEVROLET 4-DR. SEDAN, License No. MVR 021, Engine No. 0564811F56F, Defendant,

Fletcher Jones Chevrolet, Respondent.

Civ. 23348.

District Court of Appeal, Second District, Division 3, California.

April 14, 1959.

Proceeding with respect to forfeiture of automobile on ground that it has been used in the unlawful transportation of narcotics. The Superior Court of Los Angeles County, Burnett Wolfson, J., entered judgment decreeing automobile forfeited to State subject to lien of legal owner and State appealed. The District Court of Appeal, Vallée, J., held that the purchaser's credit report showing that an investigation had been made as to the truth of purchaser's statements about his employment and that his employer was asked about purchaser's moral character was admissible, and it could not be stated that evidence was insufficient to support finding that a reasonable investigation had been made by legal owner as to purchaser's moral character.

Affirmed.

1. Forfeitures ⚷5

In proceeding by State for forfeiture of automobile on ground that it was used in the illegal transportation of narcotics where conditional seller, the legal owner, claimed a lien, credit statement furnished to seller by purchaser and showing investigation by conditional seller of purchaser's employment record and purchaser's moral character was admissible in evidence to establish fact that conditional seller had made an investigation as to purchaser's moral character. West's Ann.Health & Safety Code, § 11620; West's Ann.Code Civ.Proc. § 1953f.

2. Forfeitures ⚷5

Where State brought proceeding for forfeiture of automobile on ground that it had been used in illegal transportation of narcotics and conditional seller, the legal owner, claimed a lien on automobile and as proof of his investigation of purchaser's moral character before sale, seller introduced credit statement furnished to seller by purchaser, weight to be given document was for the trial court. West's Ann.Health & Safety Code, § 11620; West's Ann.Code Civ.Proc. § 1953f.

3. Forfeitures ⚷5

Whether legal owner of automobile sought to be forfeited by State because of its use in illegal transportation of narcotics made a reasonable investigation as to the moral character of person using automobile is a question of fact. West's Ann. Code Civ.Proc. § 1953f.

4. Forfeitures ⚷5

In proceeding by State for forfeiture of automobile, used in illegal transportation of narcotics, where conditional seller, the legal owner of vehicle, claimed a lien thereon, court could not say as a matter of law that evidence was not sufficient to support finding that conditional seller had made a reasonable investigation of the good moral character of purchaser before selling vehicle. West's Ann.Health & Safety Code, § 11620; West's Ann.Code Civ.Proc. § 1953f.

5. Sales ⚷197

Under contract of sale property is transferred to buyer at time parties intend it to be transferred and their intention may be disclosed by their conduct, common usage, and the circumstances of the case. West's Ann.Civ.Code, § 1738.

6. Sales ⚷201(1)

Passage of interest in property is governed by intention of parties whenever such intention can be ascertained, and it is only when there is no indication as to such intention that seller can be said to have unconditionally delivered property to buyer.

7. Sales ⚷85(1)

Where buyer of automobile on conditional sales contract and conditional seller signed a document entitled sales order, confirmation and sales agreement and such document provided that at the time automobile was ready for delivery buyer agreed to pay the unpaid cash balance in full and in the alternate, and subject to approval of buyer's credit, buyer would enter into a conditional sales contract with conditional seller, court could find that buyer was obligated to return automobile to seller in the event its investigation of his credit was unacceptable.

◆

Edmund G. Brown, Atty. Gen., and Lynn Henry Johnson, Deputy Atty. Gen., for appellant.

Getz, Aikens & Manning and Harold T. Tredway, Los Angeles, for respondent.

VALLÉE, Justice.

Appeal from a judgment decreeing that an automobile be forfeited to the state, subject to the lien of the legal owner, on the ground it had been used in the unlawful transportation of narcotics.

The court found and decreed that the legal owner had made a reasonable investigation of the morals, responsibility, character, and reputation of the purchaser prior to the creation of its interest. Plaintiff appeals.

Plaintiff first contends the evidence was insufficient as a matter of law to establish that a reasonable investigation had been made. The argument is that the only evidence with respect to the investigation was regarding the standard operating procedure of the legal owner.

Section 11620 of the Health and Safety Code in pertinent part provides:

> "The claimant of any right, title or interest in the vehicle may prove his lien, mortgage, or conditional sales contract to be bona fide and that his right, title, or interest was created after a reasonable investigation of the moral responsibility, character, and reputation of the purchaser, and without any knowledge that the vehicle was being, or was to be, used for the purpose charged."

It was stipulated that the automobile was sold to Odis B. Hendrix on a conditional sales contract in the usual course of business; the contract was bona fide and valid in all respects; the seller—legal owner—had no knowledge that the automobile would be used for any unlawful purpose.

The legal owner, without objection, introduced in evidence a document titled "Purchaser's Credit Statement," designated exhibit C. The exhibit showed numerous written notations. About one third of the way down the document on the left-hand side was a notation, "OK by his employer." To the immediate right of this was the notation, "OK by employer." To the far right was the notation, "OK his employer."

Miss Molloy, the credit manager of the legal owner, testified she recognized the handwriting on exhibit C as that of June Fatario, who was in the employ of the legal owner in the credit department at the time of the sale. She testified to the method of preparation of the document by explaining the standard procedure followed by the credit department in making the investigation of a purchaser as follows:

> "We first call the employer and if the employment has been a year or two years, we ask the employer—well, first, naturally we ask if the person has been employed. Secondly, we ask as to their knowledge of the good moral character of the employee, and if he has been in any difficulties that they know of; and thirdly, if his home address is the same as is stated on the application.
>
> "Q. Now, according to your standard procedure, Miss Molloy, what is done by the person making the phone call in response to any answers they may receive on such phone calls? A. Well, they write 'okayed by employer' in the separate sections."

Miss Molloy testified the first notation on exhibit C meant Miss Fatario had called the employer of the prospective purchaser and was informed by him that the purchaser had been employed the length of time he had specified in his credit statement; the second notation meant she had asked the employer if the purchaser was of good moral character; the third notation meant she had ascertained from the employer that the purchaser's home address was the same as on the credit statement given by the purchaser.

There also appeared on exhibit C notations with respect to nine business firms and three banks. As to these Miss Molloy testified the legal owner, in investigating the purchaser, obtained the information noted from a service it used, which service had a record of all business houses in Los Angeles; from the service, it obtained information on the customer, including anything that would appear in the legal records with respect to whether the purchaser had been subject to criminal or civil suit; and the service picked up all of this information and relayed it to the legal owner.

The "Purchaser's Credit Statement," signed by the purchaser, gave his wife's name, stated she was employed, and by whom. Miss Molloy testified Miss Fatario had checked with the employer of the purchaser's wife; the notation "OK by employer" applied equally to the purchaser's wife; and if there had been anything derogatory it would have been noted on exhibit C.

[1-3] Exhibit C was competent evidence to establish the facts therein stated. Code Civ.Proc. § 1953f; Loper v. Morrison, 23 Cal.2d 600, 608, 145 P.2d 1. The weight to be given the document was for the trial court. Gallup v. Sparks-Mundo Engineering Co., 43 Cal.2d 1, 7–8, 271 P.2d 34. Whether the investigation was reasonable is a question of fact. People v. One 1952 Ford Sedan, 146 Cal.App.2d 183, 187, 188, 303 P.2d 832.

[4] The testimony of Miss Molloy was with respect to what investigation had been made by Miss Fatario, not merely as to the standard operating procedure of the legal owner. We cannot say, as a matter of law, that the evidence was not sufficient to support the finding that a reasonable investigation had been made.

People v. One 1941 Chevrolet Coupe, 113 Cal.App.2d 578, 248 P.2d 786, relied on by the People, is not in point. The court there found that the legal owner did not make a reasonable investigation; here the court found the contrary. In that case there were no records of an investigation produced; here the record and the testimony of Miss Molloy showed the details of the investigation.

The People next contend the property was transferred to the purchaser before the investigation was made.

On September 15, 1956 the purchaser and the legal owner signed a document styled "Sales Order, Confirmation And Sales Agreement." This document provided:

> "At the time the above described automobile is ready for delivery Purchaser agrees to pay the foregoing Unpaid Cash Balance in full, plus or minus any pay-off adjustment. In the alternate, and, subject to approval of Purchaser's credit, Purchaser will enter into a Conditional Sale Contract with Dealer or its assigns, which shall provide, in addition to the standard printed conditions thereof, as follows: * *
>
> "In addition to the foregoing, said contract shall provide for the following payments, which include Time Sales Differential:
>
> "Special Pick-up Payments:
> \$——— on ————— \$——— on —————
>
> Regular Payments:
> \$93.21 per month, for 30 equal monthly payments, beginning Oct. 28th, 1956, plus a final payment of \$——— on —————."

The signature of the purchaser appears after the following: "I acknowledge receipt of a copy of this order." The reverse side of the document is headed "Conditions." One of the conditions reads:

> "Delivery of this automobile is accepted by purchaser subject to credit approval by a financing institution, and in the event of a credit report unacceptable to the financing institution, the purchaser will return the automobile herein described immediately to the dealer."

Following the conditions, the purchaser's signature appears after the word "Buyer." The automobile was delivered on September 15, 1956. The investigation was made on September 17, 1956.

The legal owner did not submit its contracts to a financial institution. It financed its own contracts. By the terms of the "Sales Order, Confirmation And Sales Agreement" the purchaser was obligated to return the automobile to the dealer in the event its investigation was unacceptable.

[5, 6] Under a contract of sale the property is transferred to the buyer at the time the parties intend it to be transferred; and their intention may be disclosed by their conduct, common usage, and the circumstances of the case. Civ.Code, § 1738. The conduct of the parties may disclose their intent as to when property was transferred from seller to buyer. Everly v. Creech, 139 Cal.App.2d 651, 657, 294 P.2d 109. The passage of an interest in property is governed by the intention of the parties whenever such intention can be ascertained, and it is only when there is no indication as to such intention that the seller can be said to have unconditionally delivered the property to the buyer. Woodbine v. Van Horn, 29 Cal.2d 95, 106–107, 173 P.2d 17; Goldberg v. Southwestern Metals Corp., 92 Cal. App.2d 819, 821, 208 P.2d 75.

Referring to section 11620 of the Health and Safety Code, the court in People v. One 1950 Pontiac Sedan, 153 Cal.App.2d 15, at page 19, 313 P.2d 863, at page 865:

> "The purpose of this statute is to relieve the holder of a legitimate lien from the effect of the forfeiture provisions of that chapter of the Health & Safety Code, when such lienholder has made an adequate investigation before the creation of the lien on which he relies at the time the vehicle is seized. A claimant may well have had a different 'right * * * or interest' at various times, and it does not clearly appear that the statute was intended to provide that the prior creation of a temporary and conditional interest would destroy the right to such relief, when such prior interest was followed by a more substantial and definite interest upon which the claimant thereafter relied and which was created, in a practical sense, after the required investigation had been made.
>
> "It seems clear that this conditional assignment to the bank would create a temporary interest which would remain in effect until the time when the bank found the sales contract to be satisfactory and elected to accept it. But this was not necessarily the same absolute right or interest which the bank held at the time the vehicle was seized and which it was entitled to prove at the trial. When the bank completed its investigation and decided to retain the sales contract its position was materially changed and it may reasonably be said that a new and more definite 'right * * * or interest' was then 'created', within the meaning of the statute. In stating that a 'claimant' may prove that his 'right * * * or interest was created after a reasonable investigation' the statute clearly refers to the right or interest upon which the claimant then relies, and the time when that particular interest was created. It would seem unreasonable to believe that the statute was intended to enforce a forfeiture against the lienholder in such a case as this, where the interest relied on by the lienholder did not become effective until after an investigation was made, merely because some conditional and preliminary steps

toward obtaining that interest were taken before the investigation was made.

"To so construe the meaning and intent of this statute would not, as appellant contends, defeat the purpose of the statute by allowing automobiles to be left in the hands of narcotic users for 15 days, or longer periods by agreement, during which time the lender would have an interest in the vehicle. During that period the limited right or interest in the prospective lender, even under a dealer contract of this nature, would have been created before the investigation was made, and the forfeiture provisions would apply during that time. After the investigation was made, however, a somewhat different and more definite right and interest came into being or was 'created', which interest was the one claimed by the bank in this proceeding. It would be unnecessarily harsh to disregard the investigation which was actually made here, and the acts done in reliance thereon. The wording of the statute does not seem to require that it be given such an application under the circumstances here appearing."

[7] When read as a whole, whether the document signed on September 15, 1956 constituted merely a sales order or a conditional sales contract, it indicates that it was intended thereby to allow whoever financed the contract time within which to make a reasonable investigation of the moral responsibility, character, and reputation of the purchaser. At bar, the legal owner was the financing institution. In view of the language of the statute and the provisions of the "Sales Order, Confirmation And Sales Agreement" and under the facts found, the trial court could reasonably conclude that the legal owner had proved the property was not transferred to the buyer until after a reasonable investigation within the meaning of the statute.

Affirmed.

SHINN, P. J., and WOOD, J., concur.

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169 Cal.App.2d 810

Claude Raymond CURRIE, an Individual doing business under the firm name and style of Pacific Heating and Sheet Metal Company, Plaintiff, Cross-Defendant and Appellant,

v.

Louis STOLOWITZ, individually, and as a co-partner doing business under the firm name and style of Empire Electrical and Mechanical Company, Defendant, Cross-Complainant and Respondent,

and

Leonora H. Archibald, as administratrix with will annexed of the Estate of W. C. Archibald, deceased, Teresio C. Morando and James R. Brown, individually, and as co-partners doing business under the firm name and style of Empire Electrical and Mechanical Company, Defendants and Respondents.

Civ. 18248.

District Court of Appeal, First District, Division 2, California.

April 23, 1959.

Contractor's action against subcontractor for breach of contract. The Superior Court, County of San Francisco, Preston Devine, J., entered judgment for subcontractor and contractor appealed. The District Court of Appeal, Kaufman, P. J., held that where record disclosed that contractor agreed to furnish all material and labor and to install all heating, ventilating, air conditioning and plumbing for building for a certain sum, and thereafter contractor entered into a subcontract with subcontractor who agreed to do all the plumbing work for a specified sum, and contractor, while licensed as a warm-air heating, ventilating and air-conditioning contractor was not licensed as a plumbing contractor, contractor could not maintain action to recover from licensed subcontractor for breach of contract.

Affirmed.

1. Licenses ⚷39.46

Where contractor agreed to furnish all material and labor and to install all heating, ventilating, air conditioning and plumbing for building for a certain specified sum, and thereafter entered into a subcontract with licensed subcontractor who agreed to do all plumbing work on building for a certain sum, and contractor while having a license as a warm-air heating, ventilating and air-conditioning contractor at no time had a specialty license as a plumbing contractor, under statute providing that no person engaged in business or acting in capacity of contractor may bring any action for collection of compensation for performance of any act or contract for which a license is required without alleging and proving he was duly licensed, contractor was barred from bringing action against subcontractor for breach of contract. West's Ann.Bus. & Prof.Code, §§ 7026, 7028, 7030, 7031, 7058.

2. Licenses ⚷39.44

Statute providing that no person engaged in a business or acting in capacity of contractor may bring an action in any court for collection of compensation for performance of any act or contract for which a license is required, without alleging and proving that he is duly licensed, bars a suit for breach of contract as well as for collection of compensation for performance of any act. West's Ann.Bus. & Prof.Code, § 7031.

3. Licenses ⚷39.46

In breach of contract action by contractor agreeing to furnish all labor and materials to install all heating, ventilating, air conditioning and plumbing for hospital, to recover from subcontractor who had agreed to do all plumbing work, there was substantial evidence to support finding that the "plumbing work" for which contractor did not have a specialty license, was not merely incidental and supplementary to work performed under contractor's license for warm-air heating, ventilating, air-conditioning work within meaning of statute authorizing a specialty contractor to execute contract involving use of two or more crafts if performance of work in crafts or trade other than one in which he is licensed is "incidental and supplemental" to performance of work in craft for which he has specialty license. West's Ann.Bus. & Prof.Code, § 7059.

See publication Words and Phrases, for other judicial constructions and definitions of "Incidental and Supplemental".

4. Statutes ⚷219

When language of statute is open to any doubt as to its proper interpretation, contemporaneous administrative construction is to be given great weight.

5. Licenses ⚷39.46

Fact that contractor had plumbing work done under contract by licensed plumbing subcontractor did not authorize contractor to bring action against subcontractor for breach of contract under statute prohibiting a contractor from bringing an action to recover for performance of any work requiring a license and for which he is not licensed. West's Ann.Bus. & Prof. Code, § 7031.

6. Licenses ⚷39.43

Statute prohibiting any contractor, not licensed to do specific work covered by contract from bringing an action to recover for performance of such work, cannot be avoided on ground that it results in a harsh penalty or is inequitable. West's Ann.Bus. & Prof.Code, §§ 7026, 7031, 7059.

Barrett & Harkleroad, San Francisco, for appellant.

Lee E. Solomon, Everett S. Layman, San Francisco, for respondents.

KAUFMAN, Presiding Justice.

Plaintiff, C. R. Currie, an individual doing business under the firm name of Pacific Heating and Sheet Metal Company, appeals from a judgment in favor of defendants, a co-partnership, doing business under the firm name of Empire Electrical and Mechanical Company, entered after trial limited to the issue of whether plaintiff was a duly and regularly licensed contractor under the laws of the State of California.

In July 1950, plaintiff contracted with the Lodi Memorial Hospital Association, Inc. to furnish all material and labor, and to install all heating, ventilating, air conditioning and plumbing for the hospital for the sum of $233,784. Thereafter, plaintiff entered into a subcontract with the defendant who agreed to do all the plumbing work for the sum of $84,563. Defendant ceased performance under the subcontract in January 1951. Plaintiff completed the work and filed the statutory notice of completion on April 17, 1952. On September 20, 1955, plaintiff filed this action for damages in the sum of $67,810.34 for breach of contract. At the time of the trial, pursuant to section 597 of the Code of Civil Procedure, the issues were limited to: 1) whether plaintiff was properly licensed; and 2) whether plaintiff's claim was barred by the applicable statute of limitations.

At the conclusion of the trial on the first issue, the court found: that at all times plaintiff was licensed as a warm-air heating, ventilating and air conditioning contractor, the specialty license designated by the State Contractors License Board C–20; that during the progress of the contract, plaintiff in 1951 obtained additional specialty licenses C–43 (Sheet Metal Construction) and C–4 (Steam Heating); that at no time did the plaintiff hold a C–36 specialty license as a plumbing contractor, and that at all times the defendant was a licensed plumbing contractor with a C–36 specialty license. The court further found that the plumbing work subcontracted to the defendant was not incidental and supplemental to the heating, ventilating, and air conditioning work, and concluded that therefore the plaintiff was not a duly and regularly licensed contractor under the laws of the State of California, and could not succeed on his cause of action.

On appeal the plaintiff argues: (1) The trial court erred in its construction of "incidental and supplemental" as used in section 7059 of the Business and Professions Code when applied to a determination of whether plaintiff was barred by section 7031 of the Business and Professions Code. (2) The court erred in holding that section 7031 barred the instant action, as the contract with the Lodi Memorial Hospital Association was completed and paid for and not in issue. (3) The court refused to consider testimony relating to industry custom and practice as well as defendant's letter of January 22, 1951. There is no merit in any of these arguments.

There is no question here that plaintiff was acting as a contractor within the definition of section 7026 of the Business and Professions Code. That section states: "* * * The term contractor includes subcontractor and specialty contractor." Section 7058 defines a specialty contractor as follows:

> "A specialty contractor is a contractor whose operations as such are the performance of construction work requiring special skill and whose principal contracting business involves the use of specialized building trades or crafts."

Section 7028 of the Business and Professions Code makes it unlawful for any contractor to engage in his business without a license. Section 7030 makes the violation of section 7028 a misdemeanor. Section 7031 provides:

> "No person engaged in the business or acting in the capacity of a contractor, may bring or maintain any action in any court of this State for the collection of compensation for the performance of any act or contract for which a license is required by this chapter without alleging and proving that he was a duly licensed contractor at all times during the performance of such act or contract."

[1, 2] It is admitted that plaintiff did not at any time have the required C–36 license. Under the above statutes he was barred from bringing this action. It is clear that section 7031 bars a suit for breach of contract as well as for the collection of compensation for performance of any act. Harrison v. Butte Steel Buildings, Inc., 150 Cal.App.2d 296, 310 P.2d

126; Lewis & Queen v. N. M. Ball Sons, 48 Cal.2d 141, 308 P.2d 713; Moon v. Goldstein, 69 Cal.App.2d Supp. 800, 158 P.2d 1004; Sheble v. Turner, 46 Cal.App.2d 762, 117 P.2d 23; also see Owen v. Off, 36 Cal. 2d 751, 227 P.2d 457; Grant v. Weatherholt, 123 Cal.App.2d 34, 266 P.2d 185; Mansfield v. Hyde, 112 Cal.App.2d 133, 245 P.2d 577.

Plaintiff next argues that the court erroneously interpreted section 7059. That section provides:

> "The registrar, with the approval of the board, may adopt rules and regulations necessary to effect the classification of contractors in a manner consistent with established usage and procedure as found in the construction business, and may limit the field and scope of the operations of a licensed contractor to those in which he is classified and qualified to engage, as defined by Sections 7055, 7056, 7057, and 7058. A licensee may make application for classification and be classified in more than one classification if the licensee meets the qualifications prescribed by the board for such additional classification or classifications. No additional application or license fee shall be charged for qualifying or classifying a licensee in additional classifications.
>
> "Nothing contained in this section shall prohibit a specialty contractor from taking and executing a contract involving the use of two or more crafts or trades, if the performance of the work in the crafts or trades, other than in which he is licensed, *is incidental and supplemental to the performance of work in the craft for which the specialty contractor is licensed.*" (Emphasis added.)

The rules and regulations of the State Contractors License Board provide no person may engage in a field covered by a specialty license unless he has such a license or such work is incidental and supplemental to work performed pursuant to a license he does have. California Administrative Code, Title 16, §§ 730 and 760.

[3, 4] Plaintiff argues that the plumbing work (for which he did not have a specialty license) was only incidental and supplemental to the work performed under his C–20, C–4, and C–43 licenses for warm-air heating, ventilating, air conditioning, steam heating, and sheet metal construction, respectively. There is substantial evidence to support the trial court's finding, even from the testimony of defendant's own expert witness. An experienced examiner testified that the State Contractor's License Board has always construed "incidental" and "supplemental" to mean necessary to the main purpose. A similar conclusion was reached by the Attorney General. 3 Ops.Atty.Gen. 312. It is a well settled rule of statutory construction that when the language of a statute is open to any doubt as to its proper interpretation, contemporaneous administrative construction is to be given great weight.

The existing cases also support this view. In Kelly v. Hill, 104 Cal.App.2d 61, at page 65, 230 P.2d 864, at page 867, the word "incidental" as used in Business and Professions Code, section 7049 was defined to mean: "'Incidental' obviously means depending upon or appertaining to something else as primary; something necessary, appertaining to, or depending upon another which is termed the principal, something incidental to the main purpose." Plaintiff relies on Oddo v. Hedde, 101 Cal.App.2d 375, 225 P.2d 929, and E. A. Davis & Co. v. Richards, 120 Cal.App.2d 237, 260 P.2d 805, neither of which are applicable here. In the Oddo case, the owner of a building brought an action to cancel two notes and deeds of trust which had been given to the defendant contractor in payment for the construction of the building, on the ground that the contractor did not have the required general building contractor's license. The evidence showed at the time of the contract, the contractor's license board had not completed its job of classification under section 7059. The contractor had made inquiries to the Board and had been told by the Board that he could undertake the work under the general engineering contractor's license which he held. The appellate court held that the contractor had substantially complied with the requirements of the statutes. There is no evidence of substantial compliance here. In the Davis case the contractor was exempt from the licensing requirement of Business and Professions Code, section 7045 because he installed prefabricated fixtures which did not become a permanent part of the structure.

[5] Nor can the plaintiff here rely on the fact that the plumbing was to be done by the defendant who had the requisite specialty license. In Hollywood Termite Control Co. v. Structural Pest Control Board, 95 Cal.App.2d 56, 212 P.2d 278, the appellant contractor held a "D" license to engage in certain types of pest control work, but did not have an "A" or "C" license for the use of fumigants. Appellant entered into a contract for fumigation work and sub-contracted this aspect of the work to the holders of "A" and "C" licenses. In a prosecution for violation of the Structural Pest Control Act, Business and Professions Code, § 8500 et seq., it was argued that because the work was in all cases actually performed by a licensed subcontractor, there was no violation of the act in merely contracting to do the work. To this the court replied at pages 58 and 59 of 95 Cal.App.2d, at page 279 of 212 P.2d:

> "It is the essence of the Act that the public be protected against persons who are unqualified to perform the required work. It would violate the letter of the Act to offer to do and to contract to do that which he was legally unqualified to do. It is the element of subcontracting that the original contractor assume the primary responsibility, thereafter delegating that responsibility to a further contractor who is secondarily responsible. The pest control operator cannot delegate to another that which he is unqualified to do. For the foregoing reason it is unlawful for a pest control operator to contract to perform any fumigation work which he is not legally authorized to do, and he cannot escape the effect of the statute by subcontracting the work to a duly licensed operator."

[6] Plaintiff's argument against the trial court's interpretation of sections 7059 and 7031 is basically that it results in a harsh penalty and that it is inequitable to permit a party who has breached his contract to take shelter under the statutes. Plaintiff relies on Matchett v. Gould, 131 Cal.App.2d 821, 281 P.2d 524. This case was recently overruled by Lewis & Queen v. N. M. Ball Sons, 48 Cal.2d 141, 308 P.2d 713, which also answers plaintiff's other arguments on this point. In the Lewis & Queen case the defendant contractor had subcontracted a portion of its work under a state highway construction contract to the plaintiff. When the defendant discovered that its subcontract with the plaintiff would violate its contract with the state, new agreements were made whereby the plaintiff ostensibly rented its equipment to the defendant for portions of the work. The plaintiff sued to recover on the rental agreements. The defendant cross-complained, alleging breach of contract. Neither party raised the issue of illegality. The plaintiff, a partnership, was not a licensed contractor, although one of the partners had an individual license. The trial court held that the facts showed that the plaintiff had agreed to act as a contractor within section 7026 of the Business and Professions Code and that it lacked a proper license. In affirming the judgment for the defendant, in answer to an argument like the one made by plaintiff here, the court said at pages 151 and 152 of 48 Cal.2d, at page 719 of 308 P.2d:

> "Since plaintiff did not comply with the statute, it cannot 'bring or maintain any action in any court of this State for the collection of compensation * * *.' § 7031; Loving & Evans v. Blick, 33 Cal.2d 603, 204 P.2d 23. Plaintiff contends, nevertheless, that because defendant has been paid in full by the state for all work done on the parkway, justice requires that it be

compelled to turn over to plaintiff the proceeds from the state contracts attributable to plaintiff's labor.

"One answer to this contention is that, even in the absence of a provision such as section 7031, the courts generally will not enforce an illegal bargain or lend their assistance to a party who seeks compensation for an illegal act. The reason for this refusal is not that the courts are unaware of possible injustice between the parties, and that the defendant may be left in possession of some benefit he should in good conscience turn over to the plaintiff, but that this consideration is outweighed by the importance of deterring illegal conduct. Knowing that they will receive no help from the courts and must trust completely to each other's good faith, the parties are less likely to enter an illegal arrangement in the first place. (Citations)

"In some cases, on the other hand, the statute making the conduct illegal, in providing for a fine or administrative discipline excludes by implication the additional penalty involved in holding the illegal contract unenforceable; or effective deterrence is best realized by enforcing the plaintiff's claim rather than leaving the defendant in possession of the benefit; or the forfeiture resulting from unenforceability is disproportionately harsh considering the nature of the illegality. In each such case, how the aims of policy can best be achieved depends on the kind of illegality and the particular facts involved. (Citations) But we are not free to weigh these considerations in the present case. Section 7031 represents a legislative determination that the importance of deterring unlicensed persons from engaging in the contracting business outweighs any harshness between the parties, and that such deterrence can best be realized by denying violators the right to maintain any action for compensation in the courts of the state. (Citation) Moreover, even if we could take into account unjust enrichment of defendant, it is not at all clear that, had it reached the issue, the trial court would have found defendant indebted to plaintiff beyond what it had already paid."

Plaintiff further argues that this case is in the same category as Norwood v. Judd, 93 Cal.App.2d 276, 209 P.2d 24. This argument too, was completely answered in Lewis & Queen v. N. M. Ball Sons, supra, as the court pointed out that Norwood v. Judd involved an action for dissolution and accounting between partners. There were, therefore, equitable considerations which are not present here, where the plaintiff is seeking protection from his own unlicensed activities. Furthermore, in the Norwood case, this court (Division One) said at page 283 of 93 Cal.App.2d, at page 28 of 209 P.2d: "The principle that participants to an illegal contract who are *in pari delicto* can secure no relief based on such contract, is an ancient and most salutary one." To the same effect, is Lala v. Maiorana, 166 Cal.App.2d 724, 333 P.2d 862.

The record does not support plaintiff's argument relating to the trial court's exclusion of evidence concerning industry practice by the trial court. Such evidence was admitted over defendant's objections. Defendant's letter of January 22, 1951 was accepted in evidence and must be presumed to have been considered by the court.

We conclude the judgment finds ample support in the record before us.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Richard BANKS, Defendant and Appellant.*

Cr. 1412.

District Court of Appeal, Fourth District, California.

April 16, 1959.

Hearing Granted June 9, 1959.

Prosecution of one previously convicted of a felony, for possession of a firearm capable of being concealed upon the person. The Superior Court of San Diego County, John A. Hewicker, J., entered judgment of conviction and order denying motion to vacate judgment and defendant appealed from order. The District Court of Appeal, Mussell, J., held that where defendant had previously been convicted of an offense punishable either in the county jail or State prison and court had given defendant 3 months probation with 12 months incarceration in county jail, and defendant charged with possession of firearm, entered a plea of guilty in the Municipal Court and admitted prior conviction of felony and was certified to Superior Court where he again reiterated plea of guilty and admitted prior conviction of felony, plea of guilty entered on advice of counsel was an admission of every element of the offense charged and constituted a conclusive admission of guilt.

Order affirmed.

1. Criminal Law ⚷273

Where defendant had previously been convicted of crime which was punishable either in county jail or State prison and court granted defendant 3 months probation with 12 months incarceration in county jail as a condition thereof, and subsequently defendant as a person previously convicted of a felony was charged with possession of a firearm capable of being concealed on the person and entered plea of guilty in the Municipal Court and admitted prior felony conviction and appeared in Superior Court with his attorney and reiterated his plea of guilty and admitted prior conviction alleged, plea of guilty entered on advice of counsel was an admission of every element of offense charged and constituted a conclusive admission of guilt. West's Ann.Pen.Code, §§ 17, 859a, 1203.4, 12021; West's Ann. Vehicle Code, § 503.

2. Criminal Law ⚷274

Where defendant, with the advice of counsel, entered a plea of guilty on charge of violation of statute making it a crime for a person with prior felony conviction to have in his possession a firearm capable of being concealed on the person, and application to withdraw plea was not made until after application for probation had been denied and time for appeal from judgment had expired, application was properly denied. West's Ann.Pen.Code, § 12021.

3. Weapons ⚷10

Where defendant was convicted of crime punishable by imprisonment in county jail or State prison and court imposed sentence of 12 months incarceration in county jail and suspended sentence and granted probation, such conviction constituted a conviction of a "felony" within statute making it a violation of law for a person with prior felony conviction to have in his possession a firearm capable of being concealed on the person. West's Ann.Pen. Code, § 12021.

See publication Words and Phrases, for other judicial constructions and definitions of "Felony".

◆

Edgar G. Langford and J. Perry Langford, San Diego, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Ernest E. Sanchez, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant was charged with the crime of Possession of Firearm Capable of Being Concealed Upon the Person of One Previously Convicted of a Felony (Pen.Code, sec. 12021). It was alleged in the complaint filed in the Municipal Court, San Diego

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* Opinion vacated 1 Cal.Rptr. 669, 348 P.2d 102.

Judicial District, that on May 29, 1958, defendant "had in his possession and under his custody and control a firearm having a barrel less than twelve inches in length, to wit, a .38 caliber H & R revolver, serial No. 1728, he the said defendant, being then and there a person who had previously been convicted of a felony"; and "that before the commission of the offense hereinabove set forth in this complaint, said defendant was on the 18th day of May, 1953, in the Superior Court of the State of California, in and for the County of Alameda, convicted of the crime of Unlawful Taking and Driving of a Vehicle (VC 503), a felony; that the judgment upon said conviction was pronounced, rendered, given, and made on the 18th day of May, 1953, that said judgment has never since been reversed, annulled, or set aside."

Appellant entered a plea of guilty in the municipal court and admitted the prior conviction of a felony. He was certified to the superior court where proceedings were had in accordance with the provisions of Penal Code, section 859a. On August 13, 1958, appellant reiterated his plea of "guilty", as theretofore entered, admitted the prior conviction of a felony alleged, and applied for probation. On September 3, 1958, his application for probation was denied and he was sentenced to the state prison for the term prescribed by law. On September 25, 1958, appellant filed a motion in the superior court for an order setting aside the judgment of conviction herein and permitting him to withdraw his plea of guilty. The motion was denied and this appeal is taken from the order denying it.

The trial court found herein that "said Superior Court of Alameda County granted Defendant three years probation with 12 months incarceration in county jail as a condition thereof; that said probation period expired without revocation; and that sentence to prison was not pronounced against Defendant at any time in said proceedings and that no proceedings under Section 1203.4, Penal Code were had therein."

Appellant's sole contention here is that the order of the superior court of Alameda county, made on May 18, 1953, suspending the imposition of a sentence and granting defendant probation for a period of three years did not constitute a conviction of a felony sufficient to make him liable to prosecution under Penal Code, section 12021.

The offense with which appellant was charged and of which he was convicted on May 18, 1953, is punishable by imprisonment in the state prison, or in the county jail for not more than one year, or by a fine of not more than $5,000, or by both such fine and imprisonment. Vehicle Code, § 503.

Section 17 of the Penal Code provides:

> "A felony is a crime which is punishable with death or by imprisonment in the state prison. Every other crime is a misdemeanor. When a crime, punishable by imprisonment in the state prison, is also punishable by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes after a judgment other than imprisonment in the state prison, unless the court commits the defendant to the California Youth Authority. Where a court commits a defendant to the California Youth Authority upon conviction of a crime punishable by imprisonment in the state prison or fine or imprisonment in a county jail, in the discretion of the court, the crime shall be deemed a felony until and unless the court, after the person committed has been discharged from control by the California Youth Authority, and only if he was not placed in a state prison by the authority during the period of such control, on application of the person so committed and discharged, makes an order determining that the crime of which he was convicted was a misdemeanor."

[1] In the instant case appellant pleaded guilty in the municipal court to the crime charged in the complaint and admitted the

prior felony conviction alleged. On August 13, 1958, he appeared in the superior court with his attorney and reiterated his plea of guilty theretofore entered and admitted the prior conviction alleged. The plea of guilty herein entered on advice of counsel was an admission of every element of the offense charged and constituted a conclusive admission of appellant's guilt. People v. Cooper, 123 Cal.App.2d 353, 356, 266 P.2d 566; 14 Cal.Jur.2d, sec. 247, p. 492. In People v. Whitton, 112 Cal.App.2d 328, 333, 246 P.2d 60, it is said that a plea of guilty precludes any proceeding involving the taking of evidence because such a plea is a conclusive admission of appellant's guilt and of every element entering into the offense charged.

[2] Appellant's application to withdraw his plea was not made until after his application for probation had been denied and the time for appeal from the judgment had expired. In People v. Cooper, supra, 123 Cal.App.2d 353, 356, 266 P.2d 566, 567, it is said:

> "While a plea of guilty may be withdrawn pursuant to Penal Code section 1018 by reason of the mistake, ignorance, inadvertence or any factor that overcame the defendant's exercise of a free judgment, the basis of the motion for such relief 'must be established by clear and convincing evidence.' Moreover, the reviewing court is justified in concluding that the motion was properly denied when it is shown that the accused 'acted with knowledge of the facts and on advice of his counsel.' In any event, the granting of such a motion rests in the sound discretion of the court."

In People v. Ward, 96 Cal.App.2d 629, 633, 216 P.2d 114, 117, the court said:

> "If there is any difference between a petition for a writ of error *coram nobis* and a motion to vacate, it is that the former is broader than the latter. Under some circumstance a writ of error *coram nobis* can be granted although the judgment is regular on its face (People v. Butterfield, 37 Cal.App. 2d 140, 99 P.2d 310), but a motion to vacate must be denied where, as here, the judgment is regular on its face. (Citations.) Moreover, just as the writ of error *coram nobis* cannot be used to review matters that could be passed upon on an appeal, a motion to vacate cannot be used to serve the purposes of an appeal. Where the question raised could have been raised by an appeal, after the time for appeal has expired, the trial court has no jurisdiction to grant such a motion. (Citations.)"

In People v. Lempia, 144 Cal.App.2d 393, 396–397, 301 P.2d 40, 42, it is said:

> "Furthermore, appellant's contention that his plea of guilty should be set aside on the basis of mistake, ignorance, inadvertence and overreaching of his free will is unavailing because the record discloses that he was represented by counsel at all stages of the proceedings from arraignment to judgment."

In People v. Moore, 9 Cal.App.2d 251, 49 P.2d 615, the defendant admitted four prior felony convictions, a judgment of conviction was entered on the primary charge and he was sentenced as an habitual criminal. Later, he found out that three of the prior convictions were not felonies in this state. He sought relief by *coram nobis*. The order of the superior court denying him such a writ was affirmed on appeal. It was held that this type of mistake cannot be cured by *coram nobis* as defendant had open to him certain statutory remedies. The court further held, 9 Cal.App.2d at page 255, 49 P.2d at page 617:

> "We fail to see how the position of defendant in this proceeding is any different from that of a person who pleads guilty to a crime believing in fact that he was guilty of the same at the time of his plea, when, as a matter of law, the facts could not establish his guilt. In the latter situation a defendant would have the undoubted right to make a motion to change his

> plea. (Citations.) If, however, the defendant omits to do so, and the time has expired for the exercise of any of the statutory remedies after judgment, which might be invoked to cure the situation, and the judgment becomes final, there would be no further legal recourse by any form of judicial review. The same, we believe, is true in this case." (See also People v. Ingles, 97, Cal.App.2d 867, 874, 218 P.2d 987.)

[3] In support of his contention that his plea of guilty to a violation of section 503 of the Vehicle Code, the suspension of the proceedings, and the granting of probation was not a conviction of a "felony" within the terms of section 12021 of the Penal Code, appellant relies upon In re Rosencrantz, 211 Cal. 749, 297 P. 15, 16. In that case petitioner contended that she was not convicted of a felony where she pleaded guilty to a violation of section 476a of the Penal Code and was granted probation for a period of two years. The court held that "If petitioner had been sentenced to the state prison, she would have been convicted of a felony; and that had she been sentenced to the county jail, she would have been convicted of a misdemeanor"; that she was not sentenced nor was any judgment of conviction pronounced and that there was no conviction. However, in People v. Lippner, 219 Cal. 395, 404–405, 26 P.2d 457, 460, the court said:

> "In this action the defendant, as we have seen, pleaded guilty to three charges which were punishable either by imprisonment in the state prison or in the county jail. In Doble v. Superior Court, 197 Cal. 556, 241 P. 852, it was held that under such a plea the defendant is guilty of a felony. On page 576 of the opinion in 197 Cal., 241 P. 852, 860 of that case this court said: 'A fair construction of section 17, in order to give effect to every part thereof, requires us to hold, and we do so hold, that in prosecutions within the contemplation of that section the charge stands as a felony for every purpose up to judgment, and if the judgment be felonious in that event it is a felony after as well as before judgment; but if the judgment is for a misdemeanor it is deemed a misdemeanor for all purposes thereafter.' Therefore, when the court suspended judgment and placed defendant on probation, it was on his plea to three separate and distinct felonies, each punishable by imprisonment in the state prison for the term of five years."

In People v. Williams, 27 Cal.2d 220, 228, 229, 163 P.2d 692, 696, the court said:

> "Burglary in the second degree is punishable by imprisonment in the state prison (Pen.Code, § 461) and is therefore a felony. Pen.Code, § 17. While it is also punishable, in the alternative, by a county jail sentence (Pen.Code, § 461), its status can be changed only by 'a judgment imposing a punishment other than imprisonment in the state prison.' Pen.Code, § 17; In re Miller, 218 Cal. 698, 700–701, 24 P.2d 766; In re Rogers, 20 Cal.App.2d 397, 400, 66 P.2d 1237. This principle is stated in no uncertain terms in the Rogers case as follows, 20 Cal.App.2d at page 400, 66 P.2d at page 1238: 'The necessary inference to be drawn from the language of section 17 of the Penal Code that "when a crime, punishable * * * by fine or imprisonment in a county jail, in the discretion of the court, it shall be deemed a misdemeanor for all purposes, *after a judgment imposing a punishment other than imprisonment in the state prison,*" is that *the offense remains a felony* except when the discretion is actually exercised and the prisoner is punished only by a fine or imprisonment in a county jail.'"

In People v. Graff, 144 Cal.App.2d 199, 206, 300 P.2d 837, 841 (hearing denied by Supreme Court), the court said:

> "As violation of section 337a is punishable by imprisonment in the county jail or state prison, it is under Penal Code section 17, considered as a felony for every purpose up to the judgment and by a judgment other than imprison-

> ment in the State prison it loses that character prospectively only, without retroactive effect. Doble v. Superior Court, 197 Cal. 556, 576, 241 P. 852; In re Miller, 218 Cal. 698, 700, 24 P.2d 766."

In the instant case appellant entered a plea of guilty to the offense charged and twice admitted a prior felony conviction of a violation of section 503 of the Vehicle Code. The court in the Alameda county case had discretion to reduce the offense to a misdemeanor by imposing a misdemeanor sentence. However, this was not done and appellant's conviction of a violation of said section of the Vehicle Code constituted proof of his conviction of a felony. Macfarlane v. Department of Alcoholic Beverage Control, 51 Cal.2d 84, 330 P.2d 769.

The order denying appellant's motion is affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

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169 Cal.App.2d 666

Charles D. RUDOLPH, Plaintiff, Appellant and Cross-Respondent,

v.

John J. GORMAN, et al., Defendants, Milton S. Koblitz, Respondent and Cross-Appellant.

Civ. 22922.

District Court of Appeal, Second District, Division 3, California.

April 17, 1959.

Libel action, predicated upon publication by stockholders' protective committee of circular critical of president of corporation. The Superior Court of Los Angeles County, Mark Brandler, J., granted a motion for new trial, and plaintiff appealed from that order and defendant appealed from judgment. The District Court of Appeal, Shinn, P. J., held that where excessive damages appear to court to have been awarded as result of passion or prejudice, court is warranted in ordering new trial, and order will not be disturbed by reviewing court in absence of abuse of discretion.

Order affirmed and appeal from judgment dismissed.

1. Appeal and Error 🔑786

Appellant's calculated evasion of controlling question in case rendered appeal little short of frivolous.

2. Appeal and Error 🔑979(5)
New Trial 🔑77(3)

Where excessive damages appear to court to have been awarded, by jury in libel case, as result of passion or prejudice, court is warranted in ordering new trial, and order will not be disturbed by reviewing court in absence of abuse of discretion.

3. Libel and Slander 🔑123(7)
Trial 🔑194(14)

In libel action, predicated upon publication by stockholders' protective committee of circular critical of president of corporation, it was for jury to determine what portions of circular were false and what portions, if any, were true, and measure damages accordingly; and instruction that circular was libelous on its face removed from jury essential factual questions as to whether publication was false and as to whether it was privileged. West's Ann. Code Civ.Proc. § 53.

4. Libel and Slander 🔑5

Actual malice may be inferred from defamatory publication that is false and unprivileged, but such a publication does not necessarily imply existence of malice.

5. Libel and Slander 🔑5, 101(1)

Malice in fact is never presumed, but is always to be proved, but jury may infer existence of malice from unprivileged character of publication.

6. Libel and Slander ⚿124(3)

In libel action, predicated upon publication by stockholders' protective committee of circular critical of president of corporation, it was error to instruct: "In the case of a false and unprivileged publication, libelous per se, malice is implied." West's Ann.Civ.Code, § 3294.

7. Judges ⚿49(1)

A judge should so conduct himself as to afford no cause whatever for even a suspicion that in course of his judicial duties he has been subject to influences which would taint his decisions with partiality or animosity for or against any party, or would reflect in any manner upon his integrity or his ability and willingness to fairly and honestly perform his judicial duties.

8. Judges ⚿49(1)

That attorney called into case and given responsibility of presenting motion for new trial had, some five years earlier, represented judge in divorce suit did not alone disqualify judge from ruling on motion. West's Ann.Code Civ.Proc. § 170.5.

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S. L. Kurland, Los Angeles, for appellant and cross-respondent.

Sidney Dorfman, Beverly Hills, for respondent and cross-appellant.

SHINN, Presiding Justice.

In a jury trial of a libel action against Milton S. Koblitz and others, plaintiff was awarded $150,000 compensatory damages and $100,000 punitive damages against Koblitz and judgment was entered on the verdict. No special damages were sought. Koblitz made a motion for new trial, which was granted by the court upon the grounds of excessive damages and error in the giving of certain instructions. Plaintiff appeals from the order granting defendant a new trial and defendant appeals from the judgment.

Plaintiff was president of Timm Aircraft Corporation and of Timm Industries, Inc., a wholly owned subsidiary. Defendant owned 65,000 shares of Timm Aircraft stock and from 1950 to 1953 he was a director of both corporations. In 1954, a stockholders' protective committee was organized and obtained a license from the commissioner of corporations. The purpose of the committee was to obtain proxies, elect a new board of directors and to remove plaintiff from the management of the company.

On September 4, 1954, the committee mailed to the 2,800 stockholders of Timm Aircraft the four page circular which is the subject of the present action. Copies were sent to the Wall Street Journal and to several Los Angeles newspapers, which printed a summary of the circular. It is sufficient to say of the publication that it accused plaintiff, among other things, of deliberately falsifying the company's 1952 annual report by listing $48,000 in accounts receivable as cash, using company funds without authorization to purchase an automobile for his personal use, voting for a dividend of 2 cents a share for the purpose of avoiding a proxy fight, even though in 70% of the cases the cost of issuing the dividend checks exceeded the amount of the dividend, and various acts of incompetence, mismanagement and disloyalty to the company and to its founder, Mr. Timm. Defendant was treasurer of the stockholders' committee. He was consulted as to a substantial part of the contents of the circular before it was composed and he gave his approval.

It is not contended on the appeal of Koblitz that he was without responsibility for the publication of the circular. He alleged in his answer upon information and belief that the charges contained in the circular were true and that the publication was privileged. After a lengthy trial, the jury found against those defenses and awarded plaintiff a quarter of a million dollars in damages.

The order granting the new trial stated as reasons therefor that "The award of $150,000 general damages and the award of $100,000 punitive damages are so grossly excessive as to appear to have been given under the influence of passion and prejudice (CCP 657 sub. 5)" and "Insufficiency of the evidence to support and justify the verdicts of $150,000 general damages, and $100,000 punitive damages (CCP 657 sub. 6)."

[1] In his opening brief plaintiff does not even mention the ground of excessive damages. In his closing brief he merely argues that the damages were not "excessive as a matter of law and did not indicate a showing of passion and prejudice." In support of this assertion he cites cases in which substantial judgments in libel cases were affirmed upon appeal. He ignores altogether the rules which guide the trial court in the exercise of its duties in ruling upon motions for a new trial, chief among which is the requirement that the court grant the motion when convinced that the verdict is against the weight of the evidence. He makes no attempt to show that the court was guilty of an abuse of discretion in granting the motion for insufficiency of the evidence to justify the award of damages. This calculated evasion of a controlling question in the case renders the appeal little short of frivolous.

[2] Where excessive damages appear to the court to have been awarded by the jury in a libel case as the result of passion or prejudice, the court is warranted in ordering a new trial, and the order will not be disturbed by a reviewing court in the absence of an abuse of discretion. Bonner v. Los Angeles Examiner, 17 Cal.App.2d 458, 62 P.2d 427. There was, in our opinion, no abuse of discretion. It was the court's duty to grant relief from the judgment if the court was convinced that the amount of the verdict was excessive and contrary to the weight of the evidence. During the argument on the motion the court stated that in the court's opinion $15,000 would have been adequate as compensatory damages and $45,000 as punitive damages. Moreover, the court stated reasons for believing that the jurors had developed a prejudice toward defendant. Although these appear to have been cogent reasons we need not relate them. We have no hesitation in holding that the order granting a new trial must be affirmed upon the ground of damages largely in excess of amounts which the court believed had support in the evidence.

[3] Inasmuch as we find error in the giving of certain instructions which may recur upon a re-trial of the case we deem it appropriate to discuss those instructions. Code Civ.Proc. § 53. The first one reads as follows: "You are instructed that Plaintiff's Exhibit No. 1, the defamatory publication which is the subject of this lawsuit, is libelous on its face, that is libelous per se." Defendant contends that this instruction removed from the jury essential factual questions, namely, whether the publication was false and whether it was privileged. This contention is meritorious. The instruction could have caused the jury to believe that the publication was false in its entirety. It was for the jury to determine what portions were false and what portions, if any, were true and to measure the damages accordingly. By other instructions the court properly submitted to the jury the question of privilege, but the criticized instruction could have been understood as removing the question from the jury's consideration.

We see no ground of distinction between the instruction which stated that the publication in question was a libel on its face and the instruction given in Nova v. Flaherty, 145 Cal.App.2d 761, 303 P.2d 382, that the statements in question were libelous as a matter of law, which was held to be error. The purport of each instruction was to remove from the jury the questions of falsity and privilege. Although in the present case by other instructions the court submitted those questions to the jury, the same was true of the instructions given in the Nova case, but the court held that the erroneous instructions and the correct ones were conflicting, and that since the jury might as well have followed the erroneous instructions as the correct ones, the error was prejudicial. Upon a re-trial the questions of falsity and privilege should again be submitted to the jury under proper instructions.

[4–6] The court also instructed: "In the case of a false and unprivileged publication, libelous per se, malice is implied." This was error.

Section 3294, Civil Code, reads: "In an action for the breach of an obligation not arising from contract, where the defendant has been guilty of oppression, fraud, or malice, express or implied, the plaintiff, in addition to the actual damages, may recover damages for the sake of example and by way of punishing the defendant." Prior to 1905, the section used the words "malice, actual or presumed." By amendment in that year the wording was changed to "malice, express or implied." "Malice is never presumed. When plaintiff seeks exemplary damages plaintiff has the burden of proving malice." Hall, Proof in Libel Actions, 24 S.Cal.Law Rev., page 339, citing (p. 351) Hearne v. De Young, 132 Cal. 357, 64 P. 576; Davis v. Hearst, 160 Cal. 143, 166, 116 P. 530; Wright v. Baldwin, 47 Cal.App. 147, 190 P. 377; Todd v. Every Evening Ptg. Co., 6 Pennewill, Del., 233, 66 A. 97; Cohalan v. New York Press Co., 212 N.Y. 344, 106 N.E. 115.

The law is that actual malice may be inferred from a defamatory publication that is false and unprivileged. It is not the law that such a publication necessarily implies the existence of malice. As said in Davis v. Hearst, supra [160 Cal. 143, 116 P. 546], "The truth is that malice in fact is never presumed, but is always to be proved, and the utmost limit of the law is reached when it is declared that by proof of the unprivileged character of the publication, libelous per se, the jury may infer the existence of this malice." Upon a retrial of the action the instruction should not be given.

Over defendant's objection, the verified complaint in a separate action entitled Koblitz v. Rudolph et al., was received in evidence as an exhibit. The complaint reiterated many of the charges contained in the circular. The jury was instructed to consider the complaint "only on the issue of the existence of malice in fact by the defendant Koblitz against the plaintiff Rudolph; on the issue of whether or not the defendant Koblitz thereby ratified the publication of Plaintiff's Exhibit No. 1, and finally on the issue of the credibility of Koblitz, as a witness."

It is forcibly contended by defendant that the contents of the complaint were privileged under Section 47, subdivision 2, of the Civil Code. We need not decide this question. We believe that upon a retrial plaintiff will find it unnecessary and inadvisable to offer the complaint in evidence.

[7, 8] The final contention of appellant is that Judge Brandler, who presided at the trial and at the hearing of the motion for a new trial, was disqualified from ruling upon the motion. In 1951, the firm of Loeb and Loeb were attorneys for Judge Brandler, who was then a deputy district attorney, in an uncontested action for divorce between Brandler and his then wife, and Sidney Dorfman, who was an employe of the firm, represented Brandler as his attorney. Concurrently with the noticing of a motion for a new trial, Mr. Dorfman was associated with Dockweiler and Dockweiler as counsel for Koblitz. After the notice of intention was filed but before the argument, plaintiff's attorney learned that Mr. Dorfman had represented Brandler in the divorce case. Upon the argument he stated that the fact of the former relationship had been brought to his attention and after the court had granted the motion he suggested that Judge Brandler should have considered himself disqualified to act upon the motion. The motion for a new trial was argued at length. On January 9th, the court discussed the points urged in support of the motion and announced that a new trial was granted upon the grounds we have heretofore stated. There was also extensive argument January 16th on plaintiff's motion that the court reconsider its ruling on the motion for a new trial. No affidavit of disqualifi-

cation was ever filed as required by Section 170.5 of the Code of Civil Procedure. It appears to be assumed by plaintiff that bias and prejudice were shown to exist solely by reason of the fact that Mr. Dorfman had some five years earlier represented the judge in a divorce suit. We are asked to hold as a matter of law that this former relationship alone disqualified the judge from ruling on the motion. No precedent is cited in support of this contention. We thoroughly agree with the statements in the cases that are cited that a judge should so conduct himself as to afford no cause whatever for even a suspicion that in the course of his judicial duties has been subject to influences which would taint his decisions with partiality or animosity for or against any party, or would reflect in any manner upon his integrity or his ability and willingness to fairly and honestly perform his judicial duties. In presenting this point plaintiff makes no reference to the record which tends in the slightest to support his contention of bias upon the part of the judge. He refers to nothing in the record which tends in any degree to show that the rulings of the court were not made dispassionately and with a full understanding of the evidence in the case and the applicable rules of law. There is nothing of this nature in the record to which he could point. Upon the contrary, it is shown that the court gave due consideration to the arguments of counsel for plaintiff and stated fully the court's reasons for concluding that error had been committed and that the verdict was in an excessive amount. The mere fact that Mr. Dorfman was called into the case and given the responsibility of presenting the motion for new trial had no tendency to support the argument of the plaintiff. Koblitz was at first represented by the firm of Thelen, Marrin, Johnson & Bridges. Later Philip N. Gepner and Robert M. Fox succeeded them. Koblitz caused himself to be substituted as his own attorney and thereafter substituted the firm of Dockweiler & Dockweiler in his stead. He was naturally disappointed with the result of the trial, and there was nothing unusual in his seeking other counsel. Mr. Frederick Dockweiler was relieved upon his own motion. Koblitz had previously been represented by Mr. Dorfman in other litigation. Mr. Dorfman's employment was suggested by Mr. Fox, another attorney, who represented a company in which Koblitz was interested. Moreover, the trial judge was in a difficult position. It was the right of the parties to have him pass upon the motion for new trial. No other judge could have gained the same understanding of the merits of the case or been as well qualified as was the trial judge to rule upon the motion.

One cannot read the record without being impressed by the fact that Judge Brandler gave fair and judicial consideration to the contentions of the parties as they bore upon the merits of the motion for a new trial. There was no legal disqualification and no basis whatever in the record to indicate that the court's ruling was hasty, ill-considered or capricious. We are convinced that the ruling was correct. The court undoubtedly had sound reasons for holding that the damages were excessive. There was error in the giving of instructions which the court deemed prejudicial. Under these circumstances it had a duty to grant the motion.

The order is affirmed and the appeal from the judgment is dismissed.

VALLÉE, J., concurs.

PARKER WOOD, J., concurs in the judgment.

169 Cal.App.2d 692

Orville C. VICK, Jr., and Loraine Vick, husband and wife, Plaintiffs and Appellants,

v.

Florence S. GRASSER, individually and as Executrix of the Estate of Leslie M. Grasser, deceased; H. S. Damerell and Cora Damerell, husband and wife, Defendants and Respondents.

Civ. 9507.

District Court of Appeal, Third District, California.

April 17, 1959.

Action by grantees against grantors for alleged fraud in the conveyance of only one parcel of land rather than two parcels as allegedly intended, wherein grantees informed court at outset of trial that they were relying upon mistake of the parties and not upon fraud and there was substantial evidence that the parties intended that the two parcels should be conveyed. From adverse judgment of the Superior Court, Placer County, Leland J. Propp, J., the plaintiff-grantees appealed. The District Court of Appeal, Schottky, J., held that trial court abused its discretion in denying grantees permission to amend complaint at conclusion of taking of testimony to conform to proof by charging mistake as basis for action.

Judgment reversed with directions.

1. Pleading 🔑229

Great liberality should be exercised in permitting amendments at any stage of proceeding. West's Ann.Code Civ.Proc. § 473.

2. Pleading 🔑236(5)

In action by grantees against grantors for alleged fraud in conveyance of only one parcel of land rather than two parcels as allegedly intended wherein grantees informed court at outset of trial that they were relying upon mistake of parties and not upon fraud and there was substantial evidence that parties intended that the two parcels should be conveyed, trial court abused its discretion in denying grantees permission to amend complaint at conclusion of taking of testimony to conform to proof by charging mistake as basis for action. West's Ann.Code Civ.Proc. § 473.

3. Appeal and Error 🔑959(1)
Pleading 🔑236(1)

Trial court has a broad discretion in passing upon a motion to file an amended pleading, and reviewing court will not interfere with action of trial court unless it clearly appears that there has been an abuse of discretion. West's Ann.Code Civ.Proc. § 473.

4. Pleading 🔑236(5)

The discretion to be exercised in permitting an amendment of pleadings to conform to proof is one controlled by legal principles and is to be exercised in accordance with the spirit of the law and with a view to subserving, rather than defeating, the ends of substantial justice. West's Ann. Code Civ.Proc. § 473.

5. Trial 🔑397(1)

In action by grantees against grantors and grantees to whom grantors subsequently conveyed a parcel of land which plaintiff-grantees claimed should have been conveyed to them, wherein plaintiffs claimed an easement over such other parcel and further that defendant-grantees of such parcel were not bona fide purchasers and evidence was introduced in support of such claims, court erred in not finding on issues of easement and bona fide purchasers.

◆

Bowers & Sinclair, Roseville, for appellants.

Robinson & Robinson, Auburn, for respondent Grasser.

Busick & Busick, Sacramento, for respondent Damerell.

SCHOTTKY, Justice.

This is an appeal by Orville C. Vick, Jr. and Loraine Vick from a judgment in an action brought by them against Florence S. Grasser, individually and as executrix of the estate of Leslie M. Grasser and H. S. Damerell and his wife, Cora Damerell.

The record shows that in 1946 the Vicks purchased some property in Placer County from the Grassers. Negotiations for the purchase of the property were conducted between the Vicks and one W. K. Graham, a licensed real estate broker, authorized by the Grassers to sell the property. The Grassers owned two pieces of adjoining property with a combined area of approximately 2 acres. The deed the Grassers executed conveyed only one of these two parcels to the Vicks. When the Vicks learned that only one of the two parcels had been conveyed they commenced this action. The cause went to trial on a first amended complaint. This alleged that the Grassers were the owners of two contiguous parcels of real property in Placer County; that in order to get from parcel 1 to the county road it was necessary to traverse a roadway over parcel 2; that this roadway had been used by the plaintiffs openly and adversely as a means of egress and ingress from the residence of the plaintiffs in parcel 1; that in April, 1946, the Grassers employed Graham to sell the two parcels of land; that Graham, who became the authorized agent of the Grassers, orally agreed to sell the two parcels of land to the plaintiffs for $5,500 and did agree to furnish a deed for the two parcels of land; that the Grassers, with knowledge of the representations of Graham, accepted the sum of $5,500, but, with intent to defraud plaintiffs out of parcel 2, substituted a small strip of land 10 feet by 50 feet for parcel 2; that if the plaintiffs had known of the substitution, they would not have purchased any of the property; that in furtherance of the scheme to defraud the plaintiffs of parcel 2 the Grassers executed a deed to parcel 1 and a small strip of land in place of parcel 2 and delivered it to a title company who, acting as agent for the Grassers, recorded the deed without submitting it to the plaintiffs; that the deed was delivered to the Bank of America National Trust and Savings Association in Auburn, California, so that the plaintiffs did not discover the fraud until 1953; that the plaintiffs have been in possession of the parcels which were meant to be conveyed since 1946; that in furtherance of their fraudulent scheme to wrong plaintiffs the Grassers for a period of 7 years failed to assert any claim, right, or title to parcel 2; that on April 3, 1953, the Grassers notified the plaintiffs that they claimed the ownership of parcel 2; that plaintiffs immediately demanded a deed to parcel 2, but the Grassers refused to execute one; that the Grassers then executed a deed to parcel 2 to the Damerells, who, with full knowledge of the plaintiffs' claim, accepted a deed to the property. The Vicks sought a declaration that they were entitled to a deed to parcel 2 and in the alternative an easement over parcel 2 and damages. A second cause of action sought compensatory and exemplary damages against the Grassers based on fraud. Leslie Grasser died prior to the trial of the cause and his wife, the executrix of his estate, was substituted for him.

At the commencement of the trial and prior to the introduction of any evidence plaintiffs' counsel advised the court and counsel that plaintiffs were relying on the mistake of the parties and were asking for reformation of the original deed to plaintiffs as a result of the mistake; that Damerell was a party to the action on the express condition that he had knowledge of the claim of the plaintiffs to the property, and was not therefore a bona fide purchaser; that in the event the court determined that Damerell was a bona fide purchaser, then and in that event plaintiffs were asking damages against Grasser as a result of the mistake and inability to reform the original deed.

Counsel for defendants then stated that the complaint alleged fraud not mistake, and the court stated that it had examined the complaint and that it sounded in fraud. The following then appears in the record:

> "Mr. Sinclair: I did not prepare the complaint, your Honor, or the amended complaint. The caption of the amended complaint is 'Reformation of Deed and for Declaratory Relief and for Damages.' There are two causes of action. I do not—there is, in the first cause of

action, plead certain allegations of fraud and deceit and so forth. At the same time, I believe that it is sufficiently broad to cover the outline as I indicated to the Court would be, basically, the plaintiffs' case here.

"Mr. Robinson: Well, your Honor, I don't want to belabor this point—obviously we've got a lot to do—but, Mr. Sinclair, is it your statement, in a friendly manner, just trying to arrange these things before we spend a lot of time thinking about things that aren't pertinent—is it your statement that you believe this states the cause of action for reformation on the ground of mistake? There's no mistake alleged anywhere in the complaint. I just want to know. You get my point?

"Mr. Sinclair: As I have investigated and found the facts, that is my belief as to what happened. That is what we intend, or will attempt, to prove here—that there was a mistake, yes.

"Mr. Robinson: We'll make our objections as to the evidence as it's produced, your Honor.

"The Court: Very well."

The case then proceeded to trial and continued for three days. The reporter's transcript, consisting of more than 400 pages, shows that the transaction surrounding the purchase of the property and the making of the deed was thoroughly gone into. There was substantial evidence to indicate that both the Grassers and Graham, the real estate broker, intended that the two parcels should be conveyed to plaintiffs. Mr. Graham was ill at the time of the trial and was unable to testify, but portions of his file which were introduced in evidence indicated strongly that the Grassers agreed to convey two parcels of property consisting of 2 acres, more or less, to the plaintiffs. During the course of the trial counsel for plaintiffs stipulated that the defendants Grasser were not guilty of fraud.

At the conclusion of the testimony, counsel for plaintiffs requested permission to amend the complaint to conform to proof. The record shows the following:

"The Court: In regard to the motion of plaintiff to amend the complaint to conform to proof, any objection?

"Mr. Robinson: Yes, sir. I don't know what the amendment is.

"Mr. Sinclair: You know what the proof is.

"Mr. Busick: I don't know what proof he's got in he wants it to conform to. He hasn't stated it.

"Mr. Sinclair: Well, basically, as I understand it, your Honor—and for that purpose I didn't think it was necessary, but, as I understand it, the proof has shown a mistake.

"The Court: Well, perhaps, Mr. Sinclair, you had better prepare an amended complaint in writing, submit it, so that both the Court understands what your theory is and opposing counsel understand what the theory is, and the Court will automatically take it under submission.

* * * * * *

"Mr. Robinson: Gentlemen, can't we terminate this by stipulating that counsel for the plaintiffs will prepare an amended complaint; that they move the Court to—for permission to file that amended complaint; that in the event the Court allows its filing, it be deemed controverted, and the affirmative defenses which are raised in the answers on file here be considered as affirmative defenses to that complaint? That will be the stipulation. The motion is resisted, of course. I'm merely trying to get the procedure organized so we can—does that sound satisfactory to the Court, your Honor, as a method of doing it?

"The Court: The mechanics sound satisfactory to the Court.

"Mr. Busick: That would be satisfactory to us.

"Mr. Bjelke: We also resist the—

"Mr. Robinson: I might add to that that the decision on that motion be

> submitted to the Court for decision with the other motions and the decision of the case.
>
> "The Court: Is that agreeable, Mr. Sinclair?
>
> "Mr. Sinclair: Yes, your Honor. I have made the motion for the—for the amendment.
>
> "The Court: But, I mean, to handle the mechanics of it in the manner that counsel has offered to stipulate?
>
> "Mr. Sinclair: Oh, yes, I will—
>
> "The Court: In other words, you are to—
>
> "Mr. Sinclair: Prepare—
>
> "The Court: —prepare an amended complaint, and on motion to the Court on whatever ground that you've stated here to conform to proof. The motion, of course, is deemed to be denied by the opposing counsel, and if the motion is granted, then all of the various allegations in the complaint are deemed to be denied.
>
> "Mr. Sinclair: Oh, yes, yes."

The proposed second amended complaint was filed with the clerk and submitted to the court. In it the first cause of action alleged that it was because of the mutual mistake of plaintiffs and defendants Grasser that plaintiffs did not receive the second parcel of land. In their second cause of action plaintiffs sought to recover the sum of $2,000 for money had and received. Plaintiffs again joined defendants Damerell, alleging that they subsequently purchased the second parcel of land knowing of the claim of plaintiffs thereto.

The court in its memorandum opinion and order denying plaintiffs' motion to amend stated:

> "* * * An examination of the two causes of action in the proposed amended complaint leaves no doubt but that the obligations on which they are founded are intended to be contractual as opposed to delictual in nature, as was the case in the first amended complaint.
>
> "To now grant plaintiffs' motion to amend their complaint would be to permit them to change their causes of action and to set up entirely new and different causes of action. Plaintiffs' motion must be denied for the reason that an action commenced in tort cannot be amended so as to change the proceedings into an action in contract (Hackett v. Bank of California, 57 Cal. 335; 1 Cal.Jur.2d 624)."

The court then ordered judgment in favor of defendants and entered the following finding of fact: "I That each and all of the allegations in plaintiffs' Complaint touching upon the matter of fraud claimed to have been practiced by defendants are found to be untrue."

This was the only finding made by the court, and from said finding the court concluded "that plaintiffs take nothing by their First Amended Complaint."

Plaintiffs have appealed from the judgment.

Appellants' first contention is that the court erred in not permitting the filing of the second amended complaint.

[1] Section 473 of the Code of Civil Procedure authorizes the trial court, in its discretion, to allow amendments in furtherance of justice. The policy of great liberality in permitting amendments at any stage of the proceeding has been declared by our courts. Klopstock v. Superior Court, 17 Cal.2d 13, 108 P.2d 906, 135 A.L.R. 318; Price v. Mason-McDuffie Co., 50 Cal.App.2d 320, 122 P.2d 971; In re Estate of Herbst, 26 Cal.App.2d 249, 79 P.2d 139.

As stated in Richter v. Adams, 43 Cal. App.2d 184, at page 187, 110 P.2d 486, at page 487:

> "The rule that the amendment of a pleading immediately before or during a trial is not a matter of right but is placed within the sound discretion of the trial judge is too well established to need the citation of supporting authorities. It is equally well established that an appellate court will not interfere with the action of the trial judge un-

> less it clearly appears that there has been an abuse of discretion. It is also true that the exercise of his discretion must be sound and reasonable and not arbitrary nor capricious. To a certain extent the measure of the soundness of the discretion used must be found in the facts of each case."

In the case of Frost v. Witter, 132 Cal. 421, at page 424, 64 P. 705, at page 706, the court said:

> "On this point I find no general rule laid down by the decisions in this state. All that is said is that great liberality should be used by the courts in allowing amendments (Burns v. Scooffy, 98 Cal. [271] 276, 33 P. 86, and cases cited); and that the allowance of amendments is a matter within the discretion of the courts (Coubrough v. Adams, 70 Cal. [374] 378, 11 P. 634; Lestrade v. Barth, 17 Cal. [285] 288). And in practice the courts have been extremely liberal,—as, e. g., in Heilbron v. Heinlen, 72 Cal. 376, 14 P. 24, where the complaint was amended so as to describe a different tract of land from that described in the original complaint; or in Walsh v. McKeen, 75 Cal. 519, 17 P. 673, where the case was changed from an action at law to a case in equity; or in Cox v. McLaughlin, 76 Cal. 60, 18 P. 100, where the change allowed was from an action on a special contract to an action on a quantum meruit; or as in Castagnino v. Balletta, 82 Cal. [250] 256, 23 P. 127, where the change was from an action on a mechanic's lien to an action on the special contract, or in assumpsit; or in Bogart v. Crosby, 80 Cal. 195, 22 P. 84, where the principal debtors, who had been omitted from the original complaint, were brought in by amendment."

In Klopstock v. Superior Court, 17 Cal. 2d 13, at page 20, 108 P.2d 906, at page 910, 135 A.L.R. 318, the court said:

> "Of course, the court's power to permit amendments of pleadings is not unlimited. It has generally been said that an amendment may not be permitted where the effect of such amendment is to state 'another and distinct cause of action'. Dubbers v. Goux, 51 Cal. 153, 155; Clark, Code Pleading, p. 502 et seq. But this court has said: 'It is obvious that the unqualified way in which the rule is sometimes stated—i. e. that a new or different cause of action cannot be introduced by amendment—cannot be accepted; for the most common kinds of amendments are those in which complaints are amended that do not state facts sufficient to constitute a cause of action, and in these, and often in the case of new parties, a new cause of action is in fact for the first time introduced. All that can be required, therefore (to use the language of Mr. Pomeroy), is that "a wholly different cause of action" shall not be introduced * * *.' Frost v. Witter, 132 Cal. 421, 424, 64 P. 705, 706, 84 Am.St.Rep. 53; 21 Cal.Jur. 197 et seq. In determining whether a wholly different cause of action is introduced by the amendment technical considerations or ancient formulae are not controlling; nothing more is meant than that the defendant not be required to answer a wholly different legal liability or obligation from that originally stated. As the court says in the Frost case, supra, 132 Cal. at page 426, 64 P. at page 707, for the purpose of determining whether amendment is possible, the 'cause of action' referred to as furnishing the test means only the legal obligation which it is sought to enforce against the defendant. Other courts have used almost identical language; the test is not whether under technical rules of pleading a new cause of action is introduced, but rather, the test is whether an attempt is made to state facts which give rise to a wholly distinct and different legal obligation against the defendant. The power to permit amendment is denied only if a change is made in the liabili-

> ty sought to be enforced against the defendant. See Harriss v. Tams, 258 N. Y. 229, 242, 179 N.E. 476."

In Witkin, California Procedure, Volume 2, at page 1612, it is stated:

> "* * * An attorney does not necessarily know at the pleading stage exactly what his evidence is, and cannot always be sure of what it will prove. But if he produces evidence warranting a judgment in his favor within the general scope of the pleading, he should not be denied that judgment because of the proof of different grounds for recovery or defense. The modern law, following this view, has so minimized the effects of variance that it no longer constitutes a major obstacle to decisions on the merits. There are three main rules:
>
> "First, *slight variance* may be disregarded as *immaterial* and even *substantial* variance may be disregarded or cured under the doctrine of 'theory on which the case was tried.'
>
> "Second, most kinds of *material variance,* which would be ground for reversal if uncured, may be corrected by an amendment to conform to proof.
>
> "Third, some departures greater than variance and constituting a *complete failure of proof* cannot be cured or corrected and call for reversal of the judgment."

[2] Applying the principles stated in the foregoing citations, we are convinced that the trial court erred in not permitting the second amended complaint to be filed. We believe that the trial court denied the motion to file the amended complaint because it was under the impression that the proposed amended complaint was setting up an entirely new and different cause of action and that therefore it had no right to permit said amended complaint to be filed. We believe that the trial court did have a right to permit the filing of the amended complaint and that it was an abuse of discretion to deny such permission. For basically both the amended complaint which it was sought to file at the conclusion of the trial and the complaint which was the basis of the trial were the same. The only difference was that in the complaint filed before trial fraud was the basis of the complaint and in the amended complaint sought to be filed at the conclusion of the case mistake was the basis of the complaint. However, both concerned the same transaction. The difference was that in the second relief was sought on the basis of mistake rather than fraud. Furthermore, at the outset of the trial plaintiffs' counsel informed the court that plaintiffs were relying upon mistake of the parties and not upon fraud. The trial proceeded and testimony was taken for three days. There was substantial evidence that both the Grassers and Graham, the real estate broker, intended that the two parcels should be conveyed to plaintiffs. Under such circumstances, when at the conclusion of the taking of testimony plaintiffs' counsel moved for leave to amend the complaint to conform to proof, the motion should have been granted. For as this court said in Feigin v. Kutchor, 105 Cal.App.2d 744, at page 748, 234 P.2d 264, at page 267: "The administration of justice is not improved by slavish adherence to technical rules of pleading, but counsel and court should cooperate in having the pleadings so shaped that the controversy between the parties litigant may be fully and fairly determined upon its merits and in accordance with substantial justice."

We believe that what was stated in Marr v. Rhodes, 131 Cal. 267, at page 270, 63 P. 364, at page 366, is applicable. In reversing a judgment on the ground that the court erred in denying defendant's motion to amend his answer the court said:

> "We think the court should have allowed the defendant to amend his answer to enable him to prove facts which would have constituted an offset or defense to plaintiff's demand, as proposed; and if, by reason of such amendment, the plaintiff would have been taken by surprise, and required further time to prepare to meet the defense, the case could have been continued, or such terms imposed as might seem just under the circumstances.

Stringer v. Davis, 30 Cal. [318] 321; Guidery v. Green, 95 Cal. 630, 30 P. 786. In the latter case the court, in its opinion, says: 'It can very rarely happen that a court will be justified in refusing a party leave to amend his pleading so that he may properly present his case, and obviate any objection that the facts which constitute his cause of action or his defense are not embraced within the issues, or properly presented by his pleading.' See, also, Burns v. Scooffy, 98 Cal. 271, 33 P. 86."

[3, 4] While it is of course true that a trial court has a broad discretion in passing upon a motion to file an amended pleading and that an appellate court will not interfere with the action of the trial court unless it clearly appears that there has been an abuse of discretion, we do not believe the term "judicial discretion" is broad enough to sustain the court's order denying permission to file the second amended complaint. For as stated in Jepsen v. Sherry, 99 Cal.App.2d 119, 220 P.2d 819, 822, the discretion to be exercised in such a case is "one controlled by legal principles and is to be exercised in accordance with the spirit of the law and with a view to subserving, rather than defeating, the ends of substantial justice."

[5] Appellants urge as a further ground for a reversal of the judgment that the said court did not find upon all of the issues presented to it by the pleadings and the proofs. This contention must be sustained.

The amended complaint alleges that parcel 2 separates parcel 1 from the county road, and that the only means of ingress and egress to parcel 1 from the county road is over parcel 2; that for more than 7 years the plaintiffs have openly and adversely used the roadway over parcel 2 to get from the county road to parcel 1. The amended complaint then alleges that it is necessary for the use and occupation of parcel 1 that plaintiffs have the use of the road over parcel 2; that it has been in existence prior to the conveyance to the plaintiffs by Grassers and that it was in plain view of anyone inspecting parcel 2.

The amended complaint alleges further that the Grassers, in furtherance of their original design to wrong the plaintiffs, sold the property in question to H. S. Damerell and Cora Damerell, and that the defendants Damerell, with full knowledge that the plaintiffs had possession and claimed ownership of the parcel in question, accepted said deed from the Grassers.

These allegations were denied and so they were issues in the case, and evidence was introduced in support of said allegations and in support of defendants' denials thereof. But notwithstanding the fact that there were issues both as to the easement for a roadway and as to whether or not the Damerells were bona fide purchasers, the court made no findings whatever on these issues, but made only the single finding that all of the allegations in plaintiffs' complaint touching upon the matters of fraud were untrue.

As stated in 24 California Jurisprudence, at page 940:

> "It has been repeatedly affirmed that where a court renders a judgment without making findings upon all material issues of fact, the decision is against law, and constitutes ground for granting a new trial in order that the issues of fact may be determined, or for reversal upon appeal, provided it appears that there was evidence introduced as to such issue and the evidence was sufficient to sustain a finding in favor of the party complaining. * * *"

We conclude that the court erred in not permitting the filing of the second amended complaint and in not finding on the material issues of easement and bona fide purchasers. These errors require a reversal of the judgment.

The judgment is reversed with directions to the trial court to allow the filing of the second amended complaint and permit defendants to file such pleadings thereto as they may desire.

We concur:

VAN DYKE, P. J., and WARNE, J. pro tem.

169 Cal.App.2d 717

Paul S. TOENNIGES and Ruth A. Toenniges, Husband and Wife, Plaintiffs and Respondents,

v.

Forrest GRIFFITH and Mrs. Forrest Griffith, Husband and Wife; Crawford Bryant and Mrs. Crawford Bryant, Husband and Wife, et al., Defendants,

Forrest Griffeth and Eva E. Griffeth, Appellants.

Civ. 23396.

District Court of Appeal, Second District, Division 1, California.

April 20, 1959.

Rehearing Denied May 18, 1959.

See 338 P.2d 914.

Hearing Denied June 18, 1959.

Action for an injunction and damages for interference with an easement and way of necessity. Judgment for the plaintiffs in the Superior Court of Los Angeles County, Virgil M. Airola, J., and from an order denying a motion for new trial, the defendants appealed. The District Court of Appeal, Fourt, J., held that where the appeal was on a partial record the appellate court must assume that the findings were supported by the evidence and that the appeal from the order during a motion for new trial must be dismissed.

Judgment affirmed. Attempted appeal from the order dismissed.

1. Appeal and Error ⚷907(4)

Where record before the appellate court was a partial record, under the circumstances the appellate court would presume that the record included all matters material to the determination of the points on appeal. West's Ann.Rules on Appeal, rules 4(a, b), 6, 7, 52.

2. Appeal and Error ⚷907(4)

Where the record before the appellate court was a partial record, the appellate court must assume that the findings were supported by the evidence, and the question of sufficiency thereof was not open. West's Ann.Rules on Appeal, rules 4(a, b), 6, 7, 52.

3. Easements ⚷61(9)

In action to enjoin defendants from obstructing or interfering with the use by plaintiffs of an easement and way of necessity by the maintenance thereon of any gate or fence, evidence sustained judgment for the plaintiffs.

4. Appeal and Error ⚷110

An attempted appeal from an order denying a motion for new trial would be dismissed.

* * *

Henry C. Rohr, Los Angeles, for appellants.

Paul Major, Van Nuys, for respondents.

FOURT, Justice.

This is an appeal from a judgment and from an order denying defendants' motion for a new trial, in which judgment defendants Forrest Griffeth and Eva E. Griffeth were ordered to remove one of the masonry pilasters and a section of the chain fence which was built upon and obstructs a portion of a certain non-exclusive easement for road purposes; and in which said defendants, and each of them, were perpetually restrained and enjoined from obstructing, closing, or interfering with the use by plaintiffs of said non-exclusive easement by the maintenance thereon of any gate, pilaster or fence.

The plaintiffs brought an action for an injunction and damages for an interference with an easement and way of necessity. The complaint set forth, in effect, that the plaintiffs were, and had been since January 29, 1948, the owners and occupants of certain described real property, and of "an easement for road purposes, to be used in common with others over that certain strip of land 20 feet wide in" a certain tract, and then particularly described the property to be so used as an easement. It was alleged that the plaintiffs and their predecessors in interest have been and are the owners of the easement so described, and that the defendants Griffeths own and occupy the real property adjacent to the plaintiffs' property and easement, and that the defendants Griffeths acquired their title and interest from a co-defendant (Bryant), who formerly owned all of the property affected by the action. Also, it was alleged that the persons from whom the plaintiffs purchased their property had purchased the same from the co-defendant Bryant, who had sold the defendants Griffeths their property. Further, that in the summer of 1953, the defendants Griffeths erected an iron gate, supported at each end by stone and masonry construction, which gate is now locked and no one excepting the Griffeths have the key thereto. It is set forth also that such gate was wrongfully constructed by the defendants Griffeths on fourteen feet of the easement belonging to the plaintiffs, and that it was erected without the permission or consent of the plaintiffs, and at the time it was erected the plaintiffs had no knowledge that their easement was being encroached upon; that the defendants Griffeths also erected a chain fence on part of the easement. After the gate and fence were erected the plaintiffs caused a survey to be made and then discovered that the gate and a part of the chain fence were on their easement and property. Thereafter the plaintiffs served upon the defendants Griffeths a notice that the gate and fence encroached upon their property and requested a removal of the same. Further, that the plaintiffs are now forced to use a lower road to reach their property, and that such lower road in part belongs to an abutting owner who has notified the plaintiffs to cease and desist going over their property by reason of the hazardous condition of such lower road. The plaintiffs also alleged that they had suffered damages because of such interference and requested an order requiring the defendants to remove the gate and the portion of the fence erected by the defendants Griffeths on plaintiffs' land and easement; that each defendant be restrained and enjoined from obstructing, closing or interfering with the use of plaintiffs' easement and way of necessity, and for costs.

The defendants Griffeths answered the complaint, in effect, denying that the plaintiffs were the owners of the property described in the complaint as belonging to them; denied that the plaintiffs had purchased their property as they had so alleged, and denied the construction or erection of the gate and fence as alleged in the plaintiffs' complaint, and further denied that the construction was without the knowledge of plaintiffs; and denied the service of any notice that the gate and fence encroached upon the plaintiffs' property; and denied that plaintiffs were forced to use a lower road to reach their property; and further denied that the plaintiffs had suffered any damages. In the answer as originally filed, three affirmative defenses were set forth, the first stating that the allegations of the complaint did not state facts sufficient to constitute a cause of action against the Griffeths; the second setting forth in effect that two of the co-defendants (Bryants) had formerly owned all of the property in question, and that such former owners caused the property to be subdivided by metes and bounds, and created a road easement to be used in common with other owners over a strip of land twenty feet wide; that the easement has been in continuous use for road purposes for the common benefit of all adjoining owners, and that no property owner has the right of ownership to the exclusion of other property owners. The third affirmative defense is to the effect that the Griffeths bought their property from the co-defendants Bryants, heretofore mentioned, and that when they bought it there was in actual existence a roadway for the adjoining property; that the said roadway was in the same location then and now, and that by reason of the use during such time, all of the adjoining property owners have the common right of use by the deeds and the prescriptive rights accruing in favor of the property owners and the defendants Griffeths.

A trial was started and at substantially the conclusion thereof the defendants Griffeths were given ten days within which to amend their affirmative answer to conform to proof. Within the time prescribed the answering defendants filed a "Supplemental Answer" wherein they repleaded all of their original answer, and in addition thereto pleaded a first and second affirmative defense. The first affirmative defense in the supplement set forth that an easement was created by deed in the first instance; that a roadway was bulldozed following the recorded easement by approximation to the survey stakes and to the natural topography of the land; that the bulldozed roadway did not coincide exactly with the confines of the recorded easement, and that a portion of the recorded easement has not been used by the original grantor nor any successor in interest. Further, that the bulldozed roadway was intended to be the permanent location of the roadway, regardless of the location of the recorded easement; that in addition to the nonuser of a part of the recorded easement, it was the intention of the plaintiffs' predecessors to abandon such portion thereof which was not used. Further, that the defendants placed the gate and fence on the abandoned portion of the recorded easement, and did so with the knowledge and permission of the owners of the dominant estate, and that therefore by reason of the nonuser, intention to abandon and of damage to the Griffeths, the Griffeths claim abandonment of a portion of the recorded easement. The second affirmative defense in the supplement sets forth in effect that the original owners had bulldozed an actual roadway, portions of which did not coincide with the recorded easement, and that such fact was known to the owners at the time, and that the co-defendants (Bryants) who had formerly owned all of the property built a wooden gate across a private driveway leading from the easement roadway, and that the Griffeth gate was built in substantially the same place, and they now claim prescriptive rights over that portion of the recorded easement where their gate is constructed.

It was stipulated by counsel, and agreement of the parties, that the judge could view the premises, and he apparently did so.

The court made findings of fact and conclusions of law, wherein it was found to be true that the plaintiffs are, and have been since January 29, 1948, the owners and occupants of the real property described in their complaint; that it was true that the plaintiffs are husband and wife, and hold title as joint tenants; that it was true that the plaintiffs and their predecessors in interest have and now own in common with others a non-exclusive easement for road purposes as described in the plaintiffs' complaint; that it was true that the defendants Griffeths own and occupy the real property adjacent to the plaintiffs' property and the described easement, and that such defendants acquired their title and interest from the Bryants, the original owners of the property; that it was true that the plaintiffs purchased their property from their grantors, who in turn had purchased it from the Bryants, and that the respective deeds granted to the plaintiffs the easement described in the complaint; that the Griffeths built an electrically controlled gate with masonry pilasters and a section of chain-link fence which has obstructed, and now obstructs a portion of the non-exclusive easement owned by the plaintiffs and others, and that it was true that the Griffiths built the gate and pilaster in the latter part of 1953, and the fence in 1954. Further, that it was true that the Griffeths negligently constructed a pilaster and a section of chain-link fence upon land to which they had no such right, and a portion of the gate is on the recorded easement; that it was not true that the plaintiffs incurred any money damages by reason of the construction of the gate and fence; that it was not true that the Griffeths are entitled to judgment on the ground that the plaintiffs abandoned portions of the recorded easement by non-use and an intention to abandon it, and it was not true that the Griffeths are entitled to prescriptive rights over that portion of the recorded easement upon which the gate and fence now stand, and it was not true that any prescriptive rights have ripened into a prescriptive title by adverse possession, as is set forth in the first and second affirmative defenses in Griffeths' supplemental answer.

From such findings of fact the court concluded that the plaintiffs were entitled to injunctive relief for the removal of the portion of the gate, pilaster and fence which encroach upon the easement described in the plaintiffs' complaint and reserved from the Griffeths' deed, and that the plaintiffs were not entitled to damages.

A judgment was made and entered which sets forth that the cause was heard by the court without a jury; that witnesses were sworn and evidence, oral and documentary, was received; that findings of fact were made, and thereupon the court ordered, adjudged and decreed that the defendants Griffeths remove the masonry pilaster and section of chain fence which was built upon and obstructs a portion of the described road easement; further, that the defendants Griffeths be and are perpetually restrained and enjoined from obstructing, closing or interfering with the use by the plaintiffs of the easement by the maintenance of any gate, pilaster or fence; and further, that in the event the Griffeths have not removed that portion of the gate, the pilaster and the section of the chain fence which encroach upon the easement within thirty days after the judgment becomes final, the plaintiffs may remove the obstructions and the reasonable cost of such removal shall be charged to the defendants by way of costs.

The appellant in his *"Notice to Prepare Clerk's Transcript on Appeal,"* directed the clerk to prepare a clerk's transcript to include "all pleadings filed herein, the Judge's Memorandum Opinion, the Order Denying Motion for New Trial, Findings of Fact and Judgment." Respondent made no request for any augmentation of the record. Pursuant to the request of the appellant, the clerk's transcript as prepared in this case includes:

(1) Notice of appeal;

(2) Notice to prepare clerk's transcript;

(3) Notice of intention to move for new trial and ruling thereon; and

(4) Judgment roll (as to the parts designated).

[1] It appears certain, therefore, that the appellant intended to, and did appeal upon the judgment roll, plus the opinion of the trial judge. There was no request for a reporter's transcript. In other words, the record before us is a partial record, and under the circumstances of this case, we are to presume that the record includes all matters material to a determination of the points on appeal. Rules on Appeal, Rule 52.

The appellants did not see fit to take advantage of Rules 4(a), 4(b), 6 or 7 of the Rules on Appeal to bring before this court the oral proceedings, or any part thereof.

The appellants put their contentions in the form of questions, as follows:

(1) Did the respondents' and appellants' predecessors in interest, by their conduct, substitute the road that was created by them, instead of the recorded easement?

(2) Did the acts and conduct of appellants and respondents constitute a waiver and acceptance of the substituted road in lieu of the road which would have followed the recorded easement?

(3) Were the respondents estopped by their conduct and knowledge, and by their failure to complain when the gate was erected?

(4) Were the respondents estopped by lapse of time to assert their rights to use the recorded easement?

(5) Did the respondents, by their action in excavating the bank along the road create a condition about which they cannot now complain?

We have concluded that the claimed errors do not appear upon the face of the partial record presented. Counsel for the appellants must have sensed the inadequacy of the record, for he has made extensive references to the testimony and to the deposition of the plaintiff Paul S. Toenniges, none of which is before us, nor do we even know that the deposition was introduced into evidence.

[2] We are compelled to assume that the findings are supported by the evidence, and on the record before us the findings cannot be attacked. The question of sufficiency of the evidence to support the findings is not open. In re Estate of Larson, 92 Cal.App.2d 267, 206 P.2d 852.

[3] Appellants, apparently, have not attacked the form of the findings or their sufficiency to support the judgment. We have examined the findings and the judgment, and we find no error upon the face of the record. White v. Jones, 136 Cal.App. 2d 567, 288 P.2d 913; Berker v. Barnes, 139 Cal.App.2d 294, 293 P.2d 821. See also, California Trial and Appellate Practice, Stanbury, Vol. 2, Chap. 50, pp. 160–191, where it is said at pages 173–174:

"There has been slight indication that Rule 52, as amended, will affect the scope of review on a judgment roll or clerk's transcript appeal. Traditionally the only issues subject to review on such appeals are whether the complaint states a cause of action, whether the findings are within the issues, and whether the judgment is supported by the findings, all of which may be determined from the face of the record without reference to oral proceedings or exhibits. The oral proceedings may not be referred to by the appellant, no issue may be made as to the sufficiency of the evidence, and it is presumed to be sufficient to support all findings. Likewise it is presumed that the oral proceedings were regular, and that no error not appearing on the face of the record occurred."

Apparently sometime about a year after the "Notice To Prepare Clerk's Transcript on Appeal," and not as a part of the record originally contemplated by the request of appellant, the clerk of the superior court transmitted to this Court all of the exhibits in the case. Nothing before us indicates just how the exhibits are before us, that is whether by stipulation of the parties or otherwise. In any event, the exhibits consist generally of photographs and diagrams or maps of the property in the area in question, deeds or copies of deeds and various notices. From the list of exhibits before us, it is indicated that the deposition of the plaintiff was not introduced into evidence and given a number as an exhibit. However, the receipt of the exhibits, no matter how they happened to get to this Court, and a review thereof in no wise changes our opinion as to how this case should be determined.

[4] The judgment is affirmed. The attempted appeal from the order denying motion for new trial is dismissed.

WHITE, P. J., and LILLIE, J. concur.

169 Cal.App.2d 873

A. J. BLACKMAN, Elizabeth B. Johnson, and George Batchelor, Petitioners and Respondents,

v.

Charles B. MacCOY, Judge of the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, Defendant and Appellant.

Civ. 23448.

District Court of Appeal, Second District, Division 2, California.

April 27, 1959.

Hearing Denied June 24, 1959.

Prohibition proceeding. The Superior Court of Los Angeles County, Bayard Rhone, J., entered judgment granting peremptory writ, and the defendant appealed. The District Court of Appeal, Fox, P. J., held that the affidavits showed bias and prejudice of municipal court judge to conduct preliminary proceeding on felony complaint.

Affirmed.

1. Judges 🔑49(1)

The Code of Civil Procedure provision that no justice or judge shall sit or act in any action or proceeding, when it is made to appear probable that, by reason of bias or prejudice of such justice or judge, a fair and impartial trial cannot be had before him, is applicable to criminal proceedings. West's Ann.Code Civ.Proc. § 170, subd. 5.

2. Judges ⚷51(4)

If written statement under Code of Civil Procedure setting forth facts allegedly constituting ground of disqualification of trial judge is timely and states sufficient facts, it is the judge's duty to file answer within five days or be disqualified from sitting until the matter of his bias is passed on by another judge. West's Ann.Code Civ.Proc. § 170, subd. 5.

3. Judges ⚷51(3)

Under the statute, the verified statement setting forth the facts constituting the bias and prejudice of the judge must show facts and not merely conclusions, from which the claimed disqualification appears to be probable, and the stated facts must make the bias appear probable as to the issue or issues to be tried. West's Ann. Code Civ.Proc. § 170, subd. 5.

4. Judges ⚷51(3)

Affidavit asserting that persons signing felony complaint had stated in affiant's presence that such persons had discussed the matter with municipal court judge and that judge had advised such persons to press the authorities to issue criminal complaint against affiant and his secretary and his client and that district attorney's office had informed affiant that judge had requested such office to issue complaint and that such office had given judge an opinion that complaint should not issue, disclosed such bias and prejudice as required a decision of another judge as to the disqualification of the municipal court judge to hear preliminary proceedings on the felony complaint which had been issued by the judge. West's Ann.Code Civ.Proc. § 170.

5. Judges ⚷51(3)

So long as the source of affiants' information is disclosed in affidavit, setting forth the facts constituting the bias and prejudice of the judge, an averment based on information and belief is not per se objectionable. West's Ann.Code Civ.Proc. § 170.

6. Judges ⚷49(1)

One should not be held to answer on a felony charge by a biased and prejudiced judge. West's Ann.Code Civ.Proc. § 170.

7. Judges ⚷51(4)

Where affidavit relating to bias and prejudice of municipal court judge was legally sufficient and the judge failed to file an answer thereto within five days as required by statute, the judge was disqualified to conduct preliminary proceedings on felony complaint. West's Ann.Code Civ.Proc. § 170.

8. Prohibition ⚷30

Writ of prohibition restraining municipal court judge, on ground of bias and prejudice, from further proceeding on the arraignment on a felony complaint, properly ordered judge to take no judicial action in any other criminal proceeding based on the same factual situation. West's Ann. Code Civ.Proc. § 170.

◆

Harold W. Kennedy, County Counsel, Robert C. Lynch, Deputy County Counsel, Los Angeles, for appellant.

Marvin Zinman, Los Angeles, for respondents.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., William E. James, Asst. Atty. Gen., William B. McKesson, Dist. Atty., County of Los Angeles, Manley J. Bowler, Chief Deputy Dist. Atty., John W. Dickey, Deputy Dist. Atty., Los Angeles, amici curiae on behalf of respondents.

FOX, Presiding Justice.

Appellant, a judge of the municipal court, appeals from a judgment of the superior court which granted a peremptory writ of prohibition commanding and ordering the appellant to desist and refrain from any further proceedings in an action known as People of the State of California v. A. J. Blackman, George E. Batchelor, and Elizabeth B. Johnson,[1] in which the respondents herein were charged with conspiracy to commit perjury.

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[1] The judgment reads in part as follows: "* * * It Is Hereby Ordered, Adjudged and Decreed that a peremptory writ of prohibition in due form be issued

The facts which gave rise to the instant appeal are as follows: On October 28, 1957, appellant "issued a felony complaint"[2] against the respondents upon a jointly verified statement signed by George C. Finn and Charles C. Finn[3] which alleged a conspiracy to commit perjury. Appellant thereupon signed and issued a warrant for the arrest of each respondent, fixing bail at $5,000 each. The appellant directed that respondents be brought before him for arraignment in Division 22 of the municipal court wherein he presided. At that time, there existed a rule of the municipal court providing that all preliminary proceedings in felony matters in said court should be heard in the Felony Preliminary Master Calendar Division thereof. The respondents presented themselves to the latter division of the municipal court on November 1, 1957, at which time the felony complaint was dismissed by the Honorable Vernon W. Hunt, judge of the said court. On December 23, 1957, appellant again caused warrants of arrest to be issued against each respondent, fixing bail at $3,000 each. These warrants were pursuant to the issuance of a felony complaint[4] by appellant upon a verified statement signed by Charles C. Finn which was identical to the statement filed on October 28, 1957. Respondents were ordered to be brought directly to appellant's court for arraignment despite the fact he was not sitting in the Felony Preliminary Master Calendar Division of the municipal court. Respondents presented themselves for arraignment before appellant on December 26, 1957, at which time they presented to him their joint affidavit of bias and prejudice pursuant to section 170, Code of Civil Procedure. Said affidavit was filed and appellant continued with respondents' arraignment until served with an alternative writ of prohibition restraining him from further proceeding. Appellant did not make an answer to the above affidavit. A peremptory writ of prohibition was granted on May 1, 1958. It should be noted that neither of the felony complaints herein involved were with the concurrence or assent of the District Attorney of Los Angeles County, nor were said complaints issued at the resquest of or with the concurrence or assent of the attorney general.

Respondents' affidavit of bias and prejudice contained the following statements:

"1. Affiants are defendants in the above captioned matter. Charles B. MacCoy, the judge before whom further proceedings therein are about to be taken and are now pending, is prejudiced against affiants so that affiants cannot have a fair and impartial trial and hearing before such judge.

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out of and under the seal of this Court addressed to respondent Charles B. MacCoy, Judge of the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California, commanding and ordering said respondent to desist and refrain absolutely from any further proceedings in that action in the Municipal Court of Los Angeles Judicial District, County of Los Angeles, State of California known as People of the State of California vs. A. J. Blackman, George E. Batchelor and Elizabeth B. Johnson, being No. 142367 therein; and to desist and refrain absolutely from performing any judicial act, whether as a magistrate or otherwise, in any other proceedings of a criminal nature involving the petitioners herein A. J. Blackman, George E. Batchelor and Elizabeth B. Johnson or any of them and,

"It Is Hereby Further Ordered, Adjudged and Decreed that all proceedings heretofore had in the Municipal Court of Los Angeles Judicial District, County of Los Angeles, in said action No. 142367 as aforesaid, were in excess of the jurisdiction of said Court and were from their commencement null and void and,

"It Is Hereby Further Ordered, Adjudged and Decreed that the entire record of the proceedings had in said action No. 142367 be stricken and expunged from the records of the said Municipal Court of Los Angeles Judicial District, County of Los Angeles."

[2] Finding of Fact IV.

[3] Said statement was subscribed and sworn to before Judge MacCoy on Saturday, October 26, 1957.

[4] Finding of Fact VIII.

"2. Affiant A. J. Blackman is an attorney at law, admitted to practice in this state and presently engaged in the practice of law here. Clients of said affiant include Affiant George Batchelor and International Airports, Inc., a corporation. Said clients, represented by Affiant A. J. Blackman, have been in litigation with George C. Finn and Charles C. Finn, since May 25, 1952. Said litigation includes certain Los Angeles Superior Court actions as follows: International Airports, Inc. vs. Finn, et al. No. 599895, International Airports, Inc. vs. Finn, et al., No. 600291 (consolidated), involving a Curtiss C-46 aircraft No. N 111H; George Batchelor vs. Finn, et al., No. 667157, involving another Curtiss C-46 aircraft No. N 111E; and Elizabeth B. Johnson vs. Finn, et al., No. 610007, for money had and received by, and loaned to, the defendants therein. A Sheriff's sale under a Writ of Enforcement issued by the Superior Court in the consolidated cases aforesaid is now scheduled for December 30, 1957, as respects said aircraft No. N 111H. Affiants believe that one of the objects of the proceedings herein is to delay, or attempt to delay, such sale by confining affiants' attention herein and making it impractical to attend said sale.

"3. Affiant Elizabeth B. Johnson is employed as secretary to Affiant A. J. Blackman. The claims alleged in said action No. 610007 were assigned to said Affiant Elizabeth B. Johnson for collection. The issues therein are the same as those which were included within the issues of the complaint signed by Charles B. MacCoy and previously disposed of by Judge Vernon W. Hunt. Affiants are informed and believe that the issues of the instant complaint signed by Judge Charles B. MacCoy likewise embrace the issues in said civil action. Said action No. 610007 is now pending appeal.

"4. The association between Judge Charles B. MacCoy and Charles C. Finn and George C. Finn dates back to August 28, 1953, when Judge MacCoy signed an Order for issuance of a writ of attachment against the United States of America in an action filed in the Municipal Court entitled 'George C. Finn vs. United States of America, Colonel J. L. Ulricson', No. 121462 in the files of said court. Based upon said writ, a Government transport airplane was attached at Lockheed Air Terminal, Burbank, California. The action later was removed to the United States District Court and there said writ was disposed of.

"5. Affiant A. J. Blackman has been present in court with George C. Finn and Charles C. Finn on many occasions. During one of said occasions in connection with said action No. 610007, one or both of the said Finns informed the Court in said affiant's presence in substance that they were in and around Washington, D. C. from September 15, 1956, to the latter part of January, 1957; that upon their return to Los Angeles they had investigated certain matters testified to at a default prove-up on December 14, 1956; that they believed that a portion of the testimony was false; that they had taken the matter up with the District Attorney's office which had refused to issue a complaint thereon; that they had also taken the matter up with Judge Charles B. MacCoy and had discussed the matter with him; that Judge MacCoy had advised them that they should press the authorities for issuance of a criminal complaint against affiants. This was all related in time to the early months of 1957, and before the complaint first issued by Judge MacCoy was signed.

"6. Affiant A. J. Blackman has also discussed this matter with a representative of the District Attorney's office. On Monday, October 28, 1957, said affiant was informed by such representative that Judge Charles B. MacCoy, Charles C. Finn and George C. Finn had requested that office to issue a complaint; that the investigation division of that office had made a detailed and exhaustive investigation of the facts upon which the Finns sought to have such complaint issued; that such facts were reviewed by attorneys in said office, who concluded that such a complaint should not issue; that an opinion was written by said office, a copy of which was transmitted to Judge MacCoy. It is apparent that Judge MacCoy has acted as legal counsel for said Finns in several phases of their legal proceedings, has given legal advice to them upon the matters involved in the complaint herein among others, and is actively engaged in promoting the prosecution of affiants herein for purposes and to an extent which make him biased and prejudiced against affiants."

The trial court concluded that "respondent [appellant] was by reason of bias and prejudice disqualified from acting in any judicial capacity, whether as a magistrate or otherwise, with respect to petitioners or any of them in the said Municipal Court action No. 142367 or otherwise; and that by reason of said disqualification he committed jurisdictional error in acting with respect to petitioners, subject to the remedy of prohibition from this Court to prevent him from further acting with respect to petitioners or any of them."

As grounds for reversal, appellant argues, inter alia, (1) that respondents' affidavit of bias and prejudice was legally insufficient, raised no issues and could be ignored, and (2) that said affidavit showed no bias and prejudice toward the respondents.

Respondents contend, however, that the above affidavit was sufficient in both form and content, and disclosed bias and prejudice toward respondents.

[1, 2] Section 170, Code of Civil Procedure, provides in part that "[n]o justice or judge shall sit or act in any action or proceeding: * * * 5. When it is made to appear probable that, by reason of bias or prejudice of such justice or judge a fair and impartial trial cannot be had before him." This section is applicable to criminal proceedings. McKay v. Superior Court, 98 Cal.App.2d 770, 220 P.2d 945; In re Harrington, 87 Cal.App.2d 831, 197 P.2d 783; People v. Ebey, 6 Cal.App. 769, 93 P. 379. Under this section, if a party files a verified statement setting forth the facts constituting the bias and prejudice of the judge, "it is the duty of the judge to file an answer within five days or be disqualified from sitting until the matter of his bias is passed upon by another judge," (Keating v. Superior Court, 45 Cal.2d 440, 443, 289 P.2d 209, 211) "if the written statement is timely and states sufficient facts * * *." (Keating v. Superior Court, supra.)

[3] In Calhoun v. Superior Court, 51 Cal.2d 257, at page 260, 331 P.2d 648, 650, the court succinctly stated the requirements of the affidavit as follows: "Section 170 of the Code of Civil Procedure requires a verified statement *showing facts*, not conclusions, from which the claimed disqualification appears to be probable, that is, from which facts the disqualification appears to follow as a conclusion of law. Furthermore, the stated facts must make the bias appear probable *as to the issue or issues to be tried.*" We are of the opinion that the affidavit in question fully meets the requirements stated in the Calhoun case.

[4, 5] Appellant's contention that respondents' affidavit was deficient and therefore could be ignored is lacking in merit. While the affidavit is not a model of draftsmanship, it is far from legally insufficient. In paragraph 5, respondent Blackman deposed that prior to the time of issuing the first felony warrant, the Finns had stated in his presence in another court that they had discussed the matter with the appellant and he had advised them (Finns) to press the authorities to issue a criminal complaint against the respondents. In paragraph 6, it was stated that respondent Blackman was informed by a member of the district attorney's office that appellant had requested that office to issue a complaint; that a copy of an opinion prepared by that office concluding that a complaint should not issue was forwarded to Judge MacCoy. Defendant's argument that the above statements were hearsay and therefore could be disregarded is without merit. Such statements were proper to show the basis or foundation for respondents' belief that appellant was biased and prejudiced against them and as a consequence thereof the probability that they could not have a fair trial before him. This aspect of the problem was discussed in Keating v. Keating, 169 Cal. 754, at page 759, 147 P. 974, at page 976, as follows: "It is idle to contend that the affi-

davit of Mr. Keating, although positive in form, must of necessity rest upon information and belief, and that therefore it should be rejected. Knowledge of facts which might cause a litigant to feel that a judge was prejudiced against him would naturally often be only that to be derived from information conveyed to him by others." So long as the source of the affiants' information is disclosed, an averment based on information and belief is not *per se* objectionable. See Morehouse v. Morehouse, 136 Cal. 332, 335–336, 68 P. 976. Blackman might not have any personal knowledge of conversations between the Finns and appellant, or between appellant and the district attorney's office, but he was present when the Finns (or one of them) made the above statement and could testify personally to that statement. Blackman could also testify personally to his conversation with the representative from the district attorney's office. Then, whether appellant in fact so counseled the Finns, or made the asserted request to the district attorney, presented a question of fact for subsequent determination under the procedures set forth in section 170, Code of Civil Procedure.

[6] Appellant cites numerous cases holding that an affidavit which contains "nothing but conclusions and setting forth no facts constituting a ground of disqualification may be ignored * * *." (Mackie v. Dyer, 154 Cal.App.2d 395, 399, 316 P. 2d 366, 369.) However, it is clear that the affidavit here in question consisted of more than mere conclusions. While it did contain some conclusions, the affidavit also contained sufficient facts to require a decision of another judge as to the disqualification of Judge MacCoy. Appellant's conduct, as affirmatively set forth in the affidavit, manifested his belief in respondents' guilt prior to the time any complaint was issued. Beyond this, respondents' affidavit pictured Judge MacCoy as an advocate of their guilt in that he personally sought to have the district attorney issue a felony complaint against them, and after assertedly receiving a written opinion from the district attorney's office that such complaint should not issue, nevertheless proceeded with the matter. Such conduct would unmistakenly indicate something more than a passive belief in respondents' guilt; rather, that appellant was inexorably determined to have respondents prosecuted in any event. Under such circumstances, serious doubt arises as to whether Judge MacCoy could conduct a fair and impartial preliminary examination. One should not be held to answer on a felony charge by a biased and prejudiced judge any more than he should be tried by such a judge, for this would be contrary to accepted concepts of the fair administration of justice.

Appellant next argues that the affidavit failed to disclose any bias or prejudice toward respondents and, if anything, only showed he may have been friendly toward the Finns. This contention is without factual support. While the affidavit did reveal a friendly relationship between appellant and the Finns, it clearly suggested appellant's pre-determined conviction of respondents' guilt and portrayed his repeated efforts to have a felony complaint issued against them.

[7] Therefore, as the affidavit was legally sufficient and the appellant failed to file an answer thereto within five days, he was disqualified (Code Civ.Proc. § 170; Calhoun v. Superior Court, supra, 51 Cal.2d at page 261, 331 P.2d at page 651; Keating v. Superior Court, supra) and the alternative writ properly issued to restrain him from conducting any further proceedings in this matter.

[8] Finally, appellant argues that the peremptory writ of prohibition was too broad in that it ordered him "to desist and refrain absolutely from performing any judicial act, whether as a magistrate or otherwise, in any other proceedings of a criminal nature involving the petitioners herein * * * or any of them * * *." From a reasonable reading of the judgment, however, it is manifest that the above quoted provision has reference to any other criminal proceeding which is based on the factual situation involved in this case. This is entirely proper.

Since the alternative writ properly issued and there is substantial evidence to support the trial court's finding of bias and prejudice, a finding which appellant does not specifically challenge, it appears that the peremptory writ was duly granted. Therefore, as the judgment must be affirmed, we find it unnecessary to pass on respondents' argument that appellant acted in excess of his jurisdiction in that the felony complaint herein under consideration was not issued by, at the request of, or with the concurrence or assent of the district attorney or other prosecuting officer.[5]

The judgment is affirmed.

ASHBURN and HERNDON, JJ., concur.

169 Cal.App.2d 740

PEOPLE of State of California, Plaintiff and Respondent,

v.

Edith GEORGE, Defendant and Appellant.

PEOPLE of State of California, Plaintiff and Respondent,

v.

Edith BLAIR, also known as Edith George, Defendant and Appellant.

Cr. 3605, 3606.

District Court of Appeal, First District, Division 2, California.

April 21, 1959.

Prosecution for grand theft. The Superior Court, City and County of San Francisco, C. Harold Caulfield, J., entered judgment of conviction, revoked probation, and denied defendant's motion for new trial, and defendant appealed. The District Court of Appeal, Kaufman, P. J., held that where offense charged, and a previous offense allegedly committed by defendant had similar elements, in that in both instances a purse or wallet was removed from the shoulder bag of a customer in a store, while defendant was accompanied by another, and used a scarf, evidence as to previous offense was admissible to show a general plan, scheme or design, and evidence of such previous offense would not be deemed too remote, notwithstanding the fact that it occurred approximately seven years prior to offense charged.

Judgment and orders affirmed.

1. Larceny 🔑65

Evidence sustained conviction for grand theft.

2. Criminal Law 🔑1159(2)

An appellate court can set aside a jury verdict on the grounds of insufficiency of the evidence only if it clearly appears that upon no hypothesis is there substantial evidence to support the conclusion reached by the court below.

3. Criminal Law 🔑670

Purpose of an offer of proof is to bring the court's attention to the nature of the proffered evidence so that the issue of admissibility can be determined.

4. Criminal Law 🔑670

An offer of proof is not necessary where the questions together with colloquies with the trial judge clearly disclose the purpose of the proffered evidence.

5. Criminal Law 🔑369(2)

Evidence of other crimes may not be admitted merely to show criminal disposition, but may be admitted if the proof of one crime tends to prove any fact material in the trial of another, and the fact that it may prejudice the defendant in the minds of the jury is not a ground for exclusion of such evidence.

6. Criminal Law 🔑372(1)

Where a defendant has pleaded not guilty and thus put in issue all facts relating to the commission of the offense charged, evidence of prior crimes of a similar character are of value and admissible if such evidence tends to show a general plan, scheme or design which is of some direct probative value in proving that crime of which the defendant is charged was in fact committed by him.

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[5] The amici curiae brief filed by the Attorney General and the Los Angeles District Attorney also advanced this argument.

7. Criminal Law ⚷372(5)

Where grand theft charged against defendant and an alleged prior offense had similar elements, in that in both instances a purse or wallet was removed from the shoulder bag of a customer in a store, and defendant was accompanied by another and used a scarf, evidence as to the alleged prior offense was admissible to show general plan, scheme or design, and evidence of such previous offense would not be deemed too remote notwithstanding the fact that it occurred approximately seven years prior to offense charged.

8. Criminal Law ⚷982.3

A court has no power to suspend a sentence except as an incident to granting probation.

9. Criminal Law ⚷982.6(4)

When a court after pronouncing judgment and sentence of imprisonment orders all or part of the sentence suspended, such order is considered to be an informal grant of probation and the equivalent of a formal order.

10. Criminal Law ⚷982.7

Where an order of probation did not specify duration of the period of probation, maximum period of probation could not exceed maximum time for which sentence of imprisonment might have been pronounced. West's Ann.Pen.Code, § 1203.1.

11. Criminal Law ⚷982.9(3)

Where a defendant's probation was revoked within period permitted by statute, court acted entirely within its discretion in revoking such probation and sentencing defendant to prison for the offense involved. West's Ann.Pen.Code, § 1203.1.

Benjamin M. Davis, Lionel Browne, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

KAUFMAN, Presiding Justice.

Defendant Edith Blair, also known as Edith George, appeals from a judgment rendered on a jury verdict finding her guilty of grand theft from the person of another (Pen.Code, § 487), from the order denying her motion for a new trial and from an order revoking probation. The defendant was sentenced to consecutive terms in the state prison. Four errors are alleged on appeal: 1) insufficiency of the evidence to sustain the verdict and judgment as a matter of law; 2) admission of evidence of another offense committed in 1951 by the defendant; 3) an improper instruction to the jury about the 1951 offense; and 4) the revocation of probation granted in 1952.

The evidence adduced at the trial is as follows: About 2:30 p. m. on March 6, 1958, the complaining witness, Mrs. Murray, was watching a sales demonstration in the Woolworth Store at Market and Powell Streets in San Francisco. She felt a tug on her arm-strap purse and noticed that it was open and her coin purse was missing. The defendant was standing about three steps away from her in the company of Ernest Norman. Mrs. Murray accused the defendant of taking her purse. The defendant denied taking the purse. Mrs. Murray saw a movement between the defendant and Ernest Norman. Mrs. Murray asked Mr. Norman to return her purse. He also denied taking it. The defendant then "kind of waved" the colored scarf she held. Mrs. Murray looked at the floor and saw her coin purse under the defendant's right foot. A man retrieved the purse and returned it to Mrs. Murray. Inspector Atkinson appeared and arrested the defendant with Ernest Norman.

Edgar Salberg testified that he was also watching the sales demonstration at the time in question. He saw Mrs. Murray's open bag and saw the defendant and Ernest Norman near her. He heard Mrs. Murray's cries about her purse. He saw the coin purse fall along the defendant's leg to the floor and saw the defendant step on it. He retrieved the purse, asked Mrs. Murray if the purse belonged to her, and returned it.

Mr. Howland testified that on the day in question he noticed the two defendants on a Sutter Street bus because of their loud conversation. He left the bus and later went into Woolworth's. While he was watching the demonstration he heard Mrs. Murray cry that someone had stolen her purse. He saw the defendant and Ernest Norman there and saw the purse drop to the floor between the defendant and Ernest Norman. He subsequently heard the defendant deny knowing Mr. Norman or being with him.

Inspector Atkinson testified that the two defendants denied knowing each other. Ernest Norman had two bus transfers and admitted riding the Sutter Street bus. Deloise Teed, an Emporium special police officer testified that in 1951 she saw the defendant in the basement of the Emporium with another girl. At that time the defendant removed a wallet from a customer's shoulder strap purse, wrapped it in a scarf and gave it to the other girl.

The defendant and Ernest Norman were tried together. No evidence was presented on behalf of either. The jury found Norman not guilty.

[1, 2] It is clear from the above that there is no merit in defendant's argument relating to the sufficiency of the evidence. The rule of reasonable doubt argued by the defendant binds the jury and not an appellate court. An appellate court can set aside a jury verdict on the grounds of insufficiency of the evidence only if it clearly appears that upon no hypothesis is there substantial evidence to support the conclusion reached by the court below. People v. Newland, 15 Cal.2d 678, 104 P.2d 778.

[3, 4] The second allegation of error on appeal relates to the testimony of the witness Teed. It is argued, first, that the court erred in not requiring an offer of proof outside of the presence of the jury and, second, that the testimony merely showed criminal disposition. The relevant portion of the record on which this argument is based is as follows:

> "Q. Now, your name is Deloise Teed (spelling) T-e-e-d, and Mrs. Teed, what is your occupation? A. I am a special police officer, Emporium.
>
> "Q. I see. How long have you been employed by the Emporium? A. Approximately 12 years.
>
> "Q. Now, I am going to direct your attention to May 21, 1951. Were you employed as a special police officer in the Emporium at that time? A. Yes.
>
> "Q. Do you recall seeing this defendant, Edith George, who sits in court, on that day?
>
> "Mr. Davis: I will object. It is irrelevant, immaterial and incompetent. The charges in this information are on March the 6th, 1958, Your Honor, and I don't think there is any relevancy of her seeing the defendant on the date in 1951.
>
> "The Court: The jury will be instructed to follow the Court's instructions as to the purpose of this testimony. It is introduced on the theory of scheme and design and the purpose of this testimony and the limited value and the limited consideration you give to it will be covered by the Court's instructions. And furthermore, it will apply only to the defendant Edith George and will not be considered by you in connection with the defendant Ernest Norman.
>
> "Mr. Davis: Your Honor, I think that the—
>
> "The Court: The objection will be overruled for that reason.
>
> "Mr. Davis: —the District Attorney should be required to make an offer of proof at this time, outside the presence of the jury, to show what he intends to prove by this witness, in order that

defendant George's counsel can make proper objections; especially, in view of the fact that there's seven years' difference in time here. And, two, the offer of proof should show there is sufficient proof to show scheme and device.

"The Court: The District Attorney made a statement of what he intends to prove by this witness in his opening statement to the jury.

"Mr. Davis: But that isn't an offer of proof.

"The Court: Well, there is enough before the Court to enable the Court to rule on it.

"Mr. Giubbini: I would make that offer of proof, which would be substantially what I made in my opening statement.

"The Court: Proceed."

The purpose of an offer of proof is to bring the court's attention to the nature of the proffered evidence so that the issue of admissibility can be determined. (Witkin, California Evidence, § 713.) The court here stated that it had sufficient information to make the ruling. An offer of proof is not necessary where the questions together with colloquies with the trial judge clearly disclose the purpose of the proffered evidence. People v. McGee, 31 Cal.2d 229, 187 P.2d 706.

[5–7] As to the admissibility of the evidence relating to the 1951 offense, the rule is that while such evidence may not be admitted merely to show criminal disposition, it may be admitted if the proof of one crime tends to prove any fact material in the trial of another. The fact that it may prejudice the defendant in the minds of the jury is no ground for exclusion. People v. Peete, 28 Cal.2d 306, 169 P.2d 924, 930: "The relevance of evidence that proves crimes other than that charged, however, must be examined with care. People v. Albertson, 23 Cal.2d 550, [at page] 577, 145 P.2d 7." Evidence of similar crimes is relevant to show plan, scheme, system, or design or characteristic behavior pattern. People v. Freytas, 157 Cal.App.2d 706, 321 P.2d 782. People v. Cavanaugh, 44 Cal.2d 252, 282 P.2d 53. Where, as here, the defendant has pleaded not guilty and thus put in issue all facts relating to the commission of the offense, the evidence of the prior crime of a similar character is of value and admissible in that it tends to show a general plan, scheme or design which is of some direct probative value in proving that the crime of which the defendant is charged was in fact committed by him. People v. Cassandras, 83 Cal.App.2d 272, 188 P.2d 546. The two offenses here in question have three similar elements: in both instances a purse or wallet was removed from the shoulder bag of a customer in a store; the defendant was accompanied by another and used a scarf. In People v. Mims, 160 Cal.App.2d 589, 325 P.2d 234, a grand theft case very similar to this one, testimony by a store detective that she had seen the defendant reach into women's purses on prior occasions, was held admissible by this court (Division One). There can therefore be no question that the evidence here in question, if not too remote, was admissible.

The defendant argues that the 1951 offense is so remote that the evidence cannot be admitted. The State argues that the question of remoteness goes to weight rather than admissibility. While this is true, as well as the fact that considerable discretion in this regard must be allowed the trial court, it has been pointed out that "it is obvious that there is a line of reasonableness beyond which the evidence is not admissible. People v. Burns, 109 Cal.App.2d 524, at page 554, 241 P.2d 308, at page 326, 242 P.2d 9. In a number of cases, prior offenses more removed in time than in the instant case have been held not to be too remote. People v. Grimes, 113 Cal.App.2d 365, 248 P.2d 130 (10 years); People v. Burns, supra, 109 Cal.App.2d 524, 241 P.2d 308, 242 P.2d 9 (13 years); People v. Peete, supra, 28 Cal.2d 306, 169 P.2d 924 (18 years). To the contrary is People v. Lapin, 138 Cal.App.2d 251, 291 P.2d 575, which held, in a prosecution for possession of marijuana, it was error to admit evidence of a misdemeanor conviction for such possession which occurred 9 years before. We do not think the line of reasonableness was passed in the present case. The evidence was not so remote in time as to be inadmissible. We conclude, therefore, that it was properly admitted.

The next argument is that the court erred in instructing the jury on the evidence of other crimes. There is no merit in this contention. The instruction carefully pointed out the limited purpose for which the evidence was received and for which it could be considered.

Defendant's final argument is that the court had no jurisdiction to revoke probation on the 1952 offense. The record indicates that on January 15, 1952, defendant was sentenced to imprisonment in the state prison for women for grand theft. This sentence was suspended on the condition that the defendant serve one year in the county jail. Nine months later, on September 16, 1952, the one year term in the county jail was modified to the term served, and the defendant was released from custody. Defendant's argument is based on the erroneous premise that the order of September 16, 1952 ended the court's jurisdiction over the defendant for the prior offense.

[8–11] It is well established that a court has no power to suspend a sentence except as an incident to granting probation. Pen. Code, §§ 1203, 1203.1; People v. McGillis, 166 Cal.App.2d 91, 332 P.2d 706; Oster v. Municipal Court, 45 Cal.2d 134, 287 P.2d 755. When a court after pronouncing judgment and sentence of imprisonment orders all or part of the sentence suspended, such order is considered to be an informal grant of probation and the equivalent of a formal order. Oster v. Municipal Court, supra. As the order does not specify the duration of the period of probation, under Section 1203.1 of the Penal Code, the maximum period of probation cannot exceed the maximum time for which sentence of imprisonment might be pronounced. People v. Sheeley, 159 Cal.App.2d 578, 324 P.2d 65; People v. Municipal Court, 145 Cal.App.2d 767, 303 P.2d 375. In the case of grand theft the maximum punishment is 10 years. Pen.Code, § 489. Therefore, defendant's probation was revoked within the period permitted by the statutes. In revoking probation in the 1952 case on the basis of the present case, and sentencing the defendant to the state prison for the 1952 case, the court acted entirely within its discretion. People v. Smith, 164 Cal.App.2d 510, 330 P.2d 678; People v. Goldberg, 152 Cal.App.2d 562, 314 P.2d 151; People v. Lopez, 151 Cal.App.2d 121, 311 P.2d 11.

In view of the foregoing, the judgment of conviction, order denying a new trial, and order revoking probation are affirmed.

Judgment and Orders affirmed.

DOOLING and DRAPER, JJ., concur.

169 Cal.App.2d 858

William C. PITTS, Plaintiff and Appellant,

v.

Stuart K. FLETCHER and Alice Fletcher, Defendants and Respondents.

Civ. 6006.

District Court of Appeal, Fourth District, California.

April 24, 1959.

Action for rescission of a contract of sale, cancellation of a note given for the purchase price, and for damages for breach of contract. Defendants counterclaimed for damages for use and occupation of the premises. The Superior Court, Kern County, R. B. Lambert, J., entered judgment unsatisfactory to plaintiff and he appealed. The District Court of Appeal, Shepard, J., held, inter alia, that evidence consisting only of testimony that a ground rent of $30 per month was paid, was insufficient to sustain finding that reasonable value of use and occupation of the premises was $250 per month.

Judgment modified and as modified affirmed.

1. Pleading 🔑236(5)

Trial courts have discretionary power to allow amendments to conform to proof.

2. Cancellation of Instruments 🔑24(1)

The action of rescission contains as one of its necessary elements the restoration of the parties to status quo.

3. Sales 🔑110

Value of the use and occupancy of a business, fixtures and premises which seller repossessed prior to bringing an action to rescind the sale thereof, was an advantage gained by seller and constituted damage suffered by buyers and reasonable value thereof was a proper subject for the court's consideration in determining buyers' damages under their cross complaint.

4. Use and Occupation 🔑9

In action for rescission of a contract of sale, cancellation of a note given for the purchase price, and for damages for breach of contract, evidence, consisting only of testimony that a ground rent of $30 per month was paid, was insufficient to sustain finding that reasonable value of use and occupation of the premises was $250 per month.

5. Pleading 🔑237(7)

In action for rescission of a contract of sale, wherein buyers filed a cross complaint for value of use and occupation of premises repossessed by seller, trial court erred in permitting amendment of pleadings to conform to proof to extent of showing value of use and occupation of $250 per month, rather than $30 per month, where only evidence of value of use and occupation was that a ground rent of $30 per month had been paid.

Kenneth M. Smith, Claude L. Welch, Ridgecrest, for appellant.

S. B. Gill, Bakersfield, for respondents.

SHEPARD, Justice.

This is an action for rescission of a contract of sale, cancellation of a promissory note given for the purchase price, and for damages for breach of contract. From the record before us it appears that the defendants herein, at some time prior to the events which are here the subject of litigation became lessees of the premises on which was established a business known as Fletcher's Frosty Freeze, located in the town of Ridgecrest; that defendants herein, after the establishment of the business, contracted to sell said business to other parties not litigants in this action; that those parties conducted negotiations of sale with plaintiff herein and plaintiff took possession of the premises and business on June 2, 1956, paying the ground rent of $30 a month to the landlord on a lease dated June 11, 1949, which will expire May 31, 1959. Defendants re-acquired their original ownership on or about October 8, 1956, and because of plaintiff's serious financial involvement with his predecessors in interest a new contract was negotiated directly between plaintiff and defendants under date of November 30, 1956, and certain written documents were executed evidencing said agreement.

On sufficient evidence the court found that by the sale agreement defendants included tenancy rights under a 15-year ground lease dated in 1952 on said premises where the business is located, the rental thereunder being $30 per month; that said 15-year ground lease was never executed and never came into existence; that the consideration for the sale agreement of November 30, 1956 had therefore failed; and that plaintiff had been in possession of the business under the new agreement of November 30, 1956, from December 3, 1956 to August 15, 1957.

After the trial and submission of the cause, defendants moved for permission to file an amendment to their cross-complaint to conform to proof, in which amendment to the cross-complaint defendants alleged an indebtedness from plaintiff to defendants for the rental value of $3,000 for the use and occupation of the premises, equipment and fixtures sold under said business; that $906.84 had been paid thereon, leaving a balance unpaid of $2,093.16.

Thereupon the court rendered judgment for rescission of the sale of November 30, 1956, including cancellation of the $12,500 note given by plaintiff to defendants as evidence of the purchase price. The court further found that plaintiff had paid to defendants on the purchase price the sum of $1,406.84; that plaintiff owed to defendants as reasonable rental of the business the sum of $250 per month for eight and a half months (from December 3, 1956 to August 15, 1957), plus $150 paid by defendants for plaintiff on basic ground rental, making a total of $2,275. The court then subtracted the amount owed by defendants to plaintiff and adjudged a net recovery for defendants from plaintiff of the sum of $868.16.

[1–4] Appellant claims on this appeal that the court committed error in permitting the filing of defendants' "Amended Cross-complaint to Conform to Proof". We think this contention is only partly correct. It is well settled in this state that trial courts have discretionary power to allow amendments to conform to proof. Campagna v. Market Street Ry. Co., 24 Cal.2d 304, 308 [4], 149 P.2d 281; Valencia v. Shell Oil Co., 23 Cal.2d 840, 848 [10], 147 P.2d 558. We think there was not any sufficient variance between the original pleadings and the final amendment to conform to proof to have misled the plaintiff. Defendants' statement on pre-trial contained a statement that defendants would claim as damages the loss of use of the business. Code Civ.Proc. Sec. 469, 470. Additionally, it should be noted that the action of rescission contains as one of its necessary elements the restoration of the parties to status quo. Bowman v. Victor, 83 Cal.App.2d 693, 699 [3], 189 P.2d 876; Joshua Tree Townsite Co. v. Joshua Tree L. Co., 100 Cal.App.2d 590, 597 [5], 224 P.2d 85; Solorza v. Park Water Co., 86 Cal.App.2d 653, 662 [5], 195 P.2d 523. The value of the use and occupancy of the business, fixtures and premises was unquestionably an advantage gained by plaintiff and a damage suffered by defendants, and the reasonable value thereof was a proper subject for the court's consideration. Warfield v. Richey, 167 Cal.App.2d 93, 334 P.2d 101. There was evidence of ground rent value of $30 per month. To this extent the order was correct.

[5] Plaintiff further complains that the court erred in finding that the reasonable value of the use and occupation of the premises was in the sum of $250 per month. With this we agree. We have examined the entire record carefully and we have been unable to discover any evidence of any kind which would support such a finding. Defendants, confronted with this challenge, refer to the basic ground rental of $30 per month which is, of course, supportive of the court's order to that extent, but to that extent only. They next refer to the payments of the purchase price in the amount of $250 per month, as shown by defendants' Exhibit A and plaintiff's Exhibit 3. These exhibits refer entirely to the sale of the business and in no way mention or suggest a reasonable rental value. They are not in any way supportive of the subject of reasonable rental value. Defendants claim that plaintiff treated his monthly payments to defendants as rental and refer to and point out the testimony of plaintiff wherein plaintiff was being questioned on his payments under the contract of purchase. This testimony reads as follows:

> "Q. And how much money did you pay to or for the benefit of the Fletchers? A. What do you mean 'for the benefit'?
>
> "Q. Well, under any kind of deal you had, or would have had, you would have to pay the rent. A. After the proceeds was drawed up and everything, I made a down payment of $500.-

> 00 and as of the first of January I was to start the payments of $250.00 a month plus 6% interest on the balance and I was to keep the fire insurance."

It can readily be seen that the word "rent" was an insertion by defense counsel of a subject entirely foreign to the particular inquiry under examination in this series of questions. The plaintiff answered respecting the sale and quite clearly ignored the suggestion inserted by defense counsel. It is not evidence in any way supportive of reasonable rental value.

From the foregoing it appears that the court did not have authority to permit an amendment to conform to proof beyond or above the figure contained in evidence already received. The court could have reopened the case, permitted the amendment, and in the proper exercise of its equity jurisdiction settled the whole matter by taking direct evidence on the reasonable rental value of the premises; or the court could have allowed an amendment to conform to proof to the extent that proof existed, which in this instance was $30 per month. Its finding of an offset of $150 total ground rent paid by defendants on behalf of plaintiff is supported by the evidence, and the order for the amendment to conform to proof is valid to that extent only. Defendants had the opportunity, during the trial, to put in other evidence of reasonable rental value, but failed to do so. Since defendants did not offer any evidence of reasonable rental value, other than the bare proof of the basic ground rental payment, we are unable to point to any error on the part of the court which would warrant a retrial of the cause.

Since the finding of a total reasonable value of the use and occupation of the premises is not supported by the evidence to any extent greater than $150, that amount is the only offset allowable against the order of $1,406.84 to be returned by the defendants to plaintiff. Thus the monetary judgment finally resulting is in favor of plaintiff in the amount of $1,256.84. The judgment is therefore modified to read that plaintiff recover judgment from defendants in the amount of $1,256.84. The judgment for rescission of the agreement of November 30, 1956 and the cancellation of the promissory note dated December 1, 1956 in the amount of $12,500 is affirmed. Each party to pay his own costs on appeal.

GRIFFIN, P. J., and MUSSELL, J., concur.

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169 Cal.App.2d 795

In the Matter of the ESTATE OF Abkar SETRAKIAN, Deceased.

Civ. 5676.

District Court of Appeal, Fourth District, California.

April 22, 1959.

Rehearing Denied May 22, 1959.

Hearing Denied June 18, 1959.

Proceedings in the matter of a decedent's estate, wherein the Superior Court of Fresno County, Arthur C. Shepard, J., entered a decree prorating and charging federal estate, and California inheritance, taxes among devisees and legatees of decedent, and an appeal was taken. The District Court of Appeal, Stone, J. pro tem., held that the "contingency clause", in will giving residuary estate to testator's sons and directing them to pay to each of testator's daughters the sum of $8,000 per year for 14 years and $13,000 the 15th year, with payments to be made out of principal if net income from trust estate were not sufficient therefor, did not change legacy from one of trust income to straight money bequest similar to annuity, and that federal estate tax imposed upon gross taxable estate of decedent was not to be charged against trust payments made to testator's daughters.

Order reversed.

1. Internal Revenue 🔑982

The federal estate tax is not a "succession tax", that is, it is not a tax on what devisees, legatees, beneficiaries, or heirs receive, but it is a tax upon what is left by decedent; an excise tax on interest which is shifted or transferred by reason of death of owner. 26 U.S.C.A. (I.R.C.1954) §§ 2002, 2031; West's Ann.Prob.Code, §§ 970–977, 971, 973.

See publication Words and Phrases, for other judicial constructions and definitions of "Succession Tax".

2. Internal Revenue 🔑7

Federal estate tax is governed entirely by federal statute in respect to nature of tax, manner or method of its computation, and liability for payment thereof to United States, but ultimate thrust or impact of federal estate tax is governed entirely by state law. 26 U.S.C.A. (I.R.C.1954) §§ 2002, 2031; West's Ann.Prob.Code, §§ 970–977, 971, 973.

3. Internal Revenue 🔑1746

Under California law, testator may direct in his will which fund shall bear federal estate tax, and he may also exonerate any particular devise or bequest from burden. 26 U.S.C.A. (I.R.C.1954) §§ 2002, 2031; West's Ann.Prob.Code, §§ 970–977, 971, 973.

4. Internal Revenue 🔑1732

Purpose of probate code sections is to apportion equitably burden of federal estate tax so that it is borne commensurately by those whose gifts contribute to tax burden and there is eliminated from such burden all whose legacies do not in any way create or add to tax. West's Ann.Prob.Code, §§ 970, 971.

5. Internal Revenue 🔑1732

When incidence of federal estate tax is to be borne by several parties, general rule is that tax is to be prorated in proportion which each share bears to total taxable property, and only value of property actually taxed may be considered, and proration must be predicated solely on property of decedent included in gross estate for federal estate tax purposes and on parts thereof which devolved to several legatees and devisees on death of testator, excluding from consideration benefits received from decedent which are not included in taxable estate. West's Ann.Prob.Code, §§ 970, 971.

6. Wills 🔑684(5)

The "contingency clause", in will giving residuary estate to testator's sons and directing them to pay to each of testator's daughters the sum of $8,000 per year for 14 years and $13,000 the 15th year, with payments to be made out of principal if net income from trust estate were not sufficient therefor, did not change legacy from one of trust income to straight money bequest similar to annuity, and federal estate tax imposed upon gross taxable estate of decedent was not to be charged against trust payments made to testator's daughters. West's Ann.Prob.Code, §§ 970, 971, 973.

7. Statutes 🔑226

Decisions of courts of other states are not controlling, but they are persuasive and serve as guides in initial interpretation of local statutes of like import.

8. Internal Revenue 🔑1744

Where, during course of probate administration, stock was sold for sum in excess of appraised value, the difference, although part of trust estate, would in no way contribute to amount of federal estate tax assessed against probate estate; and that sum (the difference) being sufficient to meet any residuary trust payments that might, under "contingency clause", be required to be paid from principal if trust income were inadequate, federal estate tax would have to be paid from corpus of trust estate. West's Ann.Prob.Code, §§ 970, 971, 973.

9. Taxation 🔑856, 885

The California inheritance tax is a tax upon what beneficiary receives and not upon the "gross taxable estate" of decedent, and any interest in decedent's property accruing to beneficiary, whether it be future interest or otherwise, is taxable. West's Ann.Rev. & Tax.Code, §§ 14121, 14128.

10. Taxation ⟹903

State of California has authority to determine taxability of transfer and impact of resulting tax. West's Ann.Rev. & Tax. Code, §§ 14121, 14128.

11. Wills ⟹736

Where will gave testator's daughters right to receive certain income from residuary trust for a term of 15 years, with remainder over to testator's two sons, who were residuary legatees as well as trustees, California inheritance tax was to be paid out of corpus of trust estate. West's Ann. Rev. & Tax.Code, § 14124.

◆

James T. Barstow, Fresno, for appellants Gladys Serabian and Zabelle De Orian.

Crossland, Crossland & Richardson, William C. Crossland, Fresno, for appellant Hasmik Besoyan.

C. Ray Robinson, Los Angeles, for executors and respondents Souren Setrakian and Kourken Setrakian.

STONE, Justice pro tem.

This is an appeal from a decree prorating and charging the Federal Estate Taxes and California Inheritance taxes among the devisees and legatees of Abkar Setrakian, Deceased.

The Facts.

The testator, by his will executed June 2, 1948, made certain specific bequests which disposed of an inconsequential portion of his estate. The residue he gave, devised and bequeathed to his two sons in trust with directions as to the management and distribution thereof. The estate was appraised at $911,767.11. The final account reflects total charges of $1,934.823.42 from which all claims against the estate, all taxes including federal and state inheritance taxes, expenses of administration, special bequests, and support payments totaling $564,785.78 were paid, leaving to be distributed to the trustees the sum of $1,370,037.64.

The final account requested that, "by its decree the Court order the executors and trustees to charge the prorated amounts of the Federal Estate Tax paid by the executors against the persons against whom the tax has been prorated and direct the trustees to withhold from the moneys payable to the beneficiaries of the trust all such taxes so paid by the executors." The probate court determined that the bequests of the four appellants, who are daughters of testator, should each be charged with payment of federal estate taxes in the sum of $21,338.46, and California inheritance taxes in the amount of $1,653.63. The trust provides that each daughter is to receive $125,000, payable in fourteen annual installments of $8,000, and a final installment of $13,000. The only record before us is the clerk's transcript, and it is not manifest from it how the federal estate tax was prorated nor how the amount of $21,338.46 was computed. It would appear that the tax was apportioned by determining the ratio which $125,000 bears to the value of the total net taxable estate for federal estate tax purposes. The appellants contend that the federal estate taxes and the California state inheritance taxes should be paid out of the corpus of the trust, rather than from the payments to be made to them under the terms of the trust.

The Will.

The following provisions of the will give rise to the problems which confront us on this appeal:

> "3. After making the payments herein provided for my wife, the trustees shall pay to each of my four daughters, or the lawful living issue of any deceased daughter, share and share alike per stirpes and not per capita, the sum of One Hundred Twenty-five Thousand Dollars ($125,000.00) in fourteen annual installments of Eight Thousand Dollars ($8000.00) and the fifteenth installment in the amount of Thirteen Thousand Dollars ($13,000.00). In the event that any lawful issue of a deceased daughter shall be a minor at the time of becoming entitled to any payments under the provisions

> of this paragraph, any such payments shall be made to the Trust Department of Security-First National Bank of Los Angeles, Fresno, California, until any such minor shall attain lawful age, at which time said Bank shall pay over to any such child any sums then in its possession belonging to any such child, free from any trust. Payments under this paragraph shall be made out of principal if the net income from the trust estate be not sufficient therefor.
>
> "4. After making the payments hereinabove provided for my wife and my daughters, the trustees shall currently distribute the remaining net income of the trust estate to my two sons, and the lawful living issue of a deceased son, share and share alike per stirpes and not per capita; said net income shall be determined annually upon the basis of such calendar or fiscal year as shall be adopted by the trustees; the date from which payment of income shall accrue shall be the date of my death, but payments accruing during probate administration shall not bear interest.
>
> "5. The interests of beneficiaries in principal or income shall not be subject to claims of their creditors or others, nor to legal process, and may not be voluntarily or involuntarily alienated or encumbered."

The will contains no provision or direction as to the apportionment of federal estate taxes or California inheritance taxes among the devisees and legatees.

The federal estate tax and the California inheritance tax are dissimilar in nature and in the manner by which the amount of each is determined. Furthermore, the proration of the federal estate tax is governed by the Probate Code, while the California inheritance tax comes within the provisions of the Revenue and Taxation Code. Hence, of necessity, the two problems will be treated separately.

Proration of Federal Estate Taxes.

[1] The federal estate tax is not a succession tax, that is, it is not a tax on what the devisees, legatees, beneficiaries, or heirs receive, but it is a tax upon what is left by the decedent. It is an excise tax on the interest which is shifted or transferred by reason of the death of the owner. The United States Supreme Court said, in the case of Young Men's Christian Ass'n of Columbus Ohio v. Davis, 264 U.S. 47, at page 50, 44 S.Ct. 291, at page 292, 68 L.Ed. 558: "What was being imposed here was an excise upon the transfer of an estate upon death of the owner. It was not a tax upon succession and receipt of benefits under the law or the will. It was death duties as distinguished from a legacy or succession tax. What this law taxes is not the interest to which the legatees and devisees succeeded on death, but the interest which ceased by reason of the death." See also In re Estate of Madison, 26 Cal. 2d 453, 458, 159 P.2d 630; Security First Nat. Bank of Los Angeles v. Wellslager, 88 Cal.App.2d 210, 214, 198 P.2d 700; United States Trust Co. of New York v. Helvering, 307 U.S. 57, 60, 59 S.Ct. 692, 83 L.Ed. 1104.

[2, 3] The federal estate tax is governed entirely by federal statute in respect to the nature of the tax, the manner or method of its computation, and the liability for the payment thereof to the United States. 26 U.S.C.A. Chap. 11. The controlling federal statutes provide that the estate tax is a lien on the entire "gross estate" and that it shall be paid by the executor or administrator (26 U.S.C.A. §§ 2002, 2031; United States v. Woodward, 256 U.S. 632, 635, 41 S.Ct. 615, 65 L.Ed. 1131; In re Estate of Buckhantz, 120 Cal. App.2d 92, 98, 260 P.2d 794; In re Estate of Atwell, 85 Cal.App.2d 454, 460, 193 P.2d 519.) On the other hand, the ultimate thrust or the impact of the federal estate tax is governed entirely by state law (Riggs v. Del Drago, 317 U.S. 95, 98, 63 S. Ct. 109, 87 L.Ed. 106, 142 A.L.R. 1131; In re Estate of Atwell, supra; In re Estate of

Buckhantz, supra; Security First Nat. Bank of Los Angeles v. Wellslager, supra, 88 Cal.App.2d at page 213, 198 P.2d at page 702.) Under the authority of California law, the testator may direct in his will which fund shall bear the tax and he may also exonerate any particular devise or bequest from that burden. The will before us contains no such provision. Therefore, the manner of prorating the federal estate tax must be determined from an interpretation of Probate Code Sections 970 through 977. We believe Sections 970, 971 and 973 are controlling in this case. Section 970, insofar as here pertinent, provides that when an executor has "paid an estate tax to the Federal Government under the provisions of any Federal estate tax law, now existing or hereinafter enacted, upon or with respect to any property required to be included in the gross estate of a decedent under the provision of any such law, the amount of tax so paid, except in a case where a testator otherwise directs in his will * * * shall be equitably prorated among the persons interested in the estate to whom such property is or may be transferred or to whom any benefit accrues." Section 971 reads as follows:

> "The proration shall be made by the court having jurisdiction in probate of any property in the estate in the proportion, as near as may be, that the value of the property, interest or benefit of each such person bears to the total value of the property, interests and benefits received by all such persons interested in the estate."

[4, 5] It is apparent upon reading Sections 970 and 971 that they are indefinite in some particulars and contain no explicit directives to the probate court concerning the exercise of its equity jurisdiction. The sections do not define the term "estate" as distinguished from the term "taxable estate", nor do they delineate the relation of the interest of the beneficiary or heir to the creation of the tax. However, there are decisions interpreting these two sections which do define the term "the estate" from which the federal estate tax must be determined, and they also define the terms "property, interest and benefits," with reference to which the federal estate tax is to be prorated. One of the early cases interpreting these sections is Security First Nat. Bank of Los Angeles v. Wellslager, 88 Cal.App.2d 210, at page 213, 198 P.2d 700, at page 702, which aptly summarizes the purpose and nature of the code sections as follows:

> "Their purpose is to apportion equitably the burden of the tax so that it is borne commensurately by those whose gifts contribute to the tax burden and there is eliminated from such burden all whose legacies do not in any way create or add to the tax."

In other words, Probate Sections 970 and 971 are founded on equity, which dictates that any legacy or inheritance which adds to the federal estate tax should be required to bear its just proportion of that tax. Conversely, any legacy or inheritance which does not create or add to the tax should be spared such burden. The manner in which this principle shall be applied is enunciated in In re Estate of Buckhantz, 120 Cal.App.2d 92, at page 99, 260 P.2d 794, at page 797, wherein the court says:

> "When the incidence of the tax is to be borne by several parties, the general rule under such statutes is that the tax is to be prorated in the proportion which each share bears to the total taxable property; only the value of property actually taxed may be considered; and the proration must be predicated solely on the property of the decedent included in the gross estate for federal estate tax purposes and on the parts thereof which devolved to the several legatees and devisees on the death of the testator, *excluding from consideration benefits received from the decedent which are not included in the taxable estate.* Security First Nat. Bank [of Los Angeles] v. Wellslager, 88 Cal.App.2d 210, 213, 198 P.2d 700; 47 C.J.S. Internal Revenue § 776 p. 1017 and cases there cited. *The court is bound*

> *by the actual fact of inclusion or exclusion of property by the federal taxing authorities.* The task of proration begins at the point where the taxing authorities end their duty of fixing the estate tax; it takes the accomplished fact of taxation and then prorates the burden on the actuality of the tax." (Italics added.)

The general rules expressed in the Security First Nat. Bank of Los Angeles v. Wellslager and In re Estate of Buckhantz decisions governing the interpretation of Sections 970 and 971 apply also to Probate Code Section 973 relating to trusts. Section 973 provides:

> "In cases where a trust is created, or other provision made whereby any person is given an interest in income, or an estate for years, or for life, or other temporary interest in any property or fund, the tax on both such temporary interest and on the remainder thereafter shall be charged against and be paid out of the corpus of such property or fund without apportionment between remainders and temporary estates."

[6, 7] At first reading the import of this section seems clear enough without court interpretation or direction as to its application. However, one of the trust provisions in the testator's will presents an ambiguity which cannot be resolved by Probate Code Section 973 alone, and resort must be had to the cases interpreting Sections 970 and 971. Turning now to the will, it must be kept in mind that (1) each beneficiary who receives a legacy which was part of the gross estate at the time of the testator's death, and which created or added to the federal estate tax should bear his pro rata share of the estate tax, while (2) those who receive a legacy which was not a part of the "gross estate" should not bear the thrust of the tax. Had testator provided that the legacy to each daughter be paid from income, our problem would be simple, as obviously income accruing to the trust after testator's death could not have been a part of his "gross estate". Probate Code Section 973 would be applicable and clearly the tax would fall on the corpus or principal of the trust estate. Nor would there be any problem had testator directed that $125,000 of his estate be set aside for each daughter to be paid to her in fifteen annual installments. The legacy would be a part of the "gross estate" and paid from funds which created or added to the federal estate tax. Probate Code Section 971 would prevail and each beneficiary would quite properly be required to reimburse the executors her pro rata share of the federal estate tax. Unfortunately, the provisions of the will are not clear-cut in this respect. The testator devised and bequeathed all of the residue of his estate in trust to his two sons, directing them as trustees to first pay the sums specified for the support of his widow and next to pay to each daughter the sum of $8,000 per year for fourteen years, and $13,000 the fifteenth year. The problem arises because he then concluded the paragraph with the following sentence: "Payments under this paragraph shall be made out of principal if the net income from the trust estate be not sufficient therefor." It is apparent that the testator hoped that the bequests would be paid from income since he provided in the next paragraph that after the payments to the widow and the four daughters had been made, the remaining *income* should be divided between the respondents. Regardless of his hopes, the will contains the provision that if the income should prove insufficient the trustees were to make the payments from principal. Thus, the question presented to us is whether the "contingency clause" providing for payment out of principal if necessary, changes the legacy from one of trust income to a straight money bequest similar to an annuity. Counsel for one of the parties has observed that the question has never been decided by a California court. We take it this statement is correct as no California authority has been cited and the court has been unable to locate any. However, there are decisions by the courts of New York bearing on the issue. New York has a statute providing

for proration of federal estate taxes which is very similar to ours. Decedent Estate Law of New York, McKinney's Consol. Laws, C. 13, § 124; Security First Nat. Bank of Los Angeles v. Wellslager, supra, 88 Cal.App.2d at page 216, 198 P.2d at page 704; In re Estate of Hotaling, 74 Cal.App. 2d 898, 170 P.2d 111. While the decisions of other states are not controlling, they are persuasive and serve as guides in the initial interpretation of local statutes of like import. The case of In re Provot's Estate, 188 Misc. 802, 62 N.Y.S.2d 437, presented a factual situation which parallels the one before us. In the New York case, the testator directed his trustees to pay a beneficiary $4,000 per year in quarterly installments and provided, "I direct that it be paid out of the income of the said trust, but if in any one year the income of the trust is not sufficient, then I direct that the deficit be made up out of the principal of the said trust fund." The court held that the federal estate tax should be paid out of the corpus of the trust saying, 62 N.Y.S.2d on page 439:

> "The court holds that such exception is here applicable and that the estate taxes due to the grant to the life beneficiary of income rights and supplementary rights in principal are chargeable wholly to the capital of the residuary trust without obligation to make any refund whatever. Clearly the beneficiary takes pursuant to the trust and she has 'an interest in income' within the terms of section 124, Decedent Estate Law."

In construing the same statute a New York court was faced with a similar factual situation in the case of In re Thomas' Estate, 197 Misc. 552, 96 N.Y.S.2d 232, 234. The trust provided for payments to the beneficiary of $300 per month for life and, further, that "if the income of the 'trust fund' shall not be sufficient to enable the trustees to pay over that sum then 'the trustees shall pay to David Small from principal such amounts as will bring the total amounts actually paid over to him to Three Hundred Dollars ($300) per month.'" The court squarely met the question of the effect of the trustees' right to resort to principal in order to make the payments provided for by the trust, and held, 96 N.Y.S. 2d at page 234:

> "The court holds that the will creates a trust within the meaning of the statute and grants to the beneficiary 'an interest in income, or an estate for * * * life, or other temporary interest' in the fund. Decedent Estate Law, § 124, supra; Matter of Murphy's Estate, 124 Misc. 672, 209 N.Y.S. 686; Matter of Smathers' Will, 133 Misc. 812, 234 N.Y.S. 99; In re Brown's Est[ate], Sur., 65 N.Y.S.2d 624. No amortization of the tax will be required. The power given to the trustee to invade principal if necessary in order to maintain the monthly payments, does not evidence an intention to create an annuity nor alter the evident character of the interest as one pertaining to income. Matter of Provot's Estate, 188 Misc. 802, 62 N.Y.S. 2d 437. The relationship between the net yearly payments to be made and the size of the fund (a ratio of 1.8 percent) indicates that in normal years a conservative yield will be more than sufficient to provide for the required payments and indicates an intention on the part of the testator to create a true trust to pay over income. The power to invade is merely a protection to be employed in lean years and does not convert the gift into an annuity. Matter of Provot, supra; Matter of Michaelis."

We conclude that the trust payments to be made to the appellants, daughters of trustor, constitute an interest in income and a temporary interest in the trust estate, within the meaning of Section 973 of the Probate Code. The federal estate tax imposed upon the gross taxable estate of the decedent should not be charged against the trust payments to be made to appellants. We are impelled to this interpretation of Probate Code Sections 970, 971 and 973 as applied to the will before us, not alone because of the New York cases reaching the same conclusion, but for the additional reason that the intent of the testator, insofar as it can be gleaned from the rest of the will, reflects a transfer of a temporary interest in the trust estate. It is not a bequest or a legacy of a sum of money, the use and enjoyment of which is deferred, there is no setting apart of the sum of $125,000 for the benefit of each appellant. Rather, the entire estate is devised and bequeathed to the trustees. They in turn are directed to make payments to the daughters out of income, and if income be insufficient the difference to be supplied from principal. It is primarily an income trust. Its provisions follow those of the typical spendthrift trust as the testator provided against attachment of the payments by creditors or others and he prevented alienation of them by the beneficiaries. He also directed the disposition of the payments in the event any beneficiary failed to survive to receive them. It is also significant that the testator provided in Paragraph 4 of the trust that "the date from which payment of income shall accrue shall be the date of my death, but payments accruing during probate administration shall not bear interest." No reference is made to principal, and it is palpable that the testator was thinking in terms of an income trust and a temporary interest for his daughters.

[8] It is rare indeed when there are no facts peculiar to the particular matter before the court, and this case is no exception. The will was admitted to probate December 24, 1948, and an order for distribution of the residue of the estate to the trustees as provided by Paragraph 10th of the will was made September 27, 1957. The petition for distribution reflects that between December 24, 1948 and September 27, 1957 there was a net gain in excess of $800,000 to the residue of the probate estate, which is now the corpus of the trust estate. At the time of his death decedent and his brother had developed extensive vineyard properties and affiliated businesses. Ownership was evidenced by corporate stock. At the time of death the appraised value of the stock was $623,500. During the course of probate administration the stock was sold for $1,470,522.50. or an income to the estate of $838,022.50. This aspect of the case was not presented or considered by counsel for any of the parties. We therefore anticipate that respondents would argue that this is not income but a capital gain. And so it is from a purely accounting standpoint, but judged in the light of the rule laid down in the Buckhantz case governing the proration of federal estate taxes, the $800,000 gain was not a part of decedent's gross estate for federal estate tax purposes. This $838,022.50 although a part of the trust estate in no way contributed to the amount of federal estate taxes assessed against the probate estate. If we follow the theory of equitable proration to its logical and perhaps its ultimate conclusion, by correlating the thrust of the federal estate tax to the gross taxable estate of the decedent, the peculiar facts of this case support the conclusion that the payments to the beneficiaries should not be charged with any federal estate tax. The value of the trust estate indicates that in the normal course of events there should be sufficient income to provide the annual payments provided for by the trust. In the event the income falls short of this in any year, there is ample trust principal which was not a part of decedent's gross taxable estate to supplement current income. Therefore, the federal estate tax should be paid from the corpus of the trust estate.

California Inheritance Tax.

[9–11] The California Inheritance Tax is a tax upon what the beneficiary receives (In re Estate of Knapp, 37 Cal.2d 827, 831, 236 P.2d 372, and cases cited therein) and not upon the "gross taxable estate" of decedent. Any interest in the decedent's property accruing to a beneficiary, whether it be a future interest or otherwise, is taxable. Therefore the legacy of each appellant in this case unmistakenly adds to the California Inheritance Tax assessed by reason of the death. If we were to apply the equity principle of proration and the rule of the

Buckhantz case, then clearly the tax would be chargeable against the interest of each beneficiary, whether the legacy is payable from trust income or corpus. But the Probate Code does not govern the impact of California inheritance taxes and the rule of the In re Estate of Buckhantz, which correlates the thrust of the tax to its creation, cannot be applied. The payment of the California Inheritance Tax is governed by Revenue and Taxation Code, Sections 14121 through 14128. These code sections provide that in certain situations the California Inheritance Tax is payable from the corpus and that no part of the tax may be collected from the transferee. That the State of California has the authority to determine the taxability of a transfer and the impact of the resulting tax is well settled. It was said in In re Estate of Atwell, 85 Cal. App.2d 454, at page 461, 193 P.2d 519, at page 523:

> "The right to receive property by will or inheritance is not a natural right, but is a creature of the law. (Citations) The state may confer the privilege of succeeding to property upon the condition that any portion of the property it specified shall be contributed to that state."

In considering the question of the proration of the federal estate tax in a preceding portion of this opinion we concluded that the testator created an income, spendthrift trust. Therefore, Revenue and Taxation Code Section 14124 is applicable. That section provides:

> "Where a transferor has given one person any right, interest, or estate for life or for a term of years, and another person the remainder over, in the same property, the executor, administrator, or trustee shall pay the tax on each transfer out of the corpus of the property. The tax shall not be charged against the right, interest, or estate of, nor shall it be collected from, either transferee."

Under the terms of the will before us the appellant beneficiaries were given an interest in the corpus of the estate, namely, the right to receive certain income, for a term of fifteen years, with remainder over to the two sons who are the residuary legatees as well as the trustees. Therefore, it follows that the California inheritance tax should be paid out of the corpus of the trust estate pursuant to Revenue and Taxation Code Section 14124.

The order is reversed.

GRIFFIN, P. J., and MUSSELL, J., concur.

170 Cal.App.2d 27

**PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Peter PEREZ and Joseph Laran,
Defendants and Appellants.
Cr. 3550.**

District Court of Appeal, First District,
Division 2, California.
April 29, 1959.

Hearing Denied June 24, 1959.

Defendants were convicted of sale of narcotics and of conspiracy to possess, sell and transport narcotics. The Superior Court, San Mateo County, Louis B. Dematteis, J., entered judgment and an order denying motion for new trial, and defendants appealed. The District Court of Appeal, Dooling, J., held that showing that witness for prosecution was absent from state constituted sufficient foundation for admitting transcript of testimony given by absent witness at preliminary hearing without any showing that prosecution had exercised due diligence in attempting to serve subpoena on absent witness.

Judgment and order affirmed.

1. Criminal Law 🔑543(2)

Evidence that absent witness for prosecution was working in Oregon and had informed state narcotic inspector by telephone from Portland that he did not intend to appear as a witness at trial was sufficient to show that absent witness was out of the state when, three days later, transcript of testimony given by him at preliminary hearing was read to jury. West's Ann.Pen.Code, § 686, and subd. 3.

2. Criminal Law ⚷543(2)

Showing that witness for prosecution was absent from state at time transcript of testimony given by him at preliminary hearing was read to jury satisfied statutory requirement that he could not with due diligence be found within the state and constituted sufficient foundation for admitting transcript of his prior testimony without any showing that prosecution had exercised due diligence in attempting to serve subpoena on absent witness. West's Ann.Pen. Code, § 686, and subd. 3.

3. Conspiracy ⚷43(5)

Where one overt act alleged in count of information charging conspiracy to possess, sell and transport narcotics was the sale of narcotics of which defendants were found guilty under another count, express verdict of guilty on charge of sale of narcotics satisfied rule that commission of at least one overt act in furtherance of conspiracy must be found by jury, and allegation of other overt acts in support of conspiracy count was not prejudicial to defendants, even if such acts were the acts of another who had pleaded guilty before trial and was not before jury. West's Ann.Health and Safety Code, § 11500; West's Ann.Pen.Code, § 182.

◆

Mario Richard Regalado, Redwood City, for appellant Laran.

Robert H. Cornell, San Francisco, for appellant Perez.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Peter T. Kennedy, Deputy Atty. Gen., for respondent.

DOOLING, Justice.

Appellants Perez and Laran were charged jointly with one Manuel Garcia Jr. in four counts with possession, sale and transportation of, and with conspiracy to possess, transport and sell marijuana and heroin. Health and Saf.Code, § 11500; Pen.Code, § 182. Appellants pleaded not guilty to all counts and were jointly tried, the jury finding them guilty of the offenses charged in counts II and IV, sale of and conspiracy to possess, sell and transport narcotics. They appeal from the judgment and from the order denying their motions for a new trial.

The evidence shows that on February 12, 1958 State Narcotic Inspector Gazzola, upon information received from one Jack Shay (also know as Jack Schaeffer), a paid informer, arranged a purchase of narcotics. Pursuant to the arrangements, at 8:45 p. m. of the same day, the inspector parked his automobile near the Southern Pacific Depot in San Carlos, California. Shay arrived shortly thereafter accompanied by appellants and Garcia. After some discussion with Shay and with Garcia, the inspector asked for the merchandise. Garcia stated that it was being held by Pete and Joe (appellants) and he then went to the automobile occupied by appellants and returned with a brown paper bag containing heroin and a cellophane bag containing marijuana.

The inspector agreed to pay $420 for the narcotics and after counting out $100 stated that the balance was under the hood of his car. When he opened the hood, a prearranged signal, appellants and Garcia were arrested.

No contention is made that the evidence is not sufficient to support the judgments. The only errors urged are:

1. That the court erred in permitting the testimony of the witness Shay given at the preliminary hearing to be read to the jury on the ground that this witness was out of the state at the time of the trial. Penal Code, § 686, subd. 3.

2. That the information was defective in that the eighth and ninth overt acts alleged in support of the conspiracy count were acts of Garcia and not of appellants, and Garcia was not before the jury since he had pleaded guilty before the trial.

1. The testimony showed that Shay was working in Oregon and that on April 19, 1958 Shay had called Gazzola from Portland, Oregon by telephone and informed Gazzola that he did not intend to appear as a witness at the trial because he might lose his job. The case went to trial on April 21, 1958 and Shay's testimony was read on April 22.

[1, 2] Complaint is made 1. that no sufficient showing was made that Shay was out of the State on April 22 and 2. that there was a lack of diligence in attempting to serve Shay with a subpoena. Both contentions are so completely disposed of in the very recent case of People v. Carswell, 51 Cal.2d 602, 335 P.2d 99, as to justify a quotation from page 101 of that decision:

"Before the first trial Holmes had pleaded guilty to the burglary. * * * In order to facilitate his rehabilitation, the officer had on July 11 obtained a court order restoring Holmes to probation on condition that he return to his home in Philadelphia. He testified that he had asked Holmes to write him upon his arrival there, and that he had received a letter postmarked July 22. Since the trial began on July 24, it may reasonably be inferred from this evidence that Holmes was out of the state at the time of the trial.

"Defendant argues that the mere showing of Holmes' absence from the state did not constitute a sufficient foundation for the introduction of his prior testimony, as the prosecution did not show that it had exercised due diligence to insure his presence at the second trial. * * * Where the evidence is sufficient to show that the witness is absent from the state, the due diligence requirement is inapplicable. [citing cases.]"

Appellants point out that while a showing that the witness is "out of the jurisdiction" was expressly made a ground for the use of the witness' testimony given on a former trial when Penal Code section 686 was amended in 1911 to permit the use of such testimony, the provision of that section for the use of testimony given at a preliminary hearing was not amended and contains no similar provision, being limited to cases where the witness is "dead or insane, or can not with due diligence be found within the state." From this they argue that the statement quoted from Carswell that "(w)here the evidence is sufficient to show that the witness is absent from the state, the due diligence requirement is inapplicable" must be limited to cases where the testimony to be used was given at a former trial and cannot apply to testimony given at the preliminary hearing.

It is significant that the two cases cited by the Supreme Court in support of this statement (People v. Barker, 144 Cal. 705, 78 P. 266, and People v. Martin, 127 Cal.App.2d 777, 274 P.2d 509) are cases where the testimony admitted was given at a preliminary hearing and not on a former trial. It has been expressly stated (with reference to the foundation necessary for the use of testimony given at the preliminary hearing): "The only question presented * * * was whether Darnell was at the time of trial in Texas. That fact having been proved to the court 'no futile acts of diligence to secure attendance are required.'" People v. Harris, 87 Cal.App.2d 818, 824, 198 P.2d 60, 64; People v. Guernsey, 80 Cal.App.2d 463, 467, 180 P.2d 27; People v. Padilla, 81 Cal.App. 528, 532, 254 P. 585; People v. Caballero, 41 Cal.App. 146, 151, 182 P. 321. The courts in many cases have held that a showing that the witness is out of the state satisfies the requirement that he "cannot with due diligence be found within the state" (a proposition which seems to be self-evident). People v. Grill, 151 Cal. 592, 599, 91 P. 515; People v. Moran, 144 Cal. 48, 60–61, 77 P. 777; People v. Barker, supra, 144 Cal. 705, 706–707, 78 P. 266; People v. McIntyre, 127 Cal. 423, 427, 59 P. 779; People v. McDaniel, 157 Cal.App.2d 492, 499, 321 P.2d 497; People v. Martin, supra, 127 Cal.App.2d 777, 784, 274 P.2d 509; People v. Bryant, 124 Cal.App. 241, 243, 12 P.2d 168; People v. Thomas, 100 Cal.App. 82, 83, 279 P. 826; People v. Crandall, 100 Cal.App. 785, 790–791, 281 P. 81; People v. Carillo, 66 Cal.

App. 146, 149, 225 P. 475. We are satisfied that under all the authorities the showing in this case was sufficient.

[3] 2. Apart from any other consideration the presence of the allegation of the eighth and ninth overt acts in the information can not have prejudiced these defendants. The tenth overt act alleged was the sale of narcotics to Gazzola on February 12, 1958. This is the same sale of which the appellants were found guilty under count II, and the express verdict of guilty on this charge satisfies the rule that the commission of at least one overt act in furtherance of the conspiracy must be found by the jury.

Judgments and orders denying new trial affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

EAST BAY GARBAGE COMPANY, a corporation, Plaintiff, Cross-Defendant and Appellant,

v.

WASHINGTON TOWNSHIP SANITATION COMPANY, a corporation, Defendant, Cross-Complainant and Respondent.*

Civ. 18236.

District Court of Appeal, First District, Division 1, California.

April 28, 1959.

Rehearing Denied May 25, 1959.

Hearing Granted June 24, 1959.

Suit to obtain an injunction to restrain a sanitation company from collecting and disposing of garbage in a sanitary district wherein defendant filed a cross complaint seeking additional and other relief. From a judgment of the Superior Court, County of Alameda, James R. Agee, J., the plaintiff appealed. The District Court of Appeal, Hanson, J. pro tem., held that where predecessor of sanitary district entered into contract with plaintiff for collection and disposal of garbage within the district for ten-year period and no money was required to be paid out by the district's treasury, the statute respecting publication of bids for contracts with the district and requiring an award to the lowest responsible bidder had no application.

Judgment reversed.

1. Health 🔑6

A sanitary district as an entity of the state is vested with police power of the state in the field of garbage collection and disposal. West's Ann.Health & Safety Code, §§ 6400–6917.

2. Health 🔑20

Everything including garbage which, from its nature and surroundings, is, or is liable to become, a menace to public health or safety, is a proper subject of the police power of the state.

3. Health 🔑16

Where sanitary district was granted express power to collect and dispose of garbage, it had, even without the other statutory powers given, the implied power to contract to have the work done by others by virtue of its police power, and could determine whether the district and its inhabitants would best be served by having one or more agencies do the work. West's Ann.Health & Safety Code, §§ 6400–6917.

4. Health 🔑16

A contract entered into between the predecessor of a sanitary district for the collection and disposal of garbage within the district for a ten-year period was construable as a franchise as well as an exclusive contract. West's Ann.Health & Safety Code, §§ 6400–6917.

5. Municipal Corporations 🔑1027

Rule that a court must have jurisdiction of the subject matter of suit and of a person to take action against him, is not applicable where the action is taken by a legislative entity in its legislative capacity, and when legislative power is vested in a municipal board, acts done in the exercise of that power are acts of legislation, and the granting of a franchise is a purely legislative act.

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* Opinion vacated 344 P.2d 289.

6. Municipal Corporations 🔑236

Governmental entities are restricted by constitutional or legislative provisions or both from entering into contracts which may cost the entity more than a stated amount, unless the contract is entered into on a competitive basis and then only, as a rule, to the lowest bidder. West's Ann. Health & Safety Code, § 6515.5.

7. Constitutional Law 🔑70(1)

The court cannot add to or subtract language from a statute nor construe it in a manner contrary to the language used.

8. Health 🔑16

Where predecessor of sanitary district entered into contract with plaintiff for collection and disposal of garbage within district for ten-year period and no money was required to be paid out by the district's treasury but district was asking for money bids for the privilege and was ready to grant it to the highest responsible bidders and received offers by two bidders and awarded the contract to the plaintiff's predecessor, the statute respecting publication of bids for contracts with the district and requiring an award to the lowest responsible bidder had no application. West's Ann.Health & Safety Code, §§ 6400–6917, 6515, 6518.5, 6521, 6522.

◆

Quaresma & Rhodes, Fred A. Avera, Fremont, for appellant.

Bernard M. King, Fremont, for respondent.

HANSON, Justice pro tem.

This is a suit brought by the plaintiff East Bay Garbage Company, a corporation, to obtain an injunction to restrain (1) the defendant Washington Township Sanitation Company, a corporation, from soliciting customers and from collecting and disposing of garbage in that area of the Union Sanitary District which formerly comprised the Irvington Sanitary District and (2) for damages and loss of profits.

Defendant answered and filed a cross-complaint seeking (1) a similar injunction against the plaintiff, (2) dismissal of the complaint, (3) a declaration that the contract between the plaintiff's predecessor and the Irvington Sanitary District is null, void, and of no effect, and (4) for damages and loss of profits. The plaintiff filed an answer to the cross-complaint.

The matter was then submitted to the trial judge upon an agreed statement of facts which set forth the legal issues involved.

The court entered judgment on defendant's cross-complaint granting it the relief prayed for, except that the court reserved, pursuant to a written stipulation of the parties the determination of the amount of damages until such time as the case could be heard and determined on appeal.

Both plaintiff's predecessor, the East Bay Garbage Company, a partnership, and defendant since prior to April 1955 have continuously collected and disposed of garbage within the area of the Union Sanitary District which formerly comprised the Irvington Sanitary District.

Prior to the incorporation of the City of Fremont on January 23, 1956, the Irvington Sanitary District had been formed and was functioning as such within its territorial limits. On February 17, 1955, its Board of Directors published a notice in a newspaper of general circulation soliciting proposals for the collection and disposal of garbage within the District for a ten-year period under an exclusive contract. Only one publication of this notice was made. Within the time allotted, the defendant and respondent Washington Township Sanitation Company, a corporation, entered a bid and the predecessor of the East Bay Garbage Company did likewise. At the time the bids were opened and the contract awarded there were approximately 1,500 residential, commercial, or industrial establishments within the District, at which garbage was picked up on a regular periodic basis. On its bid the plaintiff-appellant proposed to pay the District a flat sum of $1,200 per year for the first five years of the contract and $1,800 per year for the second five years. The defendant-respondent proposed to pay $1.50 per year for each unit serviced. The Board of Directors awarded the exclusive contract to the plaintiff-appellant.

Thereafter on January 23, 1956 (about eleven months later), the City of Fremont was incorporated and as a result the City's territorial limits completely encircled the territorial boundaries of the Irvington District. About two months thereafter the Irvington District was consolidated with and became a part of the Union Sanitary District which before the consolidation had its territorial limits within what became the territorial limits of the incorporated City of Fremont.

Meantime on February 9, 1956, the City of Fremont adopted an ordinance (Ord. No. 15) which prohibited any person from collecting garbage within the city limits unless that person had either a contract with the City or a valid, subsisting contract which was in effect on January 24, 1956, with the Irvington Sanitary District. Additionally, the City on June 19, 1956, adopted an ordinance (No. 22) providing for the regulating and licensing of all businesses conducted within the city. The plaintiff never applied for or acquired such a license.

It is stipulated by the parties hereto that there are no factual issues in dispute, but that the legal issues are as follows:

1. a) Whether or not the contract between plaintiff's predecessor and the Irvington Sanitary District was a franchise as well as an exclusive contract, and

b) If it was, whether or not it could be attacked in the manner sought by defendant.

2. Whether or not as a result of the consolidation of the districts, the Union Sanitary District succeeded to all the rights, duties, and liabilities theretofore existing between Irvington Sanitary District and plaintiff's predecessor.

3. Whether or not plaintiff was guilty of unclean hands in refusing to obtain a business license from the City of Fremont pursuant to Ordinance No. 22.

4. Whether or not the Irvington Sanitary District was required to conform to the provisions of section 6515.5 of the Health and Safety Code in awarding the contract to plaintiff's predecessor.

5. Whether or not defendant's contract with the City of Fremont to collect garbage grants to defendant the exclusive right to collect garbage within that area of the city which formerly comprised the Irvington Sanitary District if it should be determined that plaintiff's contract is invalid.

6. Eliminated by stipulation of the parties.

7. The extent of damages suffered by the party, if any, entitled to an injunction.

Before discussing the issues on appeal it should perhaps be stated that the trial court found that all of the facts set forth in the agreed statement of facts were true and correct, and concluded: 1) that the contract between plaintiff's predecessor and the Irvington Sanitary District constituted a franchise as well as an exclusive contract; 2) that section 6515.5 of the Health and Safety Code applies to said franchise and exclusive contract; 3) that section 6515.5 requires the District to publish a notice requesting bids once a week for two consecutive weeks; 4) that said section requires that the district award the contract to the lowest responsible bidder; 5) that since the fees to be charged the residents of the District are all uniform, the lowest bidder is the bidder who pays the largest sum to the District for the privilege; 6) that because said section was not complied with by the District, the franchise and exclusive contract is void; 7) that because it is void defendant can attack its validity in an action for an injunction and declaratory relief where it can show a legal right to collect and dispose of garbage in the area in question; 8) that Ordinance No. 15 of the City of Fremont prohibits plaintiff from collecting and disposing of garbage in the area for the reason that plaintiff does not have a contract with the City as required by said Ordinance; 9) that the April 10, 1956, contract between the City and defendant's predecessor gave the franchise to collect and dispose of garbage in the area to defendant's predecessor in title; 10) that defendant is entitled to damages from plaintiff for its loss of profits, etc.; 11) that defendant was entitled to an injunction on its cross-complaint; 12) that as a result of the consolidation, the Union Sanitary District succeeded to all the rights, duties, and liabilities heretofore existing between the Irvington Sanitary District and plaintiff's predecessor; and 13) that plaintiff was not guilty of unclean hands for failure to obtain a license under the provisions of Ordinance No. 22 of the City of Fremont.

In view of the challenge to the rights, powers, authority, and duties of sanitary districts, we pass at once to a recital and appraisal of the material provisions of the Sanitary District Act of 1923 as amended. Health and Safety Code, secs. 6400–6917.

The act gives a district the power to "collect waste and garbage" (sec. 6518.5); to "make and enforce all necessary and proper regulations for: (a) The removal of garbage * * * [and] (c) All other sanitary purposes not in conflict with the laws of this State" (sec. 6521); "It may do any act necessary or proper to the complete exercise and effect of any of its powers, or for the purposes for which it is formed" (sec. 6522), "It may make and accept contracts * * * that, in the judgment of the board, are necessary or proper in the exercise of any of the powers of the district" (sec. 6515).

[1, 2] The powers thus enumerated may be classed, in part, as statutory powers and in part statutory police powers. But quite apart from these powers the District as an entity of the state is vested with the police power of the state in the field which we are here discussing. In short, as was said in California Reduction Co. v. Sanitary Reduction Works, 9 Cir., 126 F. 29, 34–35, a case dealing with a garbage contract: "One thing, however, is certain: that everything which, from its nature and surroundings, is, or is liable to become, a menace to the public health or public safety, is a proper subject to be dealt with under the police power of a state. This case comes within that class. The power to make the law necessarily carries with it the power to judge of its necessity, expediency, and justice, and, primarily at least, of the reasonableness of the means and methods used to accomplish the end sought to be obtained. Courts have nothing to do with the wisdom, policy, or expediency of the law. The courts are only authorized to deal with the question of the power of the Legislature or municipality to pass the laws or orders in question, and determine whether they are valid, and, if so, to construe their provisions. There their duty ends."

[3] As the District was granted the express power to collect and dispose of garbage, it necessarily had, even without the other statutory powers given, the implied power to contract to have the work done by others by virtue of its police power. It was within the power of the District to determine whether the District and its inhabitants would be best served by having one or more agencies do the work. In Smiley v. MacDonald, 42 Neb. 5, 13, 60 N.W. 355, 357, 27 L.R.A. 540, the court said: "[T]he removal of the noxious and unwholesome matter mentioned in the contract tends directly to promote the public health, comfort, and welfare, and is therefore a proper exercise of the police power; nor is the fact that, in this instance, the city has by contract conferred an exclusive privilege material. From the power thus conferred upon the city is implied the duty to determine the means and agencies best adapted to the end in view. The means adopted appear to be not only a reasonable

and necessary regulation, but a judicious exercise of the discretion conferred upon the city. That the object of all such regulations can be best attained by entrusting the work in hand to a responsible contractor, who possesses the facilities for carrying it on with dispatch, and with the least possible inconvenience to the public, is apparent to all. * * * The alleged excess of power is a mere sanitary measure, as obviously so as the familiar and necessary quarantine for the detention of persons exposed to contagious diseases. In either case the privilege, although exclusive, is but an incident to the proper exercise of the general police power of the state."

[4] Whether the contract entered into between the predecessor of the East Bay and the Irvington Sanitary District is to be classed as a franchise as well as an exclusive contract seems to us immaterial to a decision of this case on the merits. The trial judge, as has already been stated, found that the contract was a "franchise as well as an exclusive contract," and we are not disposed to disagree.

"The term 'franchise' has several significations, and there is some confusion in its use. We might concede, for the purposes of this opinion, that the rights and privileges conferred upon appellee are not, in the strict sense of the term, a franchise, yet it must certainly be admitted that they are special rights and privileges in the nature of a franchise, which create a valid contract which the courts should sustain." California Reduction Co. v. Sanitary Reduction Works, supra, 126 F. 29, at page 40.

[5] It is a well-established rule that a court must have a jurisdiction of the subject matter of a suit and of a person in order to take action against him, as for instance, to enter a judgment. But that rule is not applicable where the action taken is by a legislative entity, in its legislative capacity. "When legislative power is vested in a municipal board, acts done in the exercise of that power are acts of legislation, and should be recognized as such by the courts. * * * the granting of a franchise is a legislative act * * *. If the granting of this franchise be a purely legislative act, then there was no exercise of judicial functions upon the part of the board in making the grant, and clearly no excess of jurisdiction." People v. Board of Supervisors, 122 Cal. 421, 423, 55 P. 131, 132.

In the case before us, respondent contends that the contract between the appellants' predecessor is void under section 6515.5 by reason of the fact (1) that there was only one publication of the notice instead of two as required by that section and (2) that the contract was not awarded to the lowest responsible bidder as required by the statute. Upon those grounds it contends that it could sue the appellant directly to have the contract declared by the court to be void, whether it be classed as a franchise, or not, and to have the appellant enjoined from collecting and disposing of garbage in the area which formerly comprised the Irvington Sanitary District.

Whether the section is applicable to a case such as this is of major importance in that if it be inapplicable the case must be reversed for that one reason alone. Hence, we proceed at once to discuss that issue.

[6] It is a well-known fact that governmental entities are restricted by constitutional or legislative provisions or both from entering into contracts which may cost the entity more than a stated amount, unless the contract is entered into on a competitive bid basis and then only, as a rule, to the lowest bidder. Section 6515.5 is typical of such statutes.

But in the case before us the District was not seeking to have work done for it of a character for which it would have to pay moneys out of its treasury, but instead it was asking for money bids for a privilege it was ready to grant to the highest responsible bidder. It received offers by two bidders who agreed to pay to the District moneys in accordance with the terms of their bids.

Section 6515.5 reads as follows: "If the total cost of any work exceeds two thousand five hundred dollars ($2,500), the district shall publish a notice requesting bids therefor by publication for once a week for two consecutive weeks in a newspaper of general circulation in the county in which the district is located and award the contract to the lowest responsible bidder. The notice shall state the time and place for receiving and opening of sealed bids and describe in general terms the work to be done.

"If more than one bid is received, the board shall award a contract, as specified in the notice requesting bids, to the lowest responsible bidder. If only one bid is received, the board may either accept the bid or reject it and enter into a contract as provided in Section 6515 or order the work done by day's work. If no bids are received, the board may either enter into a contract as provided in Section 6515 or order the work done by day's work.

"This section shall have no application where the work is done pursuant to those acts set forth in Sections 6541 and 6541.5 of this code.

"Any contract to which this section applies that is not let pursuant to this section is void."

[7, 8] We are not permitted to add to or subtract language from a statute nor to construe it in a manner contrary to the language used. We think it self-evident that the statute is not applicable to the facts of the case before us. For that reason it follows that the contract of the plaintiff is valid and that the plaintiff and not the defendant is entitled to an injunction and damages.

Judgment reversed.

BRAY, P. J., and FRED B. WOOD, J., concur.

Hearing granted; PETERS, J., not participating.

52 Cal.2d 91

PEOPLE of the State of California, Respondent,
v.
Laurine TAYLOR, Appellant.
Cr. 6419.

Supreme Court of California,
In Bank.
May 1, 1959.

Prosecution for narcotic violation which occurred when a go-between talked to police officer who was sitting in automobile and received $10 from officer and then waved defendant to come over whereupon defendant removed package containing a narcotic from her handbag and gave it to go-between who then gave it to officer. From adverse judgment of the Superior Court, Los Angeles County, Lewis Drucker, J., and from an order denying a motion for new trial, the defendant appealed. The Supreme Court, McComb, J., held that testimony of police officer that he gave $10 to the go-between was not hearsay evidence and was properly admitted.

Judgment and order affirmed.

Opinion 331 P.2d 1048, vacated.

1. Criminal Law 🔑576(5)

Where indictment was filed September 12, 1957, but no objection was interposed by defendant when she was arraigned on December 26, 1957, or when, after entry of plea of not guilty on January 2, 1958, trial date was set for February 11, 1958, court did not err in denying defendant's motion to dismiss action at commencement of trial for failure to bring defendant to trial within 60 days after finding of indictment. West's Ann.Pen.Code, § 1382, subd. 2.

2. Criminal Law 🔑576(5)

Consent of a defendant that his trial on a criminal charge be set for a date beyond the statutory 60-day limit within which he should be brought to trial after finding of indictment is equivalent to a postponement upon his application within meaning of that statute. West's Ann.Pen. Code, § 1382, subd. 2.

3. Criminal Law 🔑576(5)

When a defendant fails to object at time a cause is set for trial beyond statutory period within which he should be brought to trial after finding of indictment, consent of defendant is presumed. West's Ann.Pen.Code, § 1382, subd. 2.

4. Criminal Law 🔑419(1)

In prosecution for narcotic violation which occurred when a go-between talked to police officer who was sitting in automobile and received $10 from officer and then waved defendant to come over whereupon defendant removed package from her handbag containing a narcotic and gave it to go-between, testimony of police officer that he gave $10 to go-between was not hearsay evidence and was properly admitted. Health & Safety Code, § 11500.

5. Poisons 🔑9

In prosecution for selling, furnishing and giving away a preparation of heroin, it was not necessary that buyer deal directly with seller and evidence that parties dealt with each other through a third party was sufficient to sustain a conviction. Health & Safety Code, § 11500; West's Ann.Pen.Code, § 31.

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Henry C. Huntington and E. V. Cavanaugh, Los Angeles, for appellant.

Edmund G. Brown, Atty. Gen., and William E. James, Asst. Atty. Gen., for respondent.

McCOMB, Justice.

From a judgment of guilty of violating section 11500 of the Health & Safety Code, after trial before the court without a jury, defendant appeals. She also appeals from the order denying her motion for a new trial.

Facts: About 2 p. m. on July 17, 1957, Police Officer Hunter and Policewoman Pettigrew of the Los Angeles Police Department were sitting in an automobile in a parking lot at the corner of Adams Boulevard and Normandie Avenue. Cecil Scott came up to the car, and the officers had a 10 or 15 minute conversation with him. Officer Hunter gave Scott $10. Scott then waved to defendant, and she came to the car, where Scott introduced her as his good friend to the police officers. He then mumbled something to defendant, who opened her red handbag, removed therefrom a white paper bindle and gave it to Scott, who immediately gave it to Officer Hunter.

Officer James H. Carter, a qualified expert in the field of chemistry, analyzed the contents of the bindle and testified that it contained heroin.

[1] *Questions:* First. *Did the trial court err in denying defendant's motion, made pursuant to the provisions of section 1382, subdivision 2, of the Penal Code, to dismiss the action at the commencement of the trial?*

No. Section 1382 of the Penal Code of California reads in part: "The court, unless good cause to the contrary is shown, must order the action to be dismissed in the following cases: * * * 2. If a defendant, whose trial has not been postponed upon his application, is not brought to trial in a superior court within 60 days after the finding of the indictment."

The record shows that the indictment was filed September 12, 1957, but that no objection was interposed by defendant when she was arraigned on December 26, 1957, or when, after entry of her plea of not guilty on January 2, 1958, the trial date was set for February 11, 1958.

These rules are here applicable:

[2] 1. The consent of a defendant that his trial on a criminal charge be set for a date beyond the 60-day limit prescribed in section 1382, subdivision 2, of the Penal Code is equivalent to a postponement upon his application within the meaning of that section. (Ray v. Superior Court, 208 Cal. 357, 358[1], 281 P. 391.)

[3] 2. When a defendant fails to object at the time a cause is set for trial beyond the statutory period, consent is presumed. (Ray v. Superior Court, supra.)

Wilson v. Superior Court, 125 Cal.App.2d 749, 271 P.2d 156, relied on by defendant, is inapplicable to the present case, for the reason that there was no showing in that case of any effort to apprehend the defendant for a period of more than one year after the return of the indictment. When he was brought before the court, he objected to a continuance of his trial beyond the 60-day period specified in section 1382, subdivision 2, of the Penal Code.

[4] Second. *Did the trial court err in receiving in evidence the testimony of Officer Hunter that he paid $10 to Scott for the transaction here in question?*

No. Defendant contends that Officer Hunter's testimony that he gave $10 to Scott is hearsay evidence because the officer's act in handing over the money took place out of defendant's presence. The testimony related only to an act which the witness himself performed, of which he had firsthand knowledge, and relative to which there was a controversy. His testimony was not hearsay evidence. (Cf. People v. Henry, 86 Cal.App.2d 785, 789, 195 P.2d 478.)

[5] Third. *Was there substantial evidence to sustain the judgment of guilty against defendant?*

Yes. The indictment charged defendant with selling, *furnishing* and *giving away* a preparation of heroin. The crime charged was proven when the evidence set forth above was received showing that defendant furnished and gave away the narcotic. Likewise, the evidence was sufficient to prove that defendant participated in the sale thereof. Section 31 of the Penal Code classifies as principals in the commission of a crime, "All persons concerned in the commission of a crime * * * whether they directly commit the act constituting the offense, or aid and abet in its commission * * *." It is not necessary that the buyer deal directly with the seller. The fact that the parties deal with each other through a third party is sufficient to sustain a conviction. (Cf. People v. Bradford, 130 Cal.App.2d 606, 608 [5], 279 P.2d 561.)

The facts set forth above reasonably support the inference that (a) defendant was the seller of the narcotic, the officer the buyer, and Scott a go-between, or (b) defendant and Scott were coparticipants in the sale of the heroin to Officer Hunter. (Cf. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.)

The judgment and order are, and each is, affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and PETERS, JJ., concur.

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52 Cal.2d 67

Vesta COGGINS, Appellant,
v.
Irene HANCHETTE, Respondent.
L. A. 25295.

Supreme Court of California,
In Bank.
May 1, 1959.

Employee's action for personal injuries sustained when she slipped and fell in employer's building on floor which was being prepared for laying of tile by defendant contractor. The Superior Court, Los Angeles County, Joseph M. Maltby, J., entered judgment for defendant tile contractor and the employee appealed. The Supreme Court, Schauer, J., held that instruction to the effect that an invitee coming on premises in process of construction is invited to use the premises in their then condition was not erroneous, when considered as a whole on ground that it made questions of negligence of occupier and contributory negligence an assumption of risk by invitee a matter of law always to be resolved in the favor of occupier, and instruction that no inference of negligence on part of tile contractor arose from mere proof that employee fell while crossing floor or from mere proof that path portion of floor was slippery, was not erroneous on ground that it was incomplete in failing to add specification that tile contractor had duty to exercise ordinary care to discover any dangerous condition.

Affirmed.

Opinion, 331 P.2d 751, vacated.

1. Negligence 🔑54

Person who on behalf of land occupier creates a condition thereon has the same liability as the occupier for bodily harm caused to others while work is in his charge.

2. Negligence 🔑138(1), 139(1), 141(3)

In action against tile contractor by injured employee falling on slippery portion of employer's floor which was being prepared for laying of tile, instruction with respect to fact that an invitee coming upon premises in process of construction is invited to use the premises in their then condition was not erroneous on the ground that the effect of instruction was to make questions of negligence of occupier and contributory negligence and assumption of risk by invitee a matter of law always to be resolved in favor of the owner or occupier.

3. Negligence 🔑138(2)

In employee's action against tile contractor laying tile on floor of employer's premises for personal injuries sustained when employee fell on slippery portion of floor which was being prepared for the laying of tile, instruction that no inference of negligence of tile contractor arose from mere proof that employee fell while crossing floor or from mere proof that floor was slippery, was not erroneous on ground that it either suggested necessity of proof by eyewitness that contractor had put a spot of mastic on path portion before inference of contractor's negligence could arise, or that it was incomplete in failing to add specification that tile contractor had duty to exercise ordinary care to discover any dangerous condition.

4. Appeal and Error ⚷933(1)

Supreme Court must assume that trial judge in passing on motion for new trial fully performed his duty of reviewing the evidence and weighing the inference fairly deducible therefrom and thereby determining whether verdict was fair and just.

◆

Stephenson & Yelovich and George M. Stephenson, San Pedro, for appellant.

Chase, Rotchford, Downen & Drukker, Henry J. Bogust and Otto M. Kaus, Los Angeles, for respondent.

SCHAUER, Justice.

Plaintiff appeals from an adverse judgment in her action to recover for personal injuries suffered when she slipped and fell on a floor undergoing repairs. We have concluded that plaintiff's complaints of prejudicial error in the jury instructions are without merit, and that the judgment should be affirmed.

It should be noted at the outset that the sole party defendant was not an owner or lessee of the premises wherein the accident occurred and that her only right to be in the premises, or to exercise any control thereover, was that which was incident to the performance of certain work pursuant to a contract hereinafter described.

On the day of the accident, in September, 1954, plaintiff was employed as a training supervisor by Pacific Telephone & Telegraph Company in San Pedro, with the duty of supervising and instructing student employes in the handling of long distance, or toll, operating. This work was done in a room known as the "training room." Defendant was engaged in the business of selling and installing floor coverings such as linoleum and asphalt tile. In August, 1954, defendant and the telephone company entered into a contract whereby defendant agreed to remove strips of mascapave linoleum from the concrete floor of a room in the telephone company building, called the "equipment room," and cover the entire floor with asphalt tile. One of defendant's employes, Roy Burrow, a tile mechanic who had been in the employ of defendant for some 18 years, was engaged in the work on the day of the accident; he was defendant's only employe on the premises on that day.

The equipment room was located adjacent to and immediately south of the training room in which plaintiff, her students, and other supervisors and students were working. To gain entrance into the training room it was necessary to pass through the equipment room from an entrance in the west wall of the latter room, then through a door located about midway in the south wall of the training room. Before the day of the accident the equipment room floor had a painted cement surface, maroon colored, with a strip of the same color linoleum cemented to the floor to provide walkways to and from the training room door through the equipment room. This linoleum runner was about 3 feet wide and extended generally in an easterly direction from the equipment room door, with its nearest edge about 3 feet south of the wall separating the two rooms, to a point opposite the training room door where it turned north to the training room entrance. As hereinafter appears, there is some conflict in the evidence as to whether this runner had been removed prior to the time of the accident.

Plaintiff and her assistant, Mrs. Marich, testified that when they went to work at 7 a. m. on that day, and when they left the training room for coffee at 9 a. m. and returned about 9:15, the linoleum runner was still in place. Mrs. Marich further testified that when she went to the lounge for five minutes between 10 a. m. and 11 a. m. she noticed the runner had been removed. Two other telephone company employes, Mrs. Everett and Mrs. Peters, testified that they saw the runner in place about 8 a. m., but when they returned from their relief periods between 10 a. m. and

10:30 a. m. it had been taken up and the walkway was grayish in color.

Except for the 15-minute coffee break between 9 and 9:15 a. m. plaintiff remained in the training room from 7 until 11 a. m. While instructing students at the switchboard, which was located in the southeast portion of the training room, she wore a headset with one earphone and a mouthpiece and stood, or sat on a high stool nearby, where she could observe them. The students wore similar headsets. For verbal instructions all sat at a table located in the west portion of the training room, and wore no headsets. The door to the training room opened inward to that room and closed automatically; it was closed on the day of the accident.

Plaintiff testified that she had not been advised that work was to be done or was being done on the equipment room floor. When she returned from coffee at 9:15 she noticed that some sanding had been done but no one was working on the floor at that time and the linoleum runner was still there. Between 9:15 and 10 a. m. she heard a noise which sounded like a vacuum cleaner but which stopped about 10 a. m., and some time between 10 and 11 a. m. she saw a man open the training room door and stick his head into the room for a few seconds. She was on the west side of the room; he did not look in her direction and she did not hear him say anything. She was aware, however, that "work was going on" in the equipment room at the time. At 11 a. m. plaintiff left the training room for lunch; her students had preceded her by two or three minutes, without incident. Plaintiff further testified that she opened the door, "took about one step out," bringing her foot approximately 12 inches into the equipment room, when her feet or foot slipped out from under her and she fell to the floor, thereby fracturing her wrist. She came to rest in a sitting position, her hips (at least in part) and her legs and feet extending out in the mastic emulsion diagonally away from the pathway leading from the training room door but her hand and fractured wrist being back on the "bare cement" of the "three-foot pathway." She "noticed there was this three-foot pathway running west" but did not "ever observe whether it went to the door." She looked back to see what had caused her to slip, and saw a 3-inch oblong spot of mastic about 12 inches from the training room doorway; the spot had a skid mark through it. She then noticed for the first time that the linoleum runner had been removed and that, except for the strip or pathway of bare floor about 3 feet wide immediately adjacent to the partition wall separating the two rooms and extending westerly from the training room door toward the door of the equipment room, the equipment room floor appeared to be covered with mastic. She saw no marking on the border of the pathway. When asked "Where were you looking as you walked out the door [from the training room to the equipment room]," she replied "I don't remember where I was looking—straight ahead of me, I guess."

Defendant's employe, Burrow, testified that on the morning of the accident he had unloaded the sanding machine, asphalt tile, and tools for the floor job and was ready to commence work about 9:15 a. m. He knew telephone company personnel were using the training room and at that time he opened the training room door, put his head in, and said "I am going to be working out here, watch your step." He then closed the door and proceeded to remove a 9-inch strip of tile from the equipment room floor, which took about four minutes. He testified that he neither saw nor removed any linoleum from the floor. He spent the next 45 minutes to an hour sanding the entire floor except for an area in the northwest corner, and about five minutes sweeping it. About 10:15 a. m. he struck off a "pathway" outlined with bright blue chalk, 3 feet from the partition wall, and thereupon walked into the training room, stood holding the door knob at arm's length, and spoke to the person he took to be the supervisor (later identified as Mrs. Everett) sitting on a high stool near the switchboard. He "informed her * * * if they had any occasion to leave the room to be sure to caution the girls that there was work going on out there." At that time he saw four or five people in the training room, in the southeast portion; he did not recall seeing any one leave or enter the training room from 9:15 a. m. until plaintiff came through the door and fell at 11 a. m.

After giving the second warning Burrow began spreading the mastic emulsion, starting at the extreme northeast corner of the equipment room and intending to cover the entire floor except for the chalk-marked pathway. The emulsion, very slippery when wet, was poured from a 5-gallon container onto the floor, a portion at a time, then spread with a trowel and allowed to set for a period of time to allow the water to evaporate, after which it is sticky and the tile is applied. As Burrow applied the mastic he was in a kneeling position, moving back and forth in an easterly-westerly direction, going south, and working along the edge of the pathway. He did not see any foreign substance in the pathway when he struck the chalk line, and during the approximately 30 minutes he had been spreading the mastic the pathway was in front of him and within his view most of the time. He had reached a point about 16 feet south of the pathway when he first saw plaintiff standing in the emulsion 2 feet south of the pathway, with the door closing behind her. She appeared to have lost her balance, her feet were shuffling in the mastic, and she fell to a position such that "her right hip, calf of her leg, ankles" and "right forearm and elbow" were on the floor. Burrow jumped up, ran through the mastic, lifted plaintiff, and walked her onto the pathway.

Plaintiff's assistant, Mrs. Marich, testified she was directly behind plaintiff as they left the training room to go to lunch and saw plaintiff slip and fall about a foot from the threshold into the equipment room. After the fall the witness observed a spot of mastic with a skid mark through it at the point where plaintiff had started to slip. Mrs. Everett and Mrs. Peters had observed a man on his knees as they returned from their coffee break about 10:15 a. m., and saw mastic had been applied to one section of the equipment room floor. They did not again leave the training room until after plaintiff's fall. Neither witness saw any chalk marks bordering the pathway at any time, and both they and Mrs. Marich testified that no one came into the training room or said anything to them about work being done in the equipment room.

As grounds for reversal plaintiff complains that the court erred to her prejudice in the giving of two jury instructions requested by defendant.

The instructions to the jury explained in general terms negligence, contributory negligence, ordinary care, and proximate cause, and then specifically declared that "The issues to be determined in this case are these:" First, was the defendant negligent? Second, was such negligence, if any, a proximate cause of any injury to plaintiff? Third, if so, was plaintiff guilty of contributory negligence?

At plaintiff's request the jury were then instructed that as a matter of law plaintiff "was an invitee on the premises where the injury occurred"; that "One who goes upon the premises of another as a business visitor at the express or implied invitation of the owner or occupant, and in connection with some mutual business interest with the owner or occupant, or with the latter's own business, is called in law an invitee"; that the defendant's "rights and duties in relation to the plaintiff were the same as if she, said defendant, had been the lawful occupant and owner of * * * the portion of the property where the injury occurred."

The following instruction was also given, which is a generally correct statement (see Raber v. Tumin, 1951, 36 Cal.2d 654, 658 [3], 226 P.2d 574) of the duties of land occupier to invitee: "Toward an invitee it is the duty of an occupier of property in the conduct of any active operations on the property, to use ordinary care to avoid any injury to the invitee, and to use ordinary care to keep the premises in a condition reasonably safe for the invitee in the reasonable pursuit of a purpose embraced within the invitation, but the responsibility of one having control of the premises is not absolute; it is limited to the performance of certain duties defined in my instructions. If there is danger attending upon the entry, or upon the work which the invitee is to do on the premises, and if such danger arises from conditions not readily apparent to the senses, and if the occupant has actual knowledge of that, or if they are discoverable by him in the exercise of ordinary care, it is the duty to give reasonable warning of such danger to the invitee. The occupant is not bound to discover defects which reasonable inspection would not disclose and he is entitled to assume that the invitee will perceive that which would be obvious to her upon the ordinary use of her own senses. * * * "

The first of the instructions of which plaintiff complains reads: "You are instructed that an invitee coming upon premises in the process of construction is invited to use the premises in their then condition. Put in another way, the invitation is merely to use the premises in whatever condition they are in at the time of the entry."

[1] The instructions were correct in telling the jury that one who (like defendant here) on behalf of the land occupier creates a condition thereon has the same liability as the occupier for bodily harm caused to others while the work is in his charge. II Rest., Torts, § 384; Donahoo v. Kress House Moving Corp. 1944, 25 Cal.2d 237, 245, 153 P.2d 349; Hall v. Barber Door Co., 1933, 218 Cal. 412, 419–420 [5, 6], 23 P.2d 279. Plaintiff complains, however, that the "uncompleted building" or "process of construction" instruction in effect tells the jury that "the owner/occupier does not owe the duty to the invitee to refrain from active negligence, nor to exercise ordinary care to keep the premises in a reasonably safe condition, nor to use reasonable care to discover danger, nor to warn of danger. The effect of the instruction is to make the question of negligence of the occupier, and contributory negligence and assumption of risk by the invitee in cases involving structures in the process of construction or repair, *ipso facto,* a matter of law to be always resolved in favor of the owner/occupier."

[2] Assuming that, standing alone, the instruction of which plaintiff complains would or could have the effect which she argues, we believe that no such result reasonably ensues when the instructions are considered as a whole, as the court told the jury to do. The premises here were admittedly under repair and, rather than telling the jury that the questions of negligence and contributory negligence had been resolved as matters of law, the instructions, as already pointed out hereinabove, plainly stated that the issues which the jury were to determine were those of negligence, contributory negligence, and proximate cause. Defendant's duty to use ordinary care in her operations, to keep the premises in a reasonably safe condition, and to warn of dangers known or reasonably discoverable in the exercise of ordinary care, were all explained. The jury were further told that "In the absence of appearances that caution her, or would caution a reasonably prudent person in like position * * * the invitee has a right to assume that the premises * * * are reasonably safe for the purposes for which the invitation was extended, and to act on that assumption. * * * [T]he duty of an invitor is subject to this overlying principle, that if and when an invitor actually learns that an invitee is in imminent danger of injury, and if, by exercising ordinary care, the invitor can minimize or thwart that danger, his duty is to apply such care to such a purpose." Furthermore, at plaintiff's request the court instructed that "If a dangerous or defective condition of or on property is created by the negligent conduct of the occupier or his employee acting within the scope of employment, and if the invitee thereafter suffers injury of which such condition was a proximate cause, in any action that the invitee may bring for damages for such injury, the law conclusively presumes that the occupier had knowledge of said condition from the time of its creation.

"When an unsafe condition which causes injury to an invitee has been created by the occupier of the property himself, or by an employee within the scope of his employment, the invitee need not prove the owner's notice or knowledge of the dangerous condition. Such knowledge is imputed to the owner." This instruction, coupled with the additional specific direction that "Although the evidence * * * shows that defendant was not the owner of the portion of the premises where the injury occurred, it does show that she was the lawful occupant thereof and in rightful possession. Her rights and duties in relation to the plaintiff were the same as if she, said defendant, had been the lawful occupant and owner of the fee title to the portion of the property where the injury occurred," fully support the trial court's conclusion that the jury were not misled to plaintiff's prejudice by the "process of construction" instruction.

[3] The same is true of the other instruction of which plaintiff complains, which reads: "No inference of negligence on the part of the defendant arises from the mere proof that the plaintiff fell while crossing the 'path portion' of the floor, or from the mere proof that the 'path portion' of the floor was slippery, in the absence of proof that slippery or dangerous condition of the 'path portion' of the floor, was created by or known to the defendant." Plaintiff urges, first, that this instruction erroneously suggests the necessity of proof by an eye witness that defendant put a spot of mastic on the path portion before an inference of defendant's negligence could arise, and, second, that the instruction is incomplete in failing to add the specification that defendant had the duty to exercise ordinary care to discover any dangerous condition. In the first place, however, there is no evidence, and none is suggested, that any one other than defendant, through Burrow, created any slippery condition, and consequently no prejudice to plaintiff appears. Secondly, as hereinabove shown, other instructions fully explained to the jury defendant's duties of care and responsibility for the conditions created by her employe. As already stated, they were told that defendant had the duty to warn of any danger from the work or conditions, discoverable in the exercise of ordinary care, and they were further specifically instructed that "The duty of an occupant of premises to warn invitees of dangers not readily apparent to the senses, of which the occupant has knowledge or which are discoverable by the occupant in the exercise of ordinary care, is a duty which cannot be delegated, and a warning given by the occupant of such danger to an invitee's employer, or to an invitee's fellow-employees is not imputed to the invitee."

[4] It also bears mention in respect to the question of prejudice, if we assume error, that the verdict of the jury was unanimous and that the trial court considered and passed on a motion for new trial. In her points and authorities in support of her motion for new trial plaintiff urged, among other things, that "When the Motion for New Trial comes before the Trial Judge, it is his duty to review the evidence, weigh the inferences fairly deducible from the facts and thereby determine whether the verdict was fair and just as to the paramount issue in the controversy." Furthermore, plaintiff specified, "The trial judge is not only authorized, but required, to exercise an independent judgment upon the issues of fact presented. A judge acts as the thirteenth juror." We must assume that the trial judge in passing on the motion for new trial fully performed his duty.

We note also, in connection with plaintiff's attack before us on the instruction relative to the duty of an invitee (quoted *ante*), that in her "Points and Authorities in Support of Motion for New Trial" plaintiff contents herself with quoting the instruction but adds not one word by way of suggestion or explanation as to how that instruction, either in the light of the other instructions or otherwise, could reasonably be held to have misled the jury. Regardless of the extent to which the points and authorities may have been augmented on oral argument the trial court obviously was not convinced that a miscarriage of justice had occurred. Nor are we.

While on the record it appears that the jury could have resolved the issues of fact in favor of plaintiff it must also be recognized that the determination of those issues was the function of the jury and that the record fully supports them in the conclusions they impliedly reached. No ground warranting reversal has been shown.

The judgment is affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE, McCOMB and PETERS, JJ., concur.

52 Cal.2d 104

Alvin A. IMMEL et al., Appellants,
v.
Ray B. LANGLEY, Respondent.
L. A. 25338.

Supreme Court of California,
In Bank.
May 5, 1959.

Election contest. The Superior Court, Imperial County, Elmer W. Heald, J., entered judgment dismissing proceeding, and an appeal was taken. The Supreme Court, Gibson, C. J., held that when it appeared on recount that there was a tie vote for nonpartisan office, showing was "sufficient to change the result of the election" within meaning of Elections Code subdivision authorizing contest of election for error sufficient to change result, and that upon finding that there was tie vote, trial court, in election contest, should have held that names of both candidates should have gone on ballot at general election.

Judgment reversed with directions to cancel and annul certificate of election.

Opinion, 333 P.2d 76, vacated.

1. Constitutional Law 🔑29
Elections 🔑126(1)

Constitution section is self-executing, and its effect, where applicable, is to transmute primary election into general election as to nonpartisan offices to which it relates; but in order for a primary election to have that effect, it is necessary that candidate for nonpartisan office shall receive votes on majority of all ballots cast, and where there is a tie vote, section does not operate to change primary election into general election. West's Ann.Const. art. 2, § 2¾.

2. Elections 🔑271, 303

When it appeared on recount that there was a tie vote for nonpartisan office, showing was "sufficient to change the result of the election" within meaning of Elections Code subdivision authorizing contest of election for error sufficient to change result; and upon finding that there was tie vote, trial court, in election contest, should have held that names of both candidates should have gone on ballot at general election. West's Ann.Elections Code, §§ 2745, 8511(e).

3. Action 🔑36
Elections 🔑269, 305(2)

Election contest proceeding was properly brought under Elections Code section enumerating grounds for contest of general election, where it then appeared from canvass of votes that one candidate for nonpartisan office had been elected at primary; and character of suit did not change when recount showed that neither of candidates had received a majority vote, and contestors were entitled to appeal under Elections Code section which provides that party aggrieved in contest may appeal from judgment. West's Ann.Elections Code, §§ 8511, 8575.

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Horton, Knox & Carter, Harry W. Horton, Reginald L. Knox, Jr., and James H. Carter, El Centro, for appellants.

Beard & Wein, J. William Beard and Henry Wien, El Centro, for respondent.

GIBSON, Chief Justice.

This case involves the propriety of a judgment dismissing an election contest after the court, upon a recount, found that two candidates for the office of county supervisor had each received the same number of votes.

At the primary election in June 1958 there were only two candidates for the office of member of the Board of Supervisors of Imperial County from the Fifth Supervisorial District, namely, J. B. Snyder, the incumbent, and Ray B. Langley, the contestee. When the votes were canvassed after the election, it appeared that Snyder had received 774 votes and Langley had received 788 votes. The duly appointed officers certified the result and declared that Langley was elected, and the county clerk issued him a certificate of election.

A statement of contest was filed under section 8511, subdivision (e), of the Elections Code, which provides: "Any elector of a county * * * may contest any election held therein, for any of the following causes: * * * (e) That the precinct board in conducting the election or in canvassing the returns, made errors sufficient to change the result of the election as to any person who has been declared elected." Upon a recount of the ballots before the court, it was found that Snyder and Langley had each received a total of 808 legal votes. Judgment was then entered that the contestors take nothing and that the proceedings be dismissed.

[1,2] Section 2¾ of article II of the Constitution provides that "Any candidate for a * * * county * * * or other nonpartisan office who at a primary election shall receive votes on a majority of all the ballots cast for candidates for the office for which such candidate seeks nomination, shall be elected to such office * * *." The section is self-executing, and its effect, where applicable, is to transmute the primary election into a general election as to the nonpartisan offices to which it relates. DeWoody v. Belding, 210 Cal. 461, 463–464, 292 P. 265; Kerr v. Russell, 209 Cal. 36, 38, 285 P. 311; McClintock v. Abel, 21 Cal.App.2d 11, 14–16, 68 P.2d 273. In order for a primary election to have the effect of a general election, however, the constitutional provision quoted above requires that a candidate for a nonpartisan office shall receive votes on a majority of all the ballots cast, and where, as here, there is a tie vote, the section does not operate to change the primary election into a general election. In this connection section 2745 of the Elections Code provides in effect that in case of a tie vote the names of all candidates at the primary receiving the same number of votes shall appear on the ballot at the general election. When it appeared on recount that there was a tie vote, the showing was "sufficient to change the result of the election" within the meaning of subdivision (e) of section 8511 of the Elections Code. Upon finding that there was a tie vote, the trial court should have held that the names of both candidates should have gone on the ballot at the general election in November.

The cases of Wright v. Ashton, 143 Cal. 544, 548, 77 P. 477, and Snibley v. Palmtag, 128 Cal. 283, 284, 60 P. 860, relied on by Langley, were decided before the adoption of section 2¾ of article II and involved the construction of statutes which differed materially from the constitutional provision. In those cases the contestor sought to unseat a rival candidate who had been declared elected, and it was held that the declaration could not properly be annulled upon the basis of a finding that a recount showed a tie vote. In reaching that result, the court construed statutory language to the effect that no irregularity would avoid an election unless it was such as to show that the person declared to be elected had not received "the highest number of legal votes," and it was held that since the vote was a tie, each candidate had received "the highest number of votes" and that therefore a contest would not lie. Obviously no such construction is possible under section 2¾ of article II, which specifies that the person elected must receive a majority.

[3] This proceeding was properly brought under section 8511 of the Elections Code, which enumerates the grounds for the contest of a general election, since it then appeared from the canvass of votes that Langley had been elected at the primary. The character of the suit did not change when the recount showed that neither of the candidates had received a majority vote, and the contestors were entitled to appeal under section 8575 of the Elections Code, which provides that a party aggrieved in a contest based on section 8511 may appeal from the judgment.

The judgment is reversed with directions to cancel and annul the certificate of election.

SHENK, TRAYNOR, SCHAUER, SPENCE, McCOMB and PETERS, JJ., concur.

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52 Cal.2d 78

Jennie HAMUD et al., Plaintiffs and Appellants,

v.

E. T. HAWTHORNE et al., Defendants and Appellants.

L. A. 25335.

Supreme Court of California, In Bank.

May 1, 1959.

Rehearing Denied May 27, 1959.

Action by asserted property owners to have a quitclaim deed declared to be a mortgage, for surrender and cancellation of a note, deed of trust, and quitclaim deed, and for other relief. From a judgment of the Superior Court, Los Angeles County, Joe Raycraft, J., the plaintiffs appealed, and the defendants cross-appealed. The Supreme Court, Schauer, J., held that where grantors under quitclaim deed intended to operate as mortgage to secure loan, after they defaulted and consented to grantees' going into possession, allowed their consent to stand unchallenged by any action for nearly five years, a period far longer than would have been available to them for effecting redemption had strict foreclosure proceedings been had, and it was not until they learned of the interest of an oil company in the property that they maintained an action for surrender and cancellation of the note and quitclaim deed so that the property might be restored to them, their action was barred by laches.

Reversed.

Opinion 332 P.2d 727, vacated.

1. Mortgages 🔑38(1)

In action by grantors to have their quitclaim deed declared to be a mortgage, evidence supported finding that quitclaim deed executed by grantors as borrowers, in a loan transaction, was a mortgage. West's Ann.Civ.Code, §§ 2889, 2924, 2953.

2. Mortgages 🔑20

Any agreement purporting to waive or restrain mortgagor's redemption rights, at the time of taking loan secured by the mortgage is invalid. West's Ann.Civ.Code, §§ 2889, 2924, 2953.

3. Mortgages 🔑20

Provisions of escrow instructions by which grantor purported to agree that after recordation of quitclaim deed given as mortgage, as authorized upon default in payment, grantors should have no further claim upon property were ineffective to waive their right to redeem the encumbered property. West's Ann.Civ.Code, §§ 2889, 2924, 2953.

4. Pleading 🔑372

Generally laches may not be relied upon where facts giving rise to defense do not appear in any of the pleadings.

5. Estoppel 🔑93(1)

One is not permitted to stand by while another develops property in which he claims an interest and then, if the property proves valuable, assert a claim thereto and if it does not prove valuable be willing that the losses incurred be borne by the other party.

6. Mortgages ⚿608½

Where grantors under quitclaim deed intended to operate as mortgage to secure loan, after they defaulted and consented to grantees' going into possession, allowed their consent to stand unchallenged by any action for nearly five years, a period far longer than would have been available to them for effecting redemption had strict foreclosure proceedings been had, and it was not until they learned of the interest of an oil company in the property that they maintained an action for surrender and cancellation of the note and quitclaim deed so that the property might be restored to them, their action was barred by laches. West's Ann.Civ.Code, §§ *2889, 2924, 2953, 3515, 3521, 3527*; West's Ann.Code Civ.Proc. §§ *702, 703, 725a*.

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Curtis L. Gemmil, Rivera, for plaintiffs and appellants.

George C. Gillette, Whittier, Herbert Gall, John U. Gall and Edward Fitzpatrick, Los Angeles, for defendants and appellants.

SCHAUER, Justice.

Defendants appeal from a judgment for plaintiffs in this suit to have a quitclaim deed declared to be a mortgage; for surrender and cancellation of a note, third deed of trust, and the quitclaim deed; for "Redemption * * * and for Reconveyance" of the property covered by the deed; and for an accounting. Defendants appeal also from an ex parte order of June 12, 1957, entered subsequent to the judgment, authorizing plaintiffs to deposit with the court clerk a certain sum of money for the benefit of defendants, as a condition of redeeming the property. Plaintiffs appeal from the portion of the main judgment allowing defendants reimbursement for property upkeep expenses, and for sums paid as principal and interest on first and second deeds of trust and for taxes and sewer bonds. We have concluded that the record establishes that plaintiffs were guilty of laches in asserting their claims to the property, and that the judgment should therefore be reversed.

On January 25, 1951, plaintiffs and defendant Hawthorne entered into a contract in the form of escrow instructions. Thereby Hawthorne agreed to loan plaintiffs $3,500, and plaintiffs agreed to deliver into the escrow a promissory note to Hawthorne, dated January 25, 1951, for $3,850, payable in full on May 1, 1951, without interest, and a third deed of trust securing the note on property, consisting of three rental units, owned by plaintiff Mrs. Hamud. The escrow instructions recited that there then existed against the property a first deed of trust in the approximate amount of $6,200, a second deed of trust in the approximate amount of $2,000, and a bond of record in the approximate amount of $195, a total of $8,395.

The escrow instructions contained the following provisions, among others:

"It is agreed between the parties hereto that the above third trust deed shall be recorded on the property described above as soon [as] the preliminary title report is received by Hansen Escrow & Mortgage Co. In addition to this third trust deed, the borrowers agree to execute a Quit Claim Deed in favor of the Lender, said Quit Claim Deed to be retained in this escrow file and used only on the following condition: (1) In the event the within described Note for $3850.00 is not paid when due, your company is authorized and instructed to record this Quit Claim Deed at once, and the borrowers herein agree to have no further claim upon this property of any nature or kind whatsoever. (2) In the event the Quit Claim Deed is recorded, any and all rentals due or to become due in the future shall immediately become the property of E. T. Hawthorne as of the date of recordation of said Quit Claim Deed."

Hawthorne deposited the $3,500 into the escrow. Plaintiffs likewise delivered into the escrow the note, the third deed of trust, and the quitclaim deed, dated January 25, 1951. On January 30, 1951, the third deed of trust was recorded, plaintiffs received the amount of the loan, and Hawthorne received the note. At this time plaintiffs were in default in payments on the first deed of trust and foreclosure was threatened. Payments on the second deed of trust were also delinquent. There was testimony that the value of the property was then about $10,100, and the total encumbrances against it, including the third deed of trust, were about $12,245.

On April 16, 1951, the escrow officer (defendant Hansen) sent plaintiffs a letter reminding that the Hawthorne note would be due on or before May 1, 1951, and stating that if it was not paid the "property" would be recorded in the name of Hawthorne. No reply was made to the letter, nor was an extension of time requested. The Hawthorne note was not paid on May 1. On May 4, 1951, the quitclaim deed was recorded at the request of the escrow company. The deed contained this statement over plaintiffs' signatures:

"The purpose of this Quit Claim Deed is to accomplish a mutual agreement between the parties hereto, and upon recordation, the grant*ees* [1] release any and all claim of any nature or kind whatsoever to the property described herein or to any rentals which may be due or accrue from the property after the date of recordation."

On May 4, 1951, the escrow officer again wrote to plaintiffs, this time stating that the quitclaim deed had been recorded and that on May 7, 1951, foreclosure proceedings were to be brought by a savings and loan association which held the first deed of trust. Plaintiffs did not reply. Immediately thereafter Hawthorne took possession of the property with, as found by the trial court, the consent of plaintiffs.

After taking possession Hawthorne paid off the delinquent second deed of trust note of $2,338.88, and paid the delinquencies on the first deed of trust. On May 7, 1951, he conveyed the property to defendant Hansen. On May 29, 1951, Hansen conveyed to defendants Shaffer, who assumed the existing encumbrances, took possession, collected the rents, paid the taxes, water bills and costs of upkeep, and made improvements to the property during the ensuing nearly five years.

In August, 1951, an action was filed against plaintiffs by Hawthorne's assignee seeking to recover $359.86 as payments assertedly made by Hawthorne on one or more of the prior encumbrances. It was apparently Hawthorne's position that the Hamuds had owed him the duty of protecting his third deed of trust by, among other things, maintaining the payments on the prior encumbrances insofar as such payments accrued prior to May 1, 1951. The Hamuds filed an answer, verified by Mrs. Hamud, which alleged as an affirmative defense "that a settlement was effec[t]uated between the plaintiff's assignor [Hawthorne] and defendants [the Hamuds] wherein the defendants returned to said * * * assignor the property upon which said assignor is now claiming the defendants as owing to him as money paid and expended." Plaintiffs asserted no claims and exercised no rights of any kind as owners of the property after defendants took possession, until October, 1955. In July, 1955, a representative from an oil company had sought to obtain a new deed from Mrs. Hamud to the Shaffers. Mr. Hamud then looked up the quitclaim deed in the County Recorder's office, discovered the erroneous use of the word "grantees" instead of "grantors," and immediately contacted his attorney. In October, 1955, Mr. Hamud stated to Mrs. Shaffer, in a telephone conversation, that plaintiffs had "held out" the mineral rights on the property. This action, however, was not filed until April 30, 1956.

The court found that the quitclaim deed was executed by plaintiffs as additional security for the loan and was intended by both plaintiffs and defendant Hawthorne to be a mortgage only, that defendants Hansen and Shaffer had at all times involved acted as agents of Hawthorne. The ensuing judgment for plaintiffs provided, among other things, that if they paid a certain sum into court for the benefit of defendant

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[1] The word "grant*ees*," rather than "grant*ors*," seems an obvious typographical error.

Hawthorne within 90 days of the date of judgment (May 29, 1957), plaintiff Jennie Hamud could redeem the property and defendants should forthwith surrender possession. On June 12, 1957, the trial court made an ex parte order authorizing plaintiffs to deposit the specified amount with the clerk of the court.

[1] As the first ground for reversal, defendants urge that the evidence does not support the finding that the quitclaim deed was in fact a mortgage, given as further security, and contend that the evidence establishes as a matter of law that the deed was delivered only after the debt became due and was legally effective only as an absolute conveyance which cannot now be set aside. This contention is without merit.

At the trial Mr. Hamud testified that before signing the escrow instructions he objected to the idea of the quitclaim deed and asked defendant Hawthorne if it could be eliminated; that Hawthorne "said, no, that was the only way they could make the loan. Take it or leave it," and Hamud "decided to take it." Hawthorne testified to the effect that the purpose of the quitclaim deed was to avoid the necessity of foreclosure in case of default by plaintiffs.

As observed in Bastajian v. Brown (1937), 57 Cal.App.2d 910, 915 [4], 135 P.2d 374, 137 P.2d 475, "Transfers of mortgaged properties by mortgagors to mortgagees for the purpose of avoiding foreclosure proceedings * * * have not been uncommon occurrences * * * [and] have been held valid by the courts where the transactions were fair and honest * * (Baldwin v. American Trading Co. [1925], 76 Cal.App. 80, 243 P. 710; Deming v. Smith [1937], 19 Cal.App.2d 683, 66 P.2d 454; Watson v. Edwards [1894], 105 Cal. 70, 38 P. 527; Phelan v. De Martin [1890], 85 Cal. 365, 24 P. 725; 18 Cal.Jur. 68 et seq.)." (See also McDonald v. Huff (1888), 77 Cal. 279, 19 P. 499.) Each of the cited cases, however, involved a situation wherein an original loan contract was first entered into providing for a note secured by a deed of trust or mortgage and, *after* default in payment, the parties entered into a *separate, distinct* and *subsequent* contract which provided for the conveyance of the subject property to the mortgagee or beneficiary, either forthwith or upon default after a further time extension granted in the contract made *subsequent* to default. It was expressly mentioned in the Phelan (at page 368 of 85 Cal., at page 726 of 24 P.) and the Baldwin (at page 87 of 76 Cal. App., at page 712 of 243 P.) cases that such transactions did not fall within the prohibitions of section 2889 [2] of the Civil Code. (See also Civil Code, §§ 2924,[3] 2953.[4])

[2, 3] Where, as here, however, the agreement purporting to waive or restrain redemption rights is made at the time of the loan, it is invalid. As declared in Salter v. Ulrich (1943), 22 Cal.2d 263, 267 [2], 138 P.2d 7, 146 A.L.R. 1344, "the right of redemption * * * may not be waived in advance. [Citations, including Civ.Code, § 2889.] However, the mortgagor may subsequently deed the property to the mortgagee or may release or sell the right of redemption. [Citations.]" (See also

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[2] Civ.Code, § 2889: "All contracts for the forfeiture of property subject to a lien, in satisfaction of the obligation secured thereby, and all contracts in restraint of the right of redemption from a lien, are void."

[3] Civ.Code, § 2924: "Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. * *"

[4] Civ.Code, § 2953: "Any express agreement made or entered into by a borrower at the time of or in connection with the making of or renewing of any loan secured by a deed of trust, mortgage or other instrument creating a lien on real property, whereby the borrower agrees to waive the rights, or privileges conferred upon him by Sections 2924, 2942b, 2924c of the Civil Code or by Sections 580a or 726 of the Code of Civil Procedure [which include redemption provisions], shall be void and of no effect. * * *"

Morello v. Metzenbaum (1944), 25 Cal.2d 494, 499 [3], 154 P.2d 670; Wakabayashi v. Stafford Packing Co. (1921), 186 Cal. 632, 633 [1], 200 P. 392; Winklemen v. Sides (1939), 31 Cal.App.2d 387, 405 [7], 88 P.2d 147.) It follows that those provisions of the escrow instructions here involved by which the plaintiffs purported to agree that after recordation of the quitclaim deed, as authorized upon default by them in payment, they should "have no further claim upon this property of any nature or kind whatsoever", were ineffective to waive plaintiffs' right to redeem the encumbered property.

[4] Defendants contend also that plaintiffs were guilty of laches and are estopped to "maintain this action" and to claim ownership of the subject property. Defendants did not specifically plead estoppel or laches as such, but did plead, and the court found, the facts as to execution of the trust deed, etc., and that "the defendant, E. T. Hawthorne, entered into possession of said premises under and pursuant to the agreement contained in said escrow instructions dated January 25, 1951 and the provisions of the Quit Claim Deed executed, delivered and recorded pursuant to the provisions thereof dated January 25, 1951." The general rule is that laches may not be relied upon where the facts giving rise to such defense do not appear in any of the pleadings (see Reed v. Norman (1953), 41 Cal.2d 17, 21–22 [6], 256 P.2d 930; Phoenix Mutual Life Ins. Co. v. Birkelund (1946), 29 Cal.2d 352, 363 [4], 175 P.2d 5; Worthen v. Jackson (1956), 139 Cal.App.2d 615, 618 [5], 293 P.2d 797. But here plaintiffs' complaint on its face shows delay in commencing suit to recover the property far beyond any period allowed for redemption after sale under the deed of trust (see Code Civ.Proc. §§ 702, 703, 725a) and the record discloses established facts from which it follows that plaintiffs should not recover.

Here, as in the Birkelund case, plaintiffs' claims are equitable in nature, and it appears from the undisputed evidence that there has been a change in circumstances and in the value of the property. As already stated, plaintiffs surrendered possession to Hawthorne in May, 1951, and in September of that year the plaintiffs, in an answer (verified by Mrs. Hamud) to the action filed against them by Hawthorne's assignee, alleged that as a settlement of Hawthorne's claim for reimbursement of the $359.86 advanced by him in payment of an installment of principal and interest on the first deed of trust and interest due on the second encumbrance, the property had been "returned" to Hawthorne. Although the word "returned" is not exactly synonymous with "conveyed" or "surrendered" it appears in its context, and in the circumstances of the filing of the answer, to have been used in that sense by the Hamuds. This would seem to be tantamount to a reaffirmation of the intent to surrender title evidenced by the quitclaim deed, and at this date the quitclaim could have been validly executed.

Furthermore, relevant to the equities of the matter, the record shows that in January, 1951, Hawthorne had advanced to plaintiffs $3,500 upon property in which it appears that plaintiffs' equity amounted to only some $1,705 (total value of property $10,000, less existing liens totaling $8,395), with payments already in default upon both the first and second trust deeds. After taking possession in reliance upon plaintiffs' consent, Hawthorne paid out an additional $2,338.88 in full discharge of the second deed of trust note, plus the delinquencies of $359 hereinabove mentioned. During the ensuing almost five years before this suit was filed defendants Shaffer paid in addition the sum of $4,970 principal and interest on the first trust deed, water bills of $334.72, taxes and sewer bonds of $1,277.75 and upkeep expenses of $1,350.35. It thus appears that defendants had invested approximately $15,000 in cash in the property, together with their services in operating it, against which the court found that they had collected only $11,719.15 in rents and "profits." Although the court ordered restitution of the property only upon the payment by plaintiffs of the difference between the cash amounts collected by defendants and those they had paid out over the nearly five year period, defendants had meanwhile borne the burden of managing, maintaining, and operating the property as well as the responsibility of meeting the encumbrances against it and the risk of declining property values and depreciation in the value of the improvements.

[5] It was not until plaintiffs learned of the interest of an oil company in the subject property that they bestirred themselves to ascertain whether such property was worth an effort on their part to reclaim it. As commented in Livermore v. Beal (1937), 18 Cal.App.2d 535, 549, 64 P.2d 987, "one is not permitted to stand by while another develops property in which he claims an interest, and then if the property proves valuable, assert a claim thereto, and if it does not prove valuable, be willing that the losses incurred * * * be borne by the opposite party. This thought was expressed in one case by the following language: 'If the property proves good, I want it; if it is valueless, you keep it.' " (See also Robison v. Hanley (1955), 136 Cal.App.2d 820, 824–825 [1–2], 289 P.2d 560.

[6] Plaintiffs, having consented to defendants' taking possession of the property in 1951, under a claim of title, were not wronged by that act. (Civ.Code, § 3515.) Their consent was not only allowed to stand unchallenged by any action at law or in equity for nearly five years (from no later than May 4, 1951, until April 30, 1956), a period far longer than would have been available to plaintiffs for effecting redemption had strict foreclosure proceedings been had, but was apparently reaffirmed in writing in September, 1951, by the filing of the verified answer in the municipal court action. On the undisputed evidence, plaintiffs appear to be opportunists who are trying to pervert equity to recover a title and possession voluntarily surrendered in 1951, for which they then received fair value, and which they now seek to reclaim, not to right a wrong suffered by them in 1951 but to procure from defendants a value which was apparently unknown to either party until 1955. For over four years they were accepting the benefits of the transaction but now they would disavow the burden. This is not equity. (See Civ.Code, § 3521.) "The law helps the vigilant, before those who sleep on their rights." (Civ. Code, § 3527.)

Upon the facts established we are convinced that equity would not be served by permitting plaintiffs now to recover that which they surrendered for fair value. No useful purpose would be served by discussion of other points urged by defendants as grounds for reversing the judgment against them.

The main judgment, as well as the ex parte order of June 12, 1957, based upon it, are reversed.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE, McCOMB and PETERS, JJ., concur.

52 Cal.2d 135

Walter WILLIAMS, Appellant,

v.

FAIRHAVEN CEMETERY ASSOCIATION
(a Nonprofit Corporation), Respondent.

L. A. 25327.

Supreme Court of California,
In Bank.
May 8, 1959.

Rehearing Denied June 3, 1959.

Action by hotel employee for injuries sustained in explosion of a gas water heater of a hotel owned by a nonprofit association and managed under a contract by corporation which had agreed to retain full control over the hiring and firing of employees as well as maintenance of the premises. From an order in the Superior Court, Orange County, Kenneth E. Morrison, J., granting the defendant's motion for a new trial after the jury returned a verdict in favor of plaintiff, the plaintiff appealed. The Supreme Court, McComb, J., held that the plaintiff hotel employee was not entitled to recover against the association owner of the hotel where at the time the corporation assumed the duty of maintaining the hotel in a reasonably safe condition, the premises and equipment were in safe condition.

Order granting new trial reversed with instructions.

Vacating opinion 332 P.2d 791.

1. Appeal and Error ⚷109, 874(5)

Under the statute, an appeal does not lie from an order denying a motion for judgment notwithstanding the verdict, but when the adverse party appeals from an order granting a new trial, the order denying the motion for judgment notwithstanding the verdict may be reviewed on such appeal. West's Ann.Code Civ.Proc. § 629.

2. Master and Servant ⚷330(3)

In action by hotel employee for injuries sustained in explosion of gas hot water heater of hotel owned by nonprofit association but managed under contract by a corporation which agreed to retain full control over the hiring and firing of employees and maintenance of the premises, evidence sustained judgment against the corporation where there was a total absence of evidence that the association interfered with the control of the premises by the corporation in any manner. West's Ann.Health & Safety Code, § 16905.

3. Master and Servant ⚷330(3)

In action by hotel employee for injuries sustained in explosion of gas hot water heater of hotel owned by nonprofit association but managed under contract by a corporation which agreed to retain full control over the hiring and firing of employees and maintenance of the premises, evidence failed to establish that the heaters were not maintained in reasonably good repair so as to impose upon the association as the owner of the premises a nondelegable duty to maintain the heaters in a reasonably safe condition. West's Ann.Health & Safety Code, § 16905.

4. Master and Servant ⚷318(2)

The general supervisory right to control the work so as to insure its satisfactory completion in accordance with the contract does not make the hirer of the independent contractor liable for the latter's negligence in performing the details of the work.

5. Master and Servant ⚷321

An owner is not liable for injuries resulting from defective appliances unless he has supplied them or has the privilege of selecting them or the materials out of which they are made, or unless he exercises active control over the men employed or the operations of the equipment used by the independent contractor.

6. Master and Servant ⚷316(1)

Where hotel employee was injured by gas hot water explosion due to negligence of a fellow employee in shutting off the valves while repairing a leaky pipe, and hotel was owned by a nonprofit association and was managed under a contract by a corporation agreeing to keep and maintain the premises retained full control over the hiring and the firing of employees and at the time the corporation assumed the duty of maintaining the hotel in a reasonably safe condition, the premises and equipment were in safe condition, the hotel employee was not entitled to recover against the association for negligence.

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Rutan, Lindsay, Dahl, Smedegaard, Howell & Tucker, W. W. McCray and James R. Moore, Santa Ana, for appellant.

Ball, Hunt & Hart and Clarence S. Hunt, Long Beach, for respondent.

McCOMB, Justice.

Plaintiff appeals from an order granting defendant's motion for a new trial after a jury returned a verdict in favor of plaintiff in an action to recover demages for personal injuries resulting from an explosion of a gas water heater in a hotel where he was employed as a porter.

Facts: Defendant, a nonprofit California corporation, is the owner of the Santa Ana Hotel in Santa Ana. On January 19, 1942, defendant entered into a written agreement with Santora Company, a corporation, wherein it was agreed that Santora would operate the hotel. Santora agreed to keep and maintain the hotel building in good condition and repair, keep the premises, fixtures and equipment insured against loss by fire, carry liability insurance, pay all taxes, assessments and utility charges, and turn over a specified portion of the income from the property to defendant. The agreement was effective for one year and was renewable by mutual consent of the parties.

Santora operated the hotel with full control and management thereof, hiring and discharging employees, and complying with the terms of the agreement until and after February 7, 1955. The record is devoid of any evidence that defendant assumed or exercised control over the hotel during this period.

On February 7, 1955, plaintiff, a porter and bellhop employed by Santora, was counting linen in the workroom of the hotel, directly above the boiler room, when an explosion occurred. The next thing he knew, he was lying injured in the alley to the rear of the hotel.

The boiler room contained a heating system and two booster-type hot water heaters, which used gas for fuel and heated water that was circulated into a 500-gallon storage tank. Defendant never assumed control over these heaters and did not inspect, repair or maintain them. At all times Santora in operating the hotel either made or ordered and paid for all repairs to the equipment in the hotel. It also hired, paid, supervised and had full control of the employees working therein.

Each of the water heaters had an intake line or pipe from the storage tank equipped with valves so that the water could be shut off. The intake line fed the water into a heated coil and out through an outlet line back to the storage tank. All lines, both intake and outlet, were equipped with manually operated valves so that either or both heaters could be isolated. They were regulated by a thermostat on the storage tank, and water was circulated by thermal or heating action. Santora had the storage tank and one of the heaters replaced in 1953. This work was done under the direction of a superintendent of maintenance for Santora, who, from 1953 to 1955, inspected the boiler room at least once a week and never found either of the heaters in need of repair.

On February 8, 1955, the plumbing inspector for the city of Santa Ana, in investigating the explosion on February 7, found both booster heaters displaced, the coils ruptured, and the pipe scattered. He reassembled the plumbing and ascertained that the valves on the inlet pipe, as well as those on the outlet pipes, were closed off tight, resulting in completely shutting off the circulation of water through both heaters. In his opinion the explosion was caused by all the valves being closed, with the result that there was no water circulation of any kind and the building up of pressure caused the coils to blow up.

Walter H. Ward, employed by Santora as maintenance man for the hotel, testified that for several weeks prior to the explosion he had not noticed anything out of the ordinary in connection with the hot water heating system and that it was functioning continuously during the hours he worked at the hotel; that on February 7, 1955, he found there was a leak in a hot water pipe above the third floor ceiling; that he had a pipe cut in the shop to repair the leak and then went down to the boiler room to cut the water off; that he shut off some water valves near the booster heaters and on a second trip to the boiler room he shut more valves off to cut the pressure off the hot water; that he did not do anything in closing the gas valves or changing the thermostat controls and when he left the boiler room both main burners were burning;

and that he then went up to repair the pipe and while he was disconnecting it the explosion occurred.

At the close of the trial defendant made motions for a nonsuit and a directed verdict, which were denied. After the verdict defendant made a motion for judgment notwithstanding the verdict and, in the alternative, a motion for a new trial. The trial court denied the motion for judgment notwithstanding the verdict and granted the motion for a new trial without specifying the grounds upon which this motion was granted.

[1] Under section 629 of the Code of Civil Procedure an appeal does not lie from an order denying a motion for judgment notwithstanding the verdict, but when the adverse party appeals from an order granting a new trial, the order denying the motion for judgment notwithstanding the verdict may be reviewed on such appeal. (In re Estate of Green, 25 Cal.2d 535, 545[6], 154 P.2d 692.)

This question is presented in reviewing the trial court's order denying defendant's motion for judgment notwithstanding the verdict: *Was the evidence insufficient to sustain the verdict and judgment in favor of plaintiff?*

[2] *Yes.* The uncontradicted evidence is that Santora operated and maintained the hotel, hired and discharged the employees, repaired the premises, installed and paid for replacements in the equipment, kept the records, maintained the insurance, and did all things necessary to keep up the premises. There is a total absence of any evidence that defendant took possession of the hotel or interfered with the control of the premises by Santora in any manner whatever.

[3] Plaintiff argues that section 16905 of the Health and Safety Code, which provides that "Every gas vent, gas water heater, or other gas appliance shall be maintained in good repair," imposed upon defendant, as owner of the premises, a nondelegable duty to maintain the heaters in a reasonably safe condition. He further argues that a landowner owes a duty to an employee of an independent contractor to provide that employee with a reasonably safe place in which to work.

These contentions are devoid of merit, for the reason that there is no evidence in the record indicating that the heaters were not maintained in reasonably good repair. All the evidence is that they were in good repair and that the explosion occurred as the result of Mr. Ward's closing the valves and confining water in heaters subject to heat from burners.

[4, 5] It is conceded by the parties that Santora was an independent contractor. In McDonald v. Shell Oil Co., 44 Cal.2d 785, 788[2] et seq., 285 P.2d 902, 904, this court said: "The general supervisory right to control the work so as to insure its satisfactory completion in accordance with the terms of the contract does not make the hirer of the independent contractor liable for the latter's negligent acts in performing the details of the work. Green v. Soule, 145 Cal. 96, 99–100, 78 P. 337. An owner is not liable for injuries resulting from defective appliances unless he has supplied them or has the privilege of selecting them or the materials out of which they are made, Hard v. Hollywood Turf Club, 112 Cal.App.2d 263, 274–275, 246 P.2d 716, or unless he exercised active control over the men employed or the operations of the equipment used by the independent contractor. Willis v. San Bernardino Lbr. & Box Co., 82 Cal.App. 751, 756, 256 P. 224." (See also Sabin v. Union Oil Co., 150 Cal. App.2d 606, 608[1], 310 P.2d 685.)

[6] Plaintiff was an employee of Santora, which by agreement had assumed the duty of maintaining the hotel in a reasonably safe condition. At the time Santora assumed that duty the premises and equipment were in a safe condition.

Snyder v. Southern Cal. Edison Co., 44 Cal.2d 793, 285 P.2d 912; Dobbie v. Pacific Gas & Electric Co., 95 Cal.App. 781, 273 P. 630; Bazzoli v. Nance's Sanitarium, Inc., 109 Cal.App.2d 232, 240 P.2d 672; Freeman v. Nickerson, 77 Cal.App.2d 40, 174 P.2d 688; and Bickham v. Southern Cal. Edison Co., 120 Cal.App.2d 815, 263 P.2d 32, relied on by plaintiff, are not here applicable.

In the Snyder case, supra, the Edison company entered into a contract with an independent contractor who agreed to repair and construct power lines for the company on its premises. While plaintiffs, as line men, were installing switches at the top of a wire supporting pole, the pole, which had been installed by the contractor, fell to the ground, injuring the plaintiffs. It was held that the Edison company was responsible for the installation of the pole and its maintenance; that where an activity involving possible danger to the public is carried on under public franchise or authority the one engaging in the activity may not delegate to an independent contractor the duties or liabilities imposed upon him by the public authority; and that where the law imposes a definite affirmative duty upon one by reason of his relationship with others, whether as owner or proprietor of land or chattels, or in some other capacity, such persons cannot escape liability for a failure to perform the duty thus imposed by entrusting it to an independent contractor. In the present case, repairing the leaky hot water pipe by Mr. Ward was not authorized by defendant and defendant exercised no control over the repair and maintenance of the hot water system in the hotel. Therefore, defendant was not liable. (See McDonald v. Shell Oil Co., supra.)

In Dobbie v. Pacific Gas & Electric Co., supra, it was held that the owner of premises is not an insurer of the safety of an invitee, but owes him the duty to exercise ordinary care in seeing that the premises are in a safe condition, and that the invitee may recover from the owner for any injuries received owing to the dangerous condition of the premises known to the owner and not to the invitee. In the instant case, the evidence disclosed that defendant did not know of the unsafe condition of the premises.

In Bazzoli v. Nance's Sanitarium, Inc., supra, a cement contractor undertaking to do certain work for the sanitarium on its premises was held to be a business visitor, toward whom the sanitarium and its servants must exercise ordinary care to keep the premises in a reasonably safe condition. In the instant case, plaintiff was not an invitee of defendant.

In Freeman v. Nickerson, supra, again there was an invitee, and the court held that it was the duty of the owner to advise the invitee of dangers known to the owner and not reasonably apparent to the invitee.

Finally, in Bickham v. Southern Cal. Edison Co., supra, it was held that the plaintiff, as an employee of the contractor, was engaged in work which was of mutual advantage to himself and the defendant, and was therefore an invitee, and that it was the defendant's duty to furnish him a safe place in which to work. In the present case, the evidence shows that the explosion did not occur as the result of defendant's failure to furnish a reasonably safe place for plaintiff to work but that it was occasioned by the negligence of Mr. Ward, an employee of Santora, over whom defendant had no control.

It is thus clear that the evidence in the present case, which is without conflict on any material point, was insufficient to support a judgment for plaintiff. Therefore, the motion for judgment notwithstanding the verdict should have been granted by the trial court.

The order granting a new trial is reversed. The trial court is instructed to vacate the judgment for plaintiff, order that defendant's motion for judgment notwithstanding the verdict be granted, enter judgment thereon, and order that defendant's motion for a new trial be denied, defendant to recover costs upon appeal.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE, and PETERS, JJ., concur.

52 Cal.2d 1

PEOPLE of the State of California, Respondent,
v.
Marion James LINDEN, Appellant.
Cr. 6191.

Supreme Court of California,
In Bank.
April 22, 1959.
Rehearing Denied May 20, 1959.

Defendant was convicted of first degree murder and from a judgment and an order denying a motion for new trial in the Superior Court, Los Angeles County, LeRoy Dawson, J, the defendant appeals. The Supreme Court, Schauer, J., held that no abuse of discretion was shown in permitting the defendant to represent himself, that asserted incompetence of defense counsel was not established, and that other rulings were either not erroneous or not prejudicial.

Judgment and order affirmed.

1. Criminal Law ⚷641(1)

The constitutional and statutory right to appear and defend in person and with counsel is not "conjunctive" and does not entitle a defendant to conduct his case personally and at the same time to be furnished the advice of an attorney. West's Ann.Pen.Code, § 686; West's Ann.Const. art. 1, § 13.

2. Criminal Law ⚷641(1)

In murder prosecution, record did not establish an abuse of discretion in permitting defendant to represent himself, where the court fully and directly advised defendant concerning the right to counsel and the record established that defendant was fully aware of his situation; the court not being required to demand that defendant as a prerequisite to appearing in person demonstrate either the acumen or the learning of a skilled lawyer. West's Ann. Pen.Code, § 686; West's Ann.Const. art. 1, § 13.

3. Constitutional Law ⚷268
Criminal Law ⚷641(1)

In murder prosecution, evidence failed to establish defendant's contention that his trial attorney was so incompetent that defendant was denied effective aid of counsel and due process based on fact that trial counsel requested that a tape containing defendant's voice be put in evidence without having asked to hear it or because of failure to keep from the jury a reference to defendant's prior criminal record. West's Ann.Const. art. 1, § 13; U.S.C.A. Const. Amend. 14, § 1; West's Ann.Pen. Code, § 1025; West's Ann.Code Civ.Proc. § 2051.

4. Criminal Law ⚷369(2), 722½

In murder prosecution, testimony of officer that defendant soon after his arrest made admissions concerning his criminal record was admissible as necessary and inseparable parts of relevant admissions as to the defendant's attitude towards police officers and towards accusations of crime and it was permissible for the prosecutor to argue in connection therewith that the defendant had gotten away with murder once.

5. Criminal Law ⚷1165(1)

In murder prosecution, where defendant after murder had been apprehended by four civilians, record failed to establish that the defendant was prejudiced by developments to which the asserted incompetence of his trial lawyer contributed concerning the role of the civilians in such apprehension. West's Ann.Const. art. 1, § 13; U. S.C.A.Const. Amend. 14, § 1; West's Ann. Pen.Code, § 1025; West's Ann.Code Civ. Proc. § 2051.

6. Criminal Law ⚷641(1)

In murder prosecution, evidence failed to sustain defendant's contention that his trial court counsel's alleged incompetence deprived him of an impartial jury. West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14, § 1; West's Ann.Pen.Code, § 1025; West's Ann.Code Civ.Proc. § 2051.

7. Criminal Law ⚷1158(3)

Where a prospective juror gives conflicting answers to questions relevant to his impartiality, the trial court's determination as to his state of mind is binding upon an appellate court.

8. Criminal Law 🔑1166½(6)

In murder prosecution, record failed to establish prejudice to the defendant because of the trial court's alleged failure to comply with the statute providing that before a juror is called, a defendant must be informed by the court that if he intends to challenge an individual juror he must do so when the juror appears and before he is sworn. West's Ann.Pen.Code, § 1066.

9. Criminal Law 🔑641(1)

In murder prosecution, record did not support claim that trial counsel was incompetent in his cross-examination of witnesses describing the shooting. West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14, § 1.

10. Criminal Law 🔑641(1)

In murder prosecution, record did not establish that trial counsel was incompetent because during the playing of a tape recording he sat near the microphone and the jury where the defendant could not see or speak with him. West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14, § 1.

11. Criminal Law 🔑641(1)

In murder prosecution, record did not establish trial counsel's incompetence on the ground that he did not obtain a witness for the defendant and did not cause the playing of other tape recordings which had been produced by the prosecutor but not offered in evidence.

12. Criminal Law 🔑641(1)

Where defendant chose to appear in propria persona, it was his duty if he wished to present evidence to do so himself and he could not complain of any shortcomings in his defense which resulted from his informed discharge of his attorney.

13. Witnesses 🔑199(4), 206

Confidential matters which an attorney learns from his client and prospective witnesses do not become subject to disclosure by the attorney merely because they become known to "other parties" or because the client discharges the attorney. West's Ann.Code Civ.Proc. § 1881, subd. 2.

14. Criminal Law 🔑723(1)

In murder prosecution, statement of the prosecutor that if defendant was found guilty of first degree murder and sentenced to life imprisonment he had the right at the conclusion of seven calendar years to be considered for parole was a correct statement of law. West's Ann.Pen.Code, §§ 190.1, 3046.

15. Criminal Law 🔑1171(1)

In murder prosecution, statements by the prosecutor on the examination of prospective jurors with reference to eligibility for parole of a person sentenced to life imprisonment were not prejudicial.

16. Criminal Law 🔑1202(1)

In murder prosecution, where indictment charged and defendant admitted two prior felony convictions, neither of such would support a determination of habitual criminality, where as to one, it was not alleged that defendant had served any term of imprisonment, and the other was of manslaughter, an offense which did not affect the habitual criminal status because it was not enumerated in the statute. West's Ann.Pen.Code, §§ 644, 3047.5.

17. Criminal Law 🔑1171(1)

In murder prosecution, statement of the prosecutor that one sentenced to life imprisonment may be released by pardon was not prejudicial on the ground that he should have further stated that the government cannot grant a pardon where the convict has been twice convicted of a felony unless on a written recommendation of a majority of the Supreme Court judges. West's Ann.Const. art. 7, § 1.

18. Criminal Law 🔑1171(1)

In murder prosecution, statement of the prosecutor with respect to eligibility for parole of one sentenced to life imprisonment was not prejudicial on the ground that it caused the jury to weigh the possibility of a parole in considering the question of guilt.

19. Criminal Law 🔑725

In murder prosecution, argument of the prosecutor was not construable as informing the jury that they should impose death penalty unless they found extenuating circumstances.

20. Criminal Law 🔑1159(5)

In murder prosecution, the trier of fact has the sole responsibility and absolute discretion to select penalty for first degree murder, and the Supreme Court cannot substitute its judgment as to the choice of punishment even where the offense made out the appropriateness of the death penalty.

21. Criminal Law 🔑1184

Where there is error related only to the selection of death penalty, Supreme Court cannot correct the error by reducing the punishment but must reverse and remand the question to the trier of fact, who is the only one empowered to reduce the degree or class of offense based on its view of the weight of evidence.

22. Criminal Law 🔑790

In murder prosecution, the jury should not be informed that the automatic appeal lies where judgment of death is imposed.

23. Criminal Law 🔑1186(4)

In murder prosecution, error in the prosecutor's argument that where a death penalty is imposed the case goes immediately to the Supreme Court and that they review the decision of the jury and then determine from the law whether it is justified, or if they believe the evidence is such that only a second degree murder was committed they could determine that there was prejudicial error, was not reversible error, where the uncontroverted evidence clearly established the defendant's guilt, defendant did not object to the remarks and in argument to the jury admitted that he killed the deceased and that he desired the death penalty with the consequent right of automatic appeal. West's Ann.Const. art. 6, § 4½.

24. Criminal Law 🔑1174(1)

In murder prosecution, failure of the trial court to comply with the statute by admonishing the jury as to their duty not to converse among themselves or with any one else on any subject connected with the trial or form any opinion thereon until the case was finally submitted was not prejudicial where at each ordinarily taken recess the jury were properly admonished, and the only occasion when they were not so admonished was when defendant interrupted the proceedings with request to conduct the case personally and the trial court ordered the jury to go upstairs. West's Ann.Pen.Code, § 1122.

25. Criminal Law 🔑1174(1)

Failure to give the statutory admonition to the jury at each adjournment is not ground for reversal where no prejudice appears. West's Ann.Pen.Code, § 1122.

26. Criminal Law 🔑717

A trial court in its discretion may permit counsel to state correct law and illustrate its application to the facts.

27. Criminal Law 🔑1171(3)

In murder prosecution, argument of the prosecutor attempting to explain the difference between a confession and admission and coercion thereof was not prejudicial where there was no evidence that any declaration of defendant was coerced.

28. Criminal Law 🔑720(1)

In murder prosecution, argument of the prosecutor was not subject to objection that he falsely argued that a tape recording included admissions of defendant's expressed intent to kill an officer.

29. Criminal Law 🔑1159(3)

Defendant's arguments concerning the effect of asserted inconsistencies in the evidence are not properly addressed to the Supreme Court where there is nothing in the record to suggest that the evidence is inherently improbable or intentionally false.

30. Criminal Law 🔑1110(1)

In murder prosecution, disallowance of defendant's proposed corrections to the reporter's transcript was not prejudicial where such could not have the slightest effect on appellate review of the judgment of conviction. West's Ann.Pen.Code, §§ 1217, 3600; West's Ann.Const. art. 1, § 13; U.S.C.A.Const. Amend. 14.

31. Constitutional Law ⚷257
Criminal Law ⚷641(1)

The right to counsel includes reasonable opportunity to prepare for trial and the refusal to allow a party to introduce any evidence may amount to a denial of a hearing.

32. Criminal Law ⚷1165(1)

Denial of a fundamental constitutional right is not excused by want of prejudice, but questions of prejudice can be considered in determining whether there was in fact a denial of a fundamental constitutional right.

33. Constitutional Law ⚷268

A state's failure to appoint counsel in a noncapital case violates the Fourteenth Amendment only when the disadvantage from the absence of counsel is aggravated by circumstances showing that it resulted in the prisoner actually being taken advantage of or prejudiced. U.S.C.A.Const. Amend. 14.

34. Criminal Law ⚷1186(4)

Neither California law nor federal due process contemplates that the elements of a fair hearing on objections to a transcript are precisely the same as those of a trial, and where the defendant personally appears at the transcript hearing, and affirmatively shows that his proposed corrections are immaterial to disposition of the appeal, the refusal to allow him opportunity to prepare and present evidence as to those inconsequential corrections if error is no more than an error of procedure not resulting in a miscarriage of justice and hence not requiring a reversal. West's Ann.Const. art. 6, § 4½.

35. Criminal Law ⚷1110(1)

In murder prosecution, defendant's request for augmentation of the record would be denied as unnecessary where the court's review of the defendant's constitutional contentions had not been affected by the absence of the statement and where the court considered the constitutional questions raised so that defendant's record was protected should he wish to present the questions to a federal court.

36. Criminal Law ⚷1110(1)

Defendant's request that the record on appeal be augmented to include tape recordings not offered in evidence could not be granted, since the tapes were not a part of the record in the trial court.

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Frank Heller and Lester M. Fleischner, Los Angeles, for appellant. Additional briefs were filed by appellant pro se.

Edmund G. Brown, Atty. Gen., William E. James and Herschel T. Elkins, Deputy Attys. Gen., for respondent.

SCHAUER, Justice.

This is an appeal (Pen.Code, § 1239, subd. (b)) from a judgment which, pursuant to jury verdict, imposes the death penalty for the first degree murder of Leo Wise, and from an order denying defendant's motion for new trial. Most of the problems here presented arise because defendant, from the inception of this lawsuit, has taken the position that the right to counsel includes the rights to be furnished a court-appointed attorney to act in such varying capacities as defendant may from time to time see fit to require—as attorney of record yet subject to defendant's direction, or as legal advisor, or as a mere clerk—and to be furnished a new court-appointed attorney when defendant becomes dissatisfied with counsel who have been assigned. We have concluded that defendant has been denied no essential aspect of any constitutional right, and that his claims of prejudicial error are without merit.

The Substance of the People's Case. On Saturday night, March 16, 1957, defendant became involved in a fight in a Los Angeles bar. Summoned by the bartender's shout, Police Officer Leo Wise, in uniform, entered the bar. He took defendant to the sidewalk, searched him for weapons and found none. The officer said, "I should arrest all of them, but I don't want to see you on the street any more. Go home." Defendant walked away in one direction and Officer Wise in another.

Later that night Officer Wise encountered defendant outside the bar and said, "I thought I told you to go home." The officer "patted him on the sides again" in a search for weapons, then went to a nearby police call box. As Wise started to place a call defendant, at about 12:20 a. m. on March 17, stepped to the officer's side, shot him twice at very close range, and ran away. Officer Wise fired twice at the fleeing defendant; defendant fired once more at the officer; and Wise placed a call and collapsed.

Defendant ran to his parked car and drove away. Luis Alatorre, an alert and courageous man who was driving by with three companions, saw the shooting and drove after the defendant. Motorcycle officers, encountered and alerted by Alatorre and his companions, pursued and halted defendant's car. One of the officers took defendant's gun from his belt. Alatorre and his companions shouted, "Be careful, he has a gun. He just shot a policeman." Defendant said to the officers, "you took me, but I got one * * * of the bunch. I would like to shoot some more, just like I did the last copper. I'll bet he is dead." (This statement and subsequent statements of defendant to police officers were interspersed with obscenities.) Defendant spat in the face of the officer who was handcuffing him. Other officers arrived and one of them said, "Let me have him for a while and I will fix him." The arresting officer replied that defendant "was under arrest and in my custody and to leave him alone." Defendant said to the latter officer, "Thank you, buddy, for stopping these [obscenities] from beating me up. I'll beat this in court. You are a good guy." Aside from the foregoing incident no officer threatened defendant. No force was used against him except to handcuff him and to hold him when he attempted to kick the officers. No hope of immunity or reward was extended, and in the officers' opinion defendant's statements were voluntary.

Lt. Gebhart and other officers in a police car took defendant to the Homicide Division. As they drove, defendant made the following statements: "I hope you have me for murder. I shot that * * * cop and I intended to kill him. If I had an opportunity I would kill all of you. * * * I tried to shoot him in the heart. * * * I shot him with a .32 and I didn't think it would do that much damage, but I hoped it would."

Defendant, Lt. Gebhart, and other officers were in the Homicide Division from 12:45 a. m. until 3 a. m. on March 17. During this period defendant (who was handcuffed) kicked and spat at officers and knocked furniture about. Lt. Gebhart testified that during such period defendant made the following statements: In the anteroom of the Homicide Division, defendant said that three years before he had been "framed" by two policemen on a charge of "interfering with an officer"; "That these officers had perjured themselves in the court, that he was convicted * * *, and that at that time while he was doing his 90-day sentence, he made up his mind he was going to kill a police officer"; "that it took the jury eight hours of deliberation on a misdemeanor charge to convict him * * * and that he was very tough to beat, that he had beaten one other murder rap," and "he was going to be very hard to convict on this charge." Immediately thereafter in the office of the captain of the Homicide Division "the conversation * * followed the same general outline with the exception that * * * Mr. Linden then said that he was not talking about himself; he was talking about a fictional character who had served 90 days on a bum rap, and then made up his mind to kill a police officer."

The Tape Recordings of Defendant's Statements. After the People had presented the foregoing evidence, defendant's trial counsel (a court-appointed private attorney who no longer represents defendant) and defendant personally requested and obtained the playing in evidence of a tape recording (introduced as People's Exhibit 19) of the interview in which defendant spoke of a "fictional character." This recording, in its intelligible portions, contains no direct admissions as to the shooting of Wise or defendant's intent to kill a police officer; it includes expressions of defendant's hatred of the police as a class and his arrogant belief that, as established by his criminal record, he was "tough to beat"; and it contains much vicious obscenity of defendant.

Defendant and his counsel had ample warning that the tape would contain language of defendant which might prejudice the jury.[1] Nevertheless defense counsel asked that all recorded statements of defendant be produced and that it be "stipulated" that they would be played to the jury. The prosecuting attorney asked, "That is at the defendant's request?" Defense counsel said, "At the defendant's request. Isn't that true, Mr. Linden?" Defendant replied, "That is fine," and shortly thereafter interrupted the court to say, "Nothing cut out, sir, played in their entirety." Defendant asked and was allowed to speak privately with his counsel and immediately thereafter counsel repeated to the court that defendant wished "all" the tapes, "complete."

The prosecuting attorney produced all taped statements of defendant. Lt. Gebhart identified People's Exhibit 19 and it was played in evidence. The prosecutor said that he did not know the contents of the remaining tapes but that they were not of conversations to which the witnesses had testified and he did not feel that he could offer them in evidence. The court suggested that defendant and his counsel consult privately as to use of the additional tapes. Thereafter neither defense counsel nor defendant (who, as hereinafter related, subsequently undertook to represent himself) asked that the additional tapes be introduced in evidence.

Lt. Gebhart, further examined, reiterated his identification of People's Exhibit 19. When defense counsel concluded his cross-examination of the lieutenant, defendant himself interrupted the proceedings with a request to personally examine the witness and asserted, "That is not my voice on that recording; that is an actor. * * * I can prove it." There followed proceedings, hereinafter described, which led to defendant's assuming his own representation. Although defendant has since often repeated his assertion that People's Exhibit 19 is false, he has never offered any evidence in support of that claim.

The prosecuting attorney, shortly after the playing of People's Exhibit 19 and again in argument, emphasized that the tape had been put in evidence at defendant's request and that the People had not wished to place it before the jury. Defendant in argument asked the jury to listen to the tape again in order to determine whether it was of his voice. During the jury's deliberations the tape was replayed at their request.

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[1] On voir dire examination the prosecutor asked a prospective juror if she would be prejudiced by evidence of defendant's vile language and said, "there may even be a tape recording of those statements in court." Thereafter the character of defendant's language was shown by the testimony of officers to his statements at the time of his apprehension and transportation to Homicide Division.

On direct examination of Lt. Gebhart, when defense counsel unsuccessfully objected to "piecemeal" testimony as to defendant's statements, the prosecuting attorney asked, "Would counsel like to hear the whole transcription?" and defense counsel replied, "That has been under discussion."

On cross-examination defense counsel brought out the fact that the lieutenant had seen a typed transcript of a recorded statement of defendant which indicated that much of the recording was unintelligible; counsel asked the witness whether his testimony as to defendant's declarations was based on isolated matters singled out from this transcript; before the witness could answer the prosecutor said, "it becomes apparent now that the entire tape recording should be made available, which I will present, and I would be most happy to have it presented to the jury"; the trial court said that this appeared unnecessary because it had not been shown (and it never was shown) that the lieutenant's testimony was based on the recording or transcript rather than his own recollection. Defense counsel then adduced from the lieutenant the testimony that *defendant, when his statements were being recorded, said "that they would probably have to delete certain portions of the tape * * * on account of his filthy language."* (Italics added.) It was after the foregoing developments that defense counsel and defendant asked that the tape be played in evidence.

Defendant's Waiver of Counsel During Trial. Counsel represented defendant without objection by the latter until the fifth day of trial. Defendant then twice interrupted the proceedings with requests to personally make motions and cross-examine. After he asserted, "That is not my voice on that recording," defendant refused to be silent and asked "to appear and defend myself in person." The court excused the jury. Defendant explained that counsel "did not want to go on with the case the way I wish" and did not believe that the tape was "framed." Defendant asked that his attorney be relieved [2] and that Mr. Frank Heller be assigned as counsel.

After considerable colloquy the court, with defendant's assent, reserved ruling on the questions of relieving defendant's counsel and his further representation until the People concluded their case. The jury were recalled. The People presented a little more evidence (including testimony of another officer who identified People's Exhibit 19) and rested.

Out of the presence of the jury the court fully and correctly advised defendant concerning the right to counsel, the lack of special privileges to a defendant who insists upon representing himself, and the absence of any right to advisory counsel in the capacity of "errand boy," all in substantial accord with the law as stated in People v. Mattson (1959), 51 Cal.2d 777, 336 P.2d 937. The court further, and properly (see People v. Caritativo (1956), 46 Cal.2d 68, 73 [10], 292 P.2d 513; People v. Dorman (1946), 28 Cal.2d 846, 850 [1], 172 P.2d 686), ruled that it would not appoint new counsel at the late stage of the proceeding. It relieved defendant's trial counsel as attorney of record and, with his consent and with express recognition of the difficult position in which he was placed, appointed him as legal advisor.

There was considerable discussion as to production of defense evidence, during which defendant took various inconsistent positions as to what he did and what he did not wish to produce. Among other things, he said that he wished "all records, medical records in the possession of the Los Angeles Police Department from 1952 through this date" and "all photographs from 1952 through the present date." From the colloquy it appears that a subpoena duces tecum for these records had been prepared but that their materiality was never sufficiently shown. The prosecutor produced certain photographs, they were "marked for identification," but defendant did not offer them in evidence. Concerning the "medical records" and additional photographs, the prosecutor thereafter asked, "Do I understand * * * [that the pictures already produced are] all the defendant desires at this time?"; defendant replied, "That is all at this time." Defendant also stated that he did not want the witnesses whom his counsel had subpoenaed and that "I am going to prove that recording is not one of my voice and I am going to try to prove it by this witness [defendant named the proposed witness and said that he was on trial in another courtroom in the building], maybe other witnesses that might come in voluntarily. I'm not going to subpoena witnesses, however." Defendant's advisor said that he would prepare and give to the sheriff a subpoena for the named witness. The court recessed "so any subpoena you want served may be prepared and served and you may try to locate this other witness."

When court reconvened, the judge asked, "Do you wish to call your witness now?" Defendant, without suggesting that he wished to offer any evidence, replied, "the defense rests."

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[2] In making this request defendant incidentally stated of his counsel that he "has been very fair with me and he has been a very good attorney," to which the trial judge responded, "Yes, he has."

Defendant's appeal counsel assert that the trial court did not determine that defendant understood the issues and available defenses and had capacity to effectively waive counsel, as required by Johnson v. Zerbst (1938), 304 U.S. 458, 464–465, 58 S.Ct. 1019, 82 L.Ed. 1461; In re James (1952), 38 Cal.2d 302, 313 [8], 240 P.2d 596; and People v. Chesser (1947), 29 Cal.2d 815, 822–825 [4–6], 178 P.2d 761. Further, they say, the following conduct of defendant shows that he was not competent to waive counsel: Prior to trial defendant told the court that he was "not capable * * * on my own" of determining whether the evidence before the grand jury was sufficient. During the colloquy which resulted in defendant's being allowed to represent himself, his then counsel expressed willingness to remain as attorney of record "Without having anybody telling me how to try a lawsuit when they don't understand what is going on." From the circumstance that defendant did not produce evidence that the tape was false, appeal counsel infer that defendant did not understand that he could offer such evidence. They also say that "From the record, there is a question whether appellant was cognizant of the possible defenses available to him, e. g., self defense," and that "In addition, the confusion which arose with reference to the subpoenaing of the Police Department pictures and records * * * and of witnesses, was evidence that the appellant did not know what he was doing."

[1] The foregoing argument is based upon isolated occurrences taken out of context and unwarranted inferences therefrom. Prior to trial defendant was repeatedly urged, and refused, to accept representation by the public defender; he presented the untenable but not naive argument (since rejected in People v. Mattson (1959), supra, 51 Cal.2d 788, 336 P.2d 945, 946) that his state constitutional (art. I, § 13) and statutory (Pen.Code, § 686) right to "appear and defend, in person and with counsel" was "conjunctive" and entitled him to conduct his case personally and at the same time to be furnished the advice of an attorney; he evidenced alertness to protect his rights by his reiterated requests for an attorney to advise him whether the indictment was subject to demurrer or motion to set it aside; and it was in this latter connection that he said, indicating recognition of the difficulty which he might encounter if he insisted upon representing himself, that "I am not capable * * * on my own" of appraising the testimony before the grand jury. Long before trial defendant was afforded the advice and accepted the representation of his trial counsel, and after defendant was allowed to undertake his own representation he still had the advisory services of counsel. Trial counsel's statement, when the matter of relegating him to the position of advisor was under discussion, that he was willing to try the case without direction from anyone who did not "understand what is going on," did not indicate his opinion that defendant was altogether devoid of understanding; rather, it indicated no more than what defendant had already explained; i. e., that defendant and counsel had reached an impasse because counsel did not believe and would not attempt to prove that the tape recording was falsified.

Defendant was afforded opportunity to obtain the evidence (if in truth it existed) which he indicated he desired. His advisor undertook to prepare and give to the sheriff a subpoena for the witness whom defendant asserted could testify concerning his claim that the tape was false. We can only conclude that defendant's failure to present any defense was not due to confusion or ignorance but rather to the non-existence of admissible evidence or to counsel's having privately persuaded defendant to have some regard for the rules of admissibility and the dangers of false evidence.

[2] Before the trial court allowed defendant to represent himself, it held lengthy discussions with him and had ample opportunity to observe his abilities and disabilities. As in People v. Mattson (1959), supra, at pages 788, 793 of 51 Cal.2d, 336 P.2d at pages 945, 949, the entire record establishes that defendant was fully aware of his situation when he insisted upon representing himself, and the court was not required to

demand that defendant, as a prerequisite to appearing in person, demonstrate either the acumen or the learning of a skilled lawyer. No abuse of discretion is shown.

[3] *Asserted Incompetence of Defense Counsel.* Defendant's appeal counsel contend that defendant's trial attorney was so incompetent that defendant was denied effective aid of counsel (Cal.Const., art. I, § 13) and due process (U.S.Const., Amend. XIV, § 1). And defendant pro se[3] charges not merely inadequate representation but collaboration against him between his trial counsel and the prosecution. The latter charge is so entirely devoid of support that it will be given no further mention.

As the principal instance of trial counsel's asserted incompetence, appeal counsel cite the fact that trial counsel requested that the tape, People's Exhibit 19, be put in evidence without having asked to hear it.[4] Although defendant pro se asserts that his trial attorney convinced him that the recording should be put in evidence, from the record as a whole we conclude that the damaging maneuver must be attributed to defendant personally and that his trial counsel cannot be charged with incompetence because he did not control his client in this regard. As we have indicated, defendant's counsel was careful to obtain defendant's consent in open court to the "stipulation" that the recordings be presented. There being nothing in the record to the contrary, we must assume that counsel did this in fairness to all concerned rather than to protect himself from his own careless or intentional initiation of tactics which might harm defendant. Defendant himself then stated his demand that the recordings be played "in their entirety" and asked and obtained his counsel's repetition of that demand. It appears to us that such demand by defendant was a part of his attempt to discredit the prosecution's case through the claim that the police had used an actor to "fake in" a voice on one or more of the recordings and misrepresented the voice as that of defendant. It thus appears that defendant decided to take the calculated risk of having People's Exhibit 19 presented. While it is unfortunate that defense counsel (in his own words) "built a lawsuit up to that recording," the record fails to persuade us that he is chargeable with defendant's plight. To the contrary, it appears probable that it was defendant's insistence upon urging his claim that the recording was false and did not contain his voice, and counsel's refusal to advance such contention, which led to defendant's demand that counsel no longer represent him.

Defendant complains that the incompetence of his trial counsel appears from his failure to keep from the jury reference to defendant's prior criminal record. Defendant was charged with and admitted two prior convictions of felony. One of these convictions (voluntary manslaughter) was brought to the attention of the jury as hereinafter explained. Defendant asserts that his trial counsel permitted and encouraged procedure contrary to the provision of section 1025 of the Penal Code that, where defendant admits a previous conviction, it must not be alluded to on the trial.

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[3] With consent of defendant's appeal counsel and this court, defendant has presented briefs in propria persona.

[4] The record does not show whether defense counsel heard the tape before he requested its introduction in evidence. (It does at least seem to indicate that he did not attempt to see the transcript of the tape, for after he had adduced testimony that Lt. Gebhart had seen such a transcript and after the prosecutor had said that he had such a transcript, defense counsel mistakenly said, "No transcript was made.") We can hardly imagine for what purpose counsel would cause the tape to be played before the jury if he had heard it. The People suggest that he may have thought that doubt would be cast on the officers' testimony as to defendant's express admissions that he intended to kill by a showing that no such admissions were recorded. We also note that apparently defendant can be quite persuasive (both the prosecutor and the trial court mentioned favorably his presentation of his oral argument to the jury) and it is not inconceivable that he might have misled counsel into the belief that there was some seemingly plausible reason for presenting the tape.

Defense counsel, on voir dire examination of prospective jurors, asked, "In the event that the evidence in this case should develop the fact that the defendant had been convicted of a felony before, would that * * prejudice you * * *?" This reference was proper. So far as appears, defense counsel and defendant recognized that the prosecution evidence might show (as it did) admissions of defendant concerning his criminal record as inseparable parts of his admissions concerning the present crime. Also they may have planned that defendant would take the stand, in which event his prior convictions of felony could be shown by the People on cross-examination (Code Civ.Proc., § 2051). As a matter of trial tactics, the damaging effect of the People's bringing out a defendant's prior record may well be lessened if the matter is frankly anticipated by the defendant.

[4] Lt. Gebhart, without objection, gave the previously mentioned testimony that defendant soon after his arrest said that "it took the jury eight hours of deliberation on a misdemeanor charge to convict him * * *, that he was very tough to beat, that he had beaten one other murder rap." Statements of defendant on the tape recording show that the mentioned "murder rap" resulted in conviction of manslaughter. Defendant urges that the receipt of this evidence violated the holding of People v. Green (1950), 96 Cal.App.2d 283, 291–292 [4], 215 P.2d 127, that it is error to receive evidence of defendant's admissions of a criminal record made in the course of but severable from admissible declarations concerning the crime for which defendant was on trial. Here, however, defendant's admissions concerning his criminal record were provable as necessary, inseparable parts of relevant admissions as to his attitude toward police officers and toward accusations of crime. (See People v. McMonigle (1947), 29 Cal.2d 730, 742, 177 P.2d 745; People v. Peete (1946), 28 Cal.2d 306, 314–315 [1], 169 P.2d 924.) And since evidence of defendant's boasts that "he had beaten one other murder rap" was properly received, it was permissible for the prosecuting attorney to make the argument, of which defendant complains, that defendant "has gotten away with murder once." It thus appears that defense counsel did not invite or permit error in connection with defendant's criminal record.

[5] Defendant pro se argues unconvincingly that he was prejudiced by developments, to which the asserted incompetence of his trial counsel contributed, concerning the role of Mr. Alatorre and his companions in the apprehension of defendant. On examination of prospective jurors counsel for defendant properly asked whether the jurors had seen newspaper or television accounts of the death of Officer Wise, and the prosecuting attorney thereafter made particular inquiry as to a television program which praised "four Mexican nationals" who "captured" defendant. Defendant makes the peculiar complaint that he was tried by a jury who had *not* seen that program. He further complains that his counsel should have cross-examined the arresting officer to show that his testimony before the grand jury might be understood to mean that defendant expressed thanks for protection from the Mexicans rather than (as shown by the officer's trial testimony) from other officers. So far as appears such cross-examination would only have emphasized defendant's vile language and would not have adduced anything helpful to defendant. Defendant also complains of statements of the prosecuting attorney in argument concerning the "Mexican boys"; these statements were factually correct and could not have prejudiced defendant.

[6] Also without merit is defendant's pro se contention that his trial counsel's incompetence and error of the court deprived him of an impartial jury. On voir dire examination the court asked the first two prospective alternate jurors, among other things, whether they knew the victim Leo Wise. They answered "No." There-

after, when the defense had only one peremptory challenge available, Mrs. Tepper was called as a prospective alternate juror. On examination by the court she said that she had heard its previous questions and would give the same answers as the jurors previously examined. Questioned by defense counsel, she said that she had two nephews on the Los Angeles police force, that she had heard of the killing, that Wise had been her neighbor but she had not known him well, and that she believed that she could give an impartial verdict. Defense counsel exercised his last peremptory challenge to excuse a juror other than Mrs. Tepper and she was sworn as an alternate juror.

[7] The fact that Mrs. Tepper gave what defendant calls "not a true answer" to the above described question of the trial court could well have been and no doubt was considered by court and counsel to show inattention, not deliberate concealment or self-contradiction as to her acquaintance with Wise. Certainly it does not appear as a matter of law that defense counsel made an unwise use of his last peremptory challenge. And no ground of challenge for cause appears. Where a prospective juror gives conflicting answers to questions relevant to his impartiality, the trial court's determination as to his state of mind is binding upon an appellate court. (People v. Daugherty (1953), 40 Cal.2d 876, 890 [4], 256 P.2d 911; People v. Eudy (1938), 12 Cal.2d 41, 45 [2], 82 P.2d 359.) Furthermore, Mrs. Tepper, an alternate juror, did not participate in the deliberations of the jury which rendered the verdict against defendant.

[8] In connection with the selection of the jury defendant pro se further complains that the trial court did not comply with section 1066 of the Penal Code, which provides, "Before a juror is called, the defendant must be informed by the court, or under its direction, that if he intends to challenge an individual juror he must do so when the juror appears, and before he is sworn." No prejudice in this regard appears, since defendant's counsel presumably was aware of section 1066. (People v. Ellworth (1891), 92 Cal. 594, 596, 28 P. 604; People v. O'Brien (1891), 88 Cal. 483, 489, 26 P. 362.)

[9] The record does not support the claim that trial counsel was incompetent in his cross-examination of the witnesses who described the shooting. Viewing the cold record from the vantage ground of deliberation rather than in the heat of trial, it can be inferred that counsel may have made an occasional small mistake in cross-examination, but no prejudice whatsoever is shown to have resulted.

Defendant pro se complains of the use in evidence of a map of the scene of the shooting. The prosecuting attorney produced the map. He did not, but defense counsel did, ask witnesses to refer to and indicate positions on the map. By stipulation it was received in evidence. Defendant's claim that this use of the map indicates bad faith of the prosecution and incompetence of defense counsel approaches absurdity.

[10] Defendant complains that his counsel during the playing of the tape recording sat near the microphone and the jury, where defendant could not see or speak with him. The record does not show the positions of the persons in the courtroom (although defendant mistakenly says that his statements in oral argument to the jury establish such positions). In any event, once the proceedings had come to a point where the tape was played (a situation for which, as we have concluded, defendant himself must be considered responsible), it does not appear that counsel could have done anything on defendant's behalf had he remained in a position where he could consult with defendant; rather, counsel without impropriety could decide to place himself where he could best hear the tape and appraise its authenticity (as to containing defendant's voice) and its effect upon the jury.

[11, 12] There is no merit in defendant's pro se complaints that his trial counsel did not obtain a witness for defendant

and did not cause the playing of the other tape recordings which had been produced by the prosecuting attorney but not offered in evidence. When defendant chose to appear in propria persona it became his duty, if he wished to present evidence, to do so himself (People v. Mattson (1959), supra, at page 793, of 51 Cal.2d, at page 949 of 336 P.2d) and he cannot complain of any shortcomings in his defense which resulted from his informed discharge of his attorney (People v. Pearson (1940), 41 Cal.App. 2d 614, 620, 107 P.2d 463). This consideration also disposes of defendant's contention that the trial court and the prosecuting attorney should have caused compliance with the "stipulation" that "all" recordings would be put in evidence.

[13] Defendant in propria persona complains that after he asked to be allowed to represent himself his trial counsel volunteered the following statements to the court in the presence of the prosecuting attorney: "the witnesses have all been subpoenaed with the exception of one witness, Mr. Bierman, whom I have on tape" but "I would not call him" because his testimony "has been ruined by the recording" and because the witness was ill; defendant had told counsel "not to subpoena but to talk with" a Mr. Peters; Mr. Peters had said that he would come to the courtroom, that "he couldn't place the defendant, but if he saw him, he could probably specify what his testimony would be." When defendant protested that his counsel had disclosed confidential matters, the attorney said that "those matters are not any longer of confidence between the defendant and myself. They are matters involving other parties that know of them. * * * [T]o protect both the defendant and the witnesses, I feel it is compulsory on my part to make that known to the court, so that he [defendant] will not say he is taken unawares." Of course confidential matters (i. e., matters privileged by Code Civ.Proc., § 1881, subd. 2) which an attorney learns from his client and prospective witnesses do not become subject to disclosure by the attorney merely because they become known to "other parties" or because the client discharges the attorney. (Hardy v. Martin (1907), 150 Cal. 341, 344, 89 P. 111; People v. Singh (1932), 123 Cal.App. 365, 369–371, 11 P.2d 73.) But since counsel here did not reveal anything prejudicial to defendant or relevant to the ensuing conduct and outcome of the case, we need not decide whether his limited disclosure was a breach of confidence.

[14] *Asserted Errors as to Choice of Penalty.* This case was tried before the effective date of Penal Code section 190.1, which provides for separate trial of guilt and of penalty. The prosecuting attorney repeatedly made statements such as the following: "if this defendant is found guilty of first degree murder and sentenced to life imprisonment he has the right at the conclusion of seven calendar years to be considered for parole." This is correct law (Pen.Code, § 3046) which is pertinent, as a matter of fact rather than a proposition of law, to selection of penalty. (People v. Turville (1959), 51 Cal.2d 620, 335 P.2d 678; People v. Riser (1956), 47 Cal.2d 566, 582 [20], 305 P.2d 1; People v. Friend (1957), 47 Cal.2d 749, 754–755 [1], 306 P. 2d 463.)

[15] On examination of prospective jurors the prosecutor also once stated that a person sentenced to life imprisonment is eligible for parole "within" seven years and twice stated that such a person may be paroled "in" seven years. These three isolated erroneous declarations, obviously inadvertent in view of the numerous correct assertions of the prosecutor that such a person would be eligible for parole *after* seven years, could not have misled the jury.

[16] Defendant mistakenly asserts that his status is that of an habitual criminal with two prior convictions of felony, so that he would not be eligible for parole until he had served nine years (Pen.Code, § 3047.5). Although the indictment charged and defendant admitted two prior felony convictions, neither of such convictions would support a determination of habitual criminality, for as to one it was not alleged

that defendant had served any term of imprisonment (see Pen.Code, § 644; People v. Dawson (1930), 210 Cal. 366, 372 [6], 292 P. 267; In re Tartar (1934), 1 Cal.App. 2d 400 [1], 36 P.2d 419) and the other was of manslaughter, an offense which does not affect habitual criminal status because it is not enumerated in section 644 (People v. Barclay (1953), 40 Cal.2d 146, 159, 252 P.2d 321, 328, footnote).

[17] Defendant complains that the prosecutor, when he correctly stated that one sentenced to life imprisonment may be released by pardon, should further have said that the governor cannot grant a pardon "where the convict has been twice convicted of a felony, unless upon the written recommendation of a majority of the judges of the supreme court" (Cal.Const., art. VII, § 1). Defendant could not reasonably have been prejudiced in this regard. The significant matter was that if the jury fixed the penalty of life imprisonment there were nevertheless means by which defendant could be released from prison; the precise operation of those means was of no particular importance. (See People v. Reese (1956), 47 Cal.2d 112, 119, 301 P.2d 582.)

[18] On one occasion, immediately after declaring that one sentenced to life imprisonment is eligible for parole after seven years, the prosecuting attorney said, "I'm not trying to invade the discretion of the jury * * * but you should consider * * * all the facts in your determination, not only as to whether the man is guilty or not, but what penalty he should receive." We cannot agree with defendant that the foregoing statement may have caused the jury to weigh the possibility of parole in considering the question of guilt. In this connection, on several other occasions, the prosecutor made it clear that the matter of parole would be relevant only if the jury found the defendant guilty of first degree murder.

[19] The prosecuting attorney in argument said that the jury would be instructed that if they found defendant guilty of first degree murder they "are given the unlimited right" of choice between the penalties of life imprisonment and death,[5] and that "You may say to yourself, what kind of first degree murder warrants life imprisonment and what kind * * * warrants the death penalty?" The prosecutor said that this case "could very well be considered by you as a case which warrants the death penalty" and, "just by way of illustration," stated the facts of other cases "where the penalty might well be considered life imprisonment." He then said, "what is there in this case when you apply the instructions and your own unlimited discretion to say you shouldn't impose the death penalty? I ask you to consider that as I review the testimony."

Defendant urges that the effect of the foregoing argument was to inform the jury, contrary to People v. Friend (1957), supra, 47 Cal.2d 749, 755 [2], 306 P.2d 463, and People v. Green (1956), 47 Cal. 2d 209, 218, 302 P.2d 307, that they should impose the death penalty unless they found extenuating circumstances. We do not believe that the argument, considered, as a whole, has that effect; it presents the prosecutor's opinion that the facts of this case warrant the death penalty, not a contention that the law requires the death penalty in the absence of mitigating circumstances.

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[5] The court correctly instructed the jury on this subject as follows:

"It is the law of this State that every person guilty of murder in the first degree shall suffer death or confinement in the state prison for life at the discretion of the jury. If you should find the defendant guilty of murder in the first degree, it will be your duty to determine which of the two penalties shall be inflicted, the death penalty or confinement in the state prison for life. If you should fix the penalty as confinement for life, you will so indicate in your verdict. If you should fix the penalty as death, you will so indicate in your verdict. In determining which penalty shall be inflicted, you are free to act according to your own judgment and discretion.

"Beyond prescribing the two alternative penalties, the law itself provides no standard for the guidance of the jury in the selection of the penalty but rather commits the whole matter of determining which of the two penalties shall be fixed to the judgment, conscience and discretion of the jury and, in the determination of that matter, the jury must agree unanimously as to which of the two penalties shall be imposed."

Error appears in the following portion of the prosecuting attorney's argument: "in California we have a law that where a death penalty is imposed * * *, it goes immediately to the Supreme Court of the State of California. They review your decision if a death penalty is imposed, and they determine from the law whether such a penalty is justified, or if they believe the evidence is such that only a second-degree murder was committed, or they could determine that there was prejudicial error." This argument contains incorrect suggestions contrary to the following holdings:

[20, 21] No matter how convincing the evidence of second degree murder may appear to an appellate court, such court cannot "believe the evidence is such that only a second-degree murder was committed" if there is evidence of and the trier of fact finds first degree murder. (People v. Matlock (1959), 51 Cal.2d 682, 336 P.2d 505.) The trier of fact has sole responsibility and absolute discretion to select the penalty for first degree murder. (People v. Friend (1957), supra, 47 Cal.2d 749, 759 [5a], 764 [11], 306 P.2d 463; People v. Green (1956), supra, 47 Cal.2d 209, 218 [7], 302 P.2d 307.) This court cannot substitute its judgment as to choice of punishment (People v. Odle (1951), 37 Cal.2d 52, 58 [3, 4], 230 P.2d 345) even where we may doubt the appropriateness of the death penalty (see People v. Brust (1957), 47 Cal.2d 776, 792, 306 P.2d 480; People v. Danielly (1949), 33 Cal.2d 362, 383, 202 P.2d 18). Where there is error related only to selection of the death penalty this court cannot correct the error by reducing the punishment, but must reverse and remand the question to the trier of fact. (People v. Green (1956), supra, 47 Cal.2d 209, 235 [15], 302 P.2d 307.) It is only the trial court which is empowered to reduce the degree or class of offense based on its view of the weight of the evidence. (People v. Borchers (1958), 50 Cal.2d 321, 330, 325 P.2d 97.)

[22] A jury should approach the tasks of finding facts and exercising discretion as to choice of penalty with appreciation that their duties are serious and that they are accountable for their decisions, not with the feeling that they are making mere tentative determinations which the courts can correct. The jury have no concern with and should not be informed of the automatic appeal where judgment of death is imposed, and of course they should not be misinformed (as they inferentially were here) concerning this court's powers.

[23] Argument such as that of the deputy district attorney above quoted improperly diminishes the jury's recognition of their duties and responsibilities and powers. In People v. Sampsell (1950), 34 Cal. 2d 757, 762 [2], 765, 214 P.2d 813, we characterized similar but more censurable argument as "reprehensible conduct which is not to be condoned," and stated that "we can see no justification for such an argument in the light of the settled rule respecting the function of this court." However, we held that the error, in the circumstances of that case, was not reversible. Since our clear pronouncement in Sampsell there is even less justification for argument of this sort.

It seems that prosecuting officials sometimes consider a holding that particular misconduct is error but not, in the circumstances, prejudicial, as establishing that as a matter of law the conduct is cause for mere rebuke but not reversal (see People v. Wilkes (1955), 44 Cal.2d 679, 687 [8], 284 P.2d 481), and continue to try their cases improperly in the expectation that, should a conviction be obtained, the appellate court will uphold it under section 4½ of article VI of the California Constitution (see People v. Lyons (1956), 47 Cal. 2d 311, 319 [8], 303 P.2d 329). Conduct of that kind demeans the office of prosecutor and his profession. Because it relates to the jury's selection of penalty it implicitly invites reversal in every case. Only under extraordinary circumstances can the constitutional provision save the verdict. Here, the following circumstances combine to avoid an otherwise indicated reversal and remand for a new trial on the issue of penalty. Uncontroverted evidence clearly establishes defendant's guilt; at the trial defendant did not object to the prosecutor's remarks; defendant in argument to the jury admitted that he killed Officer Wise[6] and said that he desired the death penalty with the consequent right of automatic appeal.[7] In the circumstances he cannot successfully object that he received what he requested.

We reject defendant's complaint as to the absence of more specific instructions as to penalty. Having assumed the burdens of counsel, he did not request such instructions, and the situation did not require the trial court to formulate and give them of its own motion.

[24, 25] *Other Claimed Errors at the Trial.* Defendant pro se complains that the trial court did not comply with the requirement of Penal Code section 1122 that it admonish the jury, at each adjournment, "that it is their duty not to converse among themselves or with anyone else on any subject connected with the trial, or to form or express any opinion thereon until the cause is finally submitted to them." No prejudicial impropriety in this regard appears. At each ordinarily taken recess the jury were admonished in the statutory language or an abbreviation thereof. The only occasion when the jury were taken from the courtroom without any admonition was when defendant, while represented by counsel, interrupted the proceedings with reiterated requests to conduct the case personally; the trial court then said, "Put the defendant in the lockup. Ladies and gentlemen of the jury, go upstairs. We have a legal point that will be argued outside the presence of the jury." Failure to give the statutory admonition is not ground for reversal where, as here, no prejudice appears. (See People v. Williams (1954), 128 Cal.App.2d 458, 464 [12], 275 P.2d 513; People v. Pearson (1940), supra, 41 Cal.App.2d 614, 620 [6], 107 P.2d 463; People v. Jordan (1937), 24 Cal.App.2d 39, 56 [17], 74 P.2d 519; People v. Leavitt (1929), 100 Cal.App. 93, 94, 279 P. 1056.) After the jury have been repeatedly admonished in the full substance of Penal Code section 1122 it is not prejudicial error to give the admonition in abbreviated form such as "Remember and abide by the admonition heretofore given," rather than repeating in full the words of the statute. (See People v. Burwell (1955), 44 Cal.2d 16, 33, 279 P. 744.) This is particularly true where no objection is made at the time the abbreviated instruction is given. And the doctrine of invited error applies to the occasion when defendant while represented by counsel personally interrupted the trial. (See People v. Gomez (1953), 41 Cal.2d 150, 162 [11], 258 P.2d 825.)

Defendant pro se complains that the trial court permitted the prosecutor to "instruct the jury." In argument the prosecuting attorney, without objection, attempted to explain and illustrate the difference between a confession and an admission and said that a confession must be shown to have been voluntary but that a coerced admission can be received in evidence. Thereafter, a juror indicated that she had not understood the prosecutor's explanation. Over defendant's objection that "the prosecutor is instructing the jury," the trial court allowed the prosecuting attorney to discuss the matter further.

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[6] Defendant said, "I am responsible for his death. * * * It is something I will be guilty of the rest of my life. It is also something I have to answer to later."

[7] Defendant argued, "I would rather have you bring back a first degree with a gas chamber because I would have a chance before a Court of Appeal to prove that tape is a fraud * * * [L]ife imprisonment * * * would never give me a right to prove * * * that tape was a fraud. * * * I do want you to take into your deepest consciousness that if you find me guilty of first degree murder, with the death penalty, you have no responsibility. You have no responsibility to this transcript [tape recording]. You have accepted it. * * * [M]y job then is to disprove it, and I will have the methods. I will have the chance * * * I will be trying to prove that Jimmy Linden * * * committed an illegal act, but he was not the person in that transcript [tape recording]."

[26, 27] A trial court in its discretion may permit counsel to state correct law and illustrate its application to the facts. (People v. Chessman (1951), 38 Cal.2d 166, 188 [29], 238 P.2d 1001.) Here we need not pass upon the correctness of the law stated by the prosecuting attorney.[8] His argument could not have prejudiced defendant because there is no evidence that any declaration of defendant, whether admission or confession, was coerced.

[28] Defendant pro se says that the prosecutor falsely argued that the tape recording includes admissions of defendant's expressed intent to kill an officer. Rather, fairly interpreted in context, the attacked portions of the argument properly urge that the recorded admissions of hatred toward police officers tend to prove the intent to kill which was more particularly evidenced by defendant's unrecorded direct admissions of such intent, and that the testimony as to the unrecorded admissions is strengthened by the recorded declarations because the same pattern of obscene language appears in both.

[29] Defendant's pro se arguments concerning the effect of asserted inconsistencies in the evidence are not properly addressed to this court, for there is nothing in the record to suggest that any evidence is inherently improbable or intentionally false. (People v. De Paula (1954), 43 Cal.2d 643, 649 [8, 9], 276 P.2d 600.) Rather, the evidence is remarkably free from any significant conflict.

[30] *The Propriety of the Proceeding which Resulted in Disallowance of Defendant's Proposed Corrections to the Reporter's Transcript.* Defendant pro se urges that the proceeding to settle the record violated the provisions of section 13 of article I of the California Constitution that "In criminal prosecutions, in any court whatever, the party accused shall have the right * * * to have the process of the court to compel the attendance of witnesses in his behalf, and to appear and defend, in person and with counsel." Furthermore, since proceedings to settle a seriously disputed record on a California appeal from a judgment of death have been characterized as "a necessary and integral part of the compulsory appeal" (Chessman v. Teets (1957), 354 U.S. 156, 162–163, 77 S.Ct. 1127, 1 L.Ed.2d 1253), defendant's suggestion that questions of Fourteenth Amendment due process are involved must be considered.

After rendition of the judgment of death defendant, as required by law (Pen.Code, §§ 1217, 3600), was taken to San Quentin Prison. The superior court clerk delivered copies of the transcript to defendant (Rules on Appeal, Rule 35(b)) by mailing them to him at the prison. Defendant at this time was representing himself.[9] He filed "proposed corrections" to the reporter's transcript. These "proposed corrections" did not clearly indicate the nature of the asserted errors in the transcript. The trial court set October 30 for hearing and ordered that defendant be brought to Los Angeles. On October 28 there was filed in the superior court defendant's request for appointment of counsel "to help and represent" him in the settlement of the transcript and for a continuance of the October 30 hearing to enable him to obtain witnesses and prepare. This request, in the circumstances of defendant's confinement, was timely. On the afternoon of October 29 the trial court appointed Mr. R. F. Bird, deputy public defender, to represent defendant. Defendant arrived in Los Angeles late on the night of October 29 and had opportunity to consult with Mr. Bird only briefly (defendant told the trial court that he "only had five minutes") on the morning of the 30th before the hearing.

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[8] The cases as to whether a coerced admission can be received in evidence are not uniform. (See Rogers v. Superior Court (1955), 46 Cal.2d 3, 10–11 [10, 13, 14], 291 P.2d 929; People v. Eggers (1947), 30 Cal.2d 676, 689 [19], 185 P.2d 1; People v. Nagle (1944), 25 Cal.2d 216 [3], 153 P.2d 344; People v. Williams (1901), 133 Cal. 165, 167, 65 P. 323; People v. Clemmons (1957), 153 Cal.App.2d 64, 71, 76, 314 P.2d 142; People v. Allen (1956), 142 Cal.App.2d 267, 268–269 [16a, 17], 298 P.2d 714; 19 Cal.Jur.2d, Evidence (1954), § 398.)

[9] The occasion for this court to follow our long established practice of appointing counsel for an indigent unrepresented defendant on an automatic appeal had not yet arisen, because in ordinary course we have no way of knowing of the pendency of such an appeal until the transcripts have been certified and transmitted to our clerk. (Rule 35(e).)

When defendant and Mr. Bird appeared for the hearing (before the judge who tried the case), Mr. Bird said that "I am satisfied with that state of the record" but that defendant wished a continuance to obtain witnesses; "I did not ascertain from him who the witnesses are; our conversation * * * wasn't altogether cordial because when I told him that the chances are pretty great that his request for witnesses would be denied, he seemed to think that he could do more good representing himself than he could by being represented with counsel, at least by the Public Defender." Defendant said, "I would need advice on procedural matters, but the actual part of this hearing I wish to carry on myself" because "I am the only person who is acquainted with the facts." Defendant refused to be represented by Mr. Bird; the public defender was relieved; and defendant's repeated requests for advisory counsel and a continuance were denied.[10]

The burden was on defendant to show that the transcript was incorrect but he contended that because he had not had opportunity to prepare he could not assume this burden. The People introduced evidence (detailed testimony, on direct and cross-examination, of the reporter who took the notes which are transcribed in the disputed portion of the record) that the transcript is correct. The precise nature of defendant's objections to the transcript, as developed by himself during the settlement proceeding, became clear.[11] Defendant affirmatively showed that the making of, or the failure to make, his proposed corrections could not, either on defendant's suggested theories or any other conceivable theory, have the slightest effect on appellate review of the judgment of conviction. The claimed errors were not prejudicial or material to any issue on appeal.

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[10] The transcript shows the following statements by Deputy Public Defender Bird, the defendant, and the court, as indicated:

"Mr. Bird: County Counsel has ruled that the Public Defender cannot be appointed to just stand by and leave some man to represent himself. We have found by bitter experience that defendants under those circumstances do things that shouldn't be done, and it reflects on the Public Defender's office.

"We feel that if we are going to have any responsibility in the case we should have full responsibility and be in control so that nothing will be done in our name which we wouldn't do, which might reflect upon our reputation if it was done.

"Mr. Linden: I realize that he has that very right, sir.

"Mr. Bird: Consequently, if the Court is going to appoint counsel to act as a sort of stand-by and give advice it should be someone other than the Public Defender.

"The Court: Take one step at a time, Mr. Linden. Do I understand that you do not desire to have the Public Defender?

"Mr. Linden: I would be very satisfied with him.

"The Court: To represent you at this hearing?

"Mr. Linden: Not to represent me, now, because the word 'represent' there —your Honor, I wish in conjunction given under Article I, Section 13 of the State Constitution, where it says I have a right to appear and defend in person and with counsel. In other words, I wish my statutory provision upheld. That's all I wish.

"Mr. Bird: I might make the statement for the benefit of the defendant that any attorney that is worth his salt isn't going to take a case unless he can control that case.

"Mr. Linden: I realize that. I had one like that. * * *

"The Court: Let's settle the question if you desire to have Mr. Bird represent you as the lawyer. * * *

"Mr. Linden: I do not wish him to represent me.

"The Court: Mr. Bird, you are relieved."

[11] The disputed portion of the transcript of the trial shows that at 11 a. m. the

The trial court stated that it did not determine the materiality of the proposed corrections but only that on the basis of the reporter's testimony it was satisfied that the transcript was in fact accurate. The court denied defendant's requests that the trial jurors be subpoenaed to testify to their recollection of the proceedings, and disallowed the proposed corrections.

[31, 32] The right to counsel includes "reasonable opportunity to prepare for trial" (In re Ochse (1951), 38 Cal.2d 230, 231 [1], 238 P.2d 561), and the refusal to allow a party to introduce any evidence may amount to denial of a hearing (Estate of Buchman (1954), 123 Cal.App.2d 546, 560–561, 267 P.2d 73, 47 A.L.R.2d 291; National Auto. Ins. Co. v. Fraties (1941), 46 Cal.App.2d 431, 115 P.2d 997). Denial of fundamental constitutional rights is not excused by want of prejudice. (People v. Sarzzawski (1945), 27 Cal.2d 7, 11, 161 P.2d 934; People v. Broad (1932), 216 Cal. 1, 8–9 [6], 12 P.2d 941.)

[33] But questions of prejudice can be considered in determining whether there was in fact a denial of a fundamental constitutional right. For example, concerning Fourteenth Amendment due process at the trial it is generally true that "A person's right to reasonable notice of a charge against him, and an opportunity to be heard in his defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel." (In re Oliver (1948), 333 U.S. 257 [68 S.Ct. 499, 507], 92 L.Ed. 682.) But specifically a state's failure to appoint counsel in a non-capital case violates the Fourteenth Amendment only when "the disadvantage from absence of counsel [is] aggravated by circumstances showing that it resulted in the prisoner [sic] actually being taken advantage of, or prejudiced" (Townsend v. Burke (1948), 334 U.S. 736, 739, 68 S.Ct. 1252, 92 L.Ed. 1690); the presence of defendant at trial "is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only" (Snyder v. Massachusetts (1934), 291 U.S. 97, 107–108, 54 S.Ct. 330, 78 L.Ed. 674); and the accused has no absolute Fourteenth Amendment right to confront and cross-examine the witnesses against him (Stein v.

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prosecutor resumed his opening argument; when he concluded it defendant's advisor said, "One of the jurors wants to speak"; the juror stated that the prosecutor "said something yesterday I didn't understand that I worried about all night"; the juror referred to the prosecutor's previously mentioned argument as to the difference between an admission and a confession; over defendant's objection that "the prosecutor is instructing the jury" and "I want a running objection to this line," the prosecutor was allowed to again discuss this difference; noon recess was then taken.

Defendant's position as developed by him at the settlement proceeding was that the above summarized portion of the transcript is incorrect in the following respects: Defendant's advisor did not say, "One of the jurors wants to speak," and the juror herself said that she "cried" rather than "worried" all night. (No possible relevance of these asserted inaccuracies to any contention which has been, or could be, made on appeal is shown.) Defendant further claimed that the discussion concerning the juror's question occurred beginning at 11 a. m., before the prosecutor's presentation of the last of his opening argument, rather than after he concluded such argument, and that if the transcript so showed then defendant's "running objection to this line [of discussion by the prosecutor of the difference between a confession and an admission]" would have been an objection not only to "this line" but also to everything that occurred from 11 a. m. until the noon recess. (Since defendant's "running objection" was specifically directed to "this line" it could only go to such "line," no matter when it was made.)

New York (1953), 346 U.S. 156, 195–196, 73 S.Ct. 1077, 97 L.Ed. 1522).

[34] Furthermore, neither California law nor our understanding of federal due process contemplates that the elements of a fair hearing on objections to a transcript are precisely the same as those of a trial. We conclude that where, as here, defendant personally appears at the transcript hearing and affirmatively shows that his proposed corrections are immaterial to disposition of the appeal, the refusal to allow him opportunity to prepare and present evidence as to those inconsequential corrections, if error at all, is no more than error of procedure which does not result in a miscarriage of justice and therefore does not require reversal. (Cal.Const., art. VI, § 4½.)

Proceedings on Appeal. This court appointed Mr. Frank Heller, the attorney whom defendant sought to have substituted as trial counsel, to represent him on appeal. Mr. Lester M. Fleischner is associated with Mr. Heller. After the appeal had been briefed by counsel and, with permission, by defendant in propria persona, defendant pro se filed an application to remove his attorneys and to appear personally and with some other court-appointed attorney, together with a "demand" that counsel withdraw and that pending withdrawal they obtain augmentation of the record. The "demand" includes baseless charges that defendant's appeal counsel were "planted" by the district attorney and "double-crossed" defendant.

We informed defendant that we would not permit him to appear personally for oral argument; that Mr. Heller would argue unless defendant advised us that he did not wish Mr. Heller to do so; that we would not appoint another attorney but would allow defendant to employ one and, if he did so, Mr. Heller would step out of the case; and that defendant or any attorney employed by him could file supplemental briefs or statements.

Thereafter defendant pro se filed an application for augmentation of the record, a supplemental brief, and an application for removal of his attorneys. The latter application states that "it would be misrepresentation if they [defendant's appeal counsel] are allowed to make oral argument." Since defendant had not employed other counsel, we denied the application for removal of his appointed counsel. Mr. Fleischner argued and counsel filed a supplemental memorandum on defendant's behalf. We commend counsel for their faithful and diligent representation of defendant in the face of his unwarranted attacks.

[35, 36] Defendant's pro se requests for augmentation of the record have been disposed of as follows: (1) He asked that the reporter's transcript be augmented to include oral proceedings of July 25, 1957, when he moved for a new trial. (The clerk's transcript shows that on that date the motion was merely made, not argued or determined. The subsequent hearing on the motion is fully transcribed.) Defendant asserts that on July 25 he stated that his motion was "on constitutional grounds" and that the omission of this statement from the record will indicate to a federal court that he did not properly raise his constitutional contentions in the trial court. We deemed augmentation in this regard unnecessary. Our review of defendant's constitutional contentions has not been affected by the absence of a statement that they were asserted as grounds for new trial. And since our opinion shows that we consider the constitutional questions to have been raised, defendant's record is protected should he wish to present the questions to a federal court. (See Whitfield v. Ohio (1936), 297 U.S. 431, 436, 56 S.Ct. 532, 80 L.Ed. 778.) (2) The request for augmentation of the record by a transcript of People's Exhibit 19 was granted. (3) Defendant's request that the record be augmented to include tape recordings which were not offered in evidence could not be granted, for those tapes are not a part of the record in the trial court. (Howard v. Howard (1953), 119 Cal.App.2d 122, 123 [1], 259 P.2d 41.)

Neither prejudicial error nor miscarriage of justice is shown.

For the reasons above stated the judgment and order appealed from are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE and McCOMB, JJ., concur.

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52 Cal.2d 36

PEOPLE of the State of California, Respondent,

v.

Stephen A. NASH, Appellant.

Cr. 6133.

Supreme Court of California,
In Bank.
April 24, 1959.

Defendant was convicted of first degree murder, assault with a deadly weapon and assault by means of force likely to produce great bodily injury, and from a judgment of the Superior Court, Los Angeles County, H. Burton Noble, J., an automatic appeal was taken. The Supreme Court, Schauer, J., held that where alienists appointed by the court to investigate the sanity of defendant directed their investigation and testimony to the question whether defendant met the tests of accountability established by existing California law, and the evidence established that he met such test and the instructions were adequately comprehensive to inform the jury of that law to require their compliance with it, no reversible error was shown.

Judgment affirmed.

1. Criminal Law 🔑48

The "M'Naughton Rule" is that if at the time the accused committed the act he was laboring under such a defect of reason from disease of the mind as not to know the nature and quality of his act, or if he did know it, that he did not know that he was doing what was wrong, accused is incapable of committing crime.

See publication Words and Phrases, for other judicial constructions and definitions of "M'Naughton Rule".

2. Criminal Law 🔑48

With respect to the defense of insanity, the terms "sound mind" and "legal sanity" are not synonymous.

See publication Words and Phrases, for other judicial constructions and definitions of "Legal Sanity" and "Sound Mind".

3. Criminal Law 🔑50

California has never accepted the irresistible impulse test with respect to the defense of insanity.

4. Criminal Law 🔑893

A verdict on a plea of not guilty by reason of insanity is not merely an acceptance or rejection of a medical diagnosis or a decision that punishing the accused would or would not be therapeutic to him, nor is it a determination that society would be better protected by the execution of accused or his confinement under the Penal Code or by a confinement in an institution set up under the Welfare and Institutions Code. West's Ann.Pen.Code, §§ 26, subds. 1–8, 1026, 1026a, 1191, 1201, 1367, 1368, 1370, 1372, 1449, 3701, 3703, 3704; West's Ann. Welfare & Inst.Code, §§ 5000–5189, 5050, 5500–5521, 5600–5607.

5. Criminal Law 🔑1162

In murder prosecution, where alienists appointed by the court to investigate the sanity of defendant directed their investigation and testimony to the question whether the defendant met the tests of accountability established by existing California law under the M'Naughton Rule, by which the insanity which renders a person incapable of crime is measured, and the evidence established that he met such test, and the instructions were adequately comprehensive to inform the jury of that law and to require their compliance with it, no reversible error was shown. West's Ann.Pen.Code, § 1027.

6. Constitutional Law ⟹70(1)

If the M'Naughton Rule, by which California measures insanity which renders a person incapable of crime, is to be changed, the change should be made by the Legislature and not by the court.

◆

Richard S. Buckley, Deputy Public Defender, Los Angeles, and George T. Davis, San Francisco, for appellant.

Maxwell E. Greenberg, Los Angeles, as amicus curiae on behalf of appellant.

Stanley Mosk and Edmund G. Brown, Attys. Gen., and Norman H. Sokolow, Deputy Atty. Gen., for respondent.

SCHAUER, Justice.

[1] A jury found defendant guilty of first degree murder of Lawrence Rice (count 1), first degree murder of John Berg (count 2), assault with a deadly weapon upon Dennis Butler (count 3), and assault by means of force likely to produce great bodily injury upon Dennis Butler (count 4). They fixed the penalty on each murder count at death and found that defendant was sane at the time of every offense. On this appeal from the ensuing judgment and an order denying a new trial, defendant attacks the M'Naughton rule by which California measures the insanity which renders a person incapable of crime[1] and urges this court "to re-examine the existing test in California for determining criminal responsibility and to up-date its thinking and rulings on said subject." We are not convinced that it is necessary or proper for us to undertake this task.

At the trial on the pleas of not guilty defendant introduced no evidence. The prosecution evidence, which includes extrajudicial declarations of defendant, is as follows:

Defendant, 33 years old and of no particular occupation or fixed abode, met Butler (victim of counts 3 and 4, the felonious assaults) for the first time on Los Angeles' "skid row" on November 16, 1957. At defendant's suggestion they visited bars and drank beer, for which defendant paid. According to Butler, in one of the bars defendant handed Butler $5 as a loan offered by defendant when he learned that Butler was without funds; according to defendant, he produced the $5 when Butler agreed to defendant's request that they indulge in a homosexual relationship. They walked to defendant's hotel room and there drank whiskey. According to Butler, he then for the first time realized that defendant was interested in a homosexual relationship; according to defendant, Butler refused to perform his agreement. Butler ran from the room. Defendant chased him for two or three blocks and demanded and received the $5. When Butler refused to return to the hotel room defendant stabbed him once in the abdomen with a hunting knife. Defendant assisted Butler to the lobby of defendant's hotel. Butler testified that "It was just getting dark" and, in explanation of his failure to call for help when he was attacked on the street, that it "seems there was nobody around or nobody that would have done any good at all until I got in the lobby." There Butler shouted for help. While the hotel clerk was calling the police defendant knocked Butler to the floor and kicked him twice, breaking his collarbone. Defendant fled from the hotel and did not return.

Much of the hereinafter recounted detail as to defendant's conduct is taken from recordings of his extrajudicial statements.

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[1] Queen v. M'Naughton (1843), 4 St.Tr. (N.S.) 847, 931, M'Naughton's Case (1843), 10 Clark & Fin. 200, 210, 8 Eng. Rep. 718, 722, and this court (e. g., People v. Gorshen (1959), 51 Cal.2d 716, 336 P.2d 492) state the basic rule as follows: that at the time the accused committed the act he was laboring under such a defect of reason, from disease of the mind, as not to know the nature and quality of his act or, if he did know it, that he did not know that he was doing what was wrong.

For ten days after the assaults on Butler, defendant wandered about Los Angeles and nearby cities. On November 26, 1956, on a street in Long Beach, defendant for the first time met John Berg (victim of count 2, murder). Defendant was annoyed by Berg's homosexual approach, but went with Berg to his apartment in order to obtain a place to sleep. During the night Berg "kept pestering" defendant with homosexual attentions. In the morning defendant was awakened by Berg "still fooling around" and stabbed him once in the abdomen and six times in the throat with a knife which defendant described as "Hunting knife. Ninety-eight cents. Favorite knife. Very cheap and very good. * * * I've gone through about three of them knives." Defendant washed, searched the apartment for money without success, dressed in a suit of Berg, and departed.

Defendant went to San Diego, then returned to the Los Angeles area. On November 29, 1956, defendant saw ten-year-old Lawrence Rice (victim of count 1, murder) playing on the Ocean Park beach. Defendant bought the boy soft drinks and hamburgers and walked with him along the beach and under the Santa Monica pier. There defendant stabbed the boy several times in the abdomen and about 18 times in the back. Some of the wounds were inflicted before and some after defendant pulled down the child's trousers and underclothes and pulled up his shirt. Defendant slashed the boy's left buttock and departed. He took a bus to Los Angeles and returned to "skid row." There, on the afternoon of November 29, 1956, he came to the attention of the police because he happened to be present when they made an arrest unconnected with defendant. When defendant so came to their attention, the officers detained him, checked their records, and found that there was a warrant for his arrest for the Butler assaults.

On the trial of the general issue three court-appointed physicians who were experienced in psychiatry and who had examined defendant (Dr. Marcus Crahan, Dr. Karl Von Hagen, Dr. Robert Wyers) testified to opinions as follows: Defendant's intent when he fatally stabbed Berg and the Rice boy was to obtain sexual sadistic gratification, to torture, and to kill. The intent to torture and kill was deliberately formed and premeditated before defendant inflicted any wound. Before he met Berg or Rice defendant had planned that when he found a suitable victim under circumstances in which he believed he could escape detection he would kill.

At the trial on the sanity issue defendant, the three previously mentioned court-appointed physicians, and Dr. Frederick Hacker, another court-appointed psychiatrist who had examined defendant, were called by the defense and testified to their opinions that defendant was legally sane. Dr. Douglas M. Kelley, a psychiatrist who became interested in defendant and was afforded opportunity to talk with him without defendant's knowing that Kelley was a physician and psychiatrist, testified for the People to the same opinion. The doctors explained that they used the M'Naughton test. Defendant explained that he knew, and "Any seven year old child knows," that "according to your laws" defendant's homicides were wrong and subject to the death penalty, but that in defendant's opinion his slayings were not wrong "because I am perfectly justified in every carcass I got. * * * I figured that all out. * * * If you want some carcasses you have to pay with your own. That is quite all right as long as you get enough of them." Asked by the prosecutor whether it was "a fair statement" that "You can't and will not conform" to the laws and the rules of society, defendant replied, "That is correct! Exactly it! I don't have to, with a knife in my hand."

Defendant, according to his testimony and repeated extrajudicial admissions, had committed eleven homicides including the two for which he was on trial. Five of these he described and police investigation confirmed their commission; others could not be confirmed, for defendant refused to disclose the identity of the victims and the place of the killings because no one would pay him for the information. Defendant, although voluble, also refused to answer some inquiries as to his reactions because, as he testified, they were "money questions." Throughout defendant's testimony and extrajudicial declarations runs the theme that law-enforcement officials, psychiatrists, representatives of media of public conmmunication, and even the trial judge and jury should pay defendant for disclosing his actions, thoughts, and feelings. Defendant gave elaborate pseudo-scientific explanations of the reasons for his killings and his asserted belief that they were justified.[2]

[2] The following account is taken from defendant's interviews with psychiatrists and his testimony. The quoted language is chiefly that of defendant.

Defendant did not remember his natural parents and believed that he was illegitimate. He was circumcised and believes that "society" had no right to interfere with his body in this fashion. His foster-father was weak. Defendant was subjected to strict discipline and unprovoked cruelty by his foster-mother and in parochial schools. He became convinced that Christians are hypocrites and that there is a "price tag" on charity. Also his foster-parents and the parochial schools left him sexually ignorant and inhibited.

By the time defendant entered public high school he was "an emotional wreck." "It was a mental impossibility" for him to make "adjustments that a child must make, to be ready for that kind of freedom." As a child, defendant testified, he recognized his inability to "face reality," but "Ever since I got a knife, I make my reality. I can face it very easily." Defendant left high school after less than a year. He served for more than a year in the Civilian Conservation Corps, which "seemed to be the ideal setup for me" because there was "just enough discipline and just enough laxity." Then, during more than a year of private employment in various jobs and states, defendant "made a fairly good adjustment, other than, let's say, sex."

Immediately after the Pearl Harbor attack defendant enlisted in the Army. For a year "I made a good soldier" (but "I wouldn't be a good one overseas" because "I didn't have nothing to die for. I hadn't done any living yet"). Then "this instability really showed itself" and, after twice being A.W.O.L., defendant, to avoid the punishment of imprisonment, announced that he was homosexual and was discharged. Defendant considers this admission of homosexuality "one of the greatest mistakes in my life."

Defendant spent the next few years drifting from one odd job to another. He committed a series of "strong-arm robberies" for which he was never apprehended, although he was jailed several times for "suspicion of robbery" and for minor offenses. In 1945 he was confined for psychiatric examination for five days in Los Angeles County General Hospital, "railroaded" to a Veterans Hospital for 28 days, and released as mentally sound.

In 1948 defendant was convicted of "grand theft from the person" and sent to San Quentin Prison. He is bitterly resentful because he was imprisoned for a longer time than is usual for a first offender. He was paroled in 1953 and after six months he had an argument with his parole officer and was returned to San Quentin as "unadaptable to outside conditions." He was again released in 1955.

While defendant was in San Quentin he determined to revenge himself upon society by murdering. He first thought of derailing a train, then decided that this would not be sufficiently personal ("When you get a train you get a bunch of old fogeys who have nothing to live for anyway"); that he would prefer to "know his customers"; that he would give "top priority" to sailors (because they had much sexual freedom and because they "rolled queers"); then, to children (because they had more to anticipate than adults and because their deaths would cause their parents suffering and destroy their hopes and ambitions for the children's future); and, "if I got tired of the first two, * * * girls, anywheres from fifteen, eighteen, twenty, something like that, years of age."

When defendant was released from San Quentin in 1955 he tried unsuccessfully to enlist in the Merchant Marine. He then went from place to place, sometimes worked at odd jobs, and committed homicides pursuant to his plans to revenge himself on society. The victims of the killings which defendant described were civilian homosexual "pick-ups" and the Rice child. Defendant was particularly pleased when his victims "had something to live for."

Defendant's first killing was in December, 1955. A few days thereafter he was arrested for assault upon another homosexual "pick-up," convicted of a misdemeanor, and served six months. At this time he was examined by two psychiatrists who determined that he was not a sexual psychopath. After his arrest on the present charges defendant, in talking with Dr. Kelley, described these examinations and explained "how you go about fooling some psychiatrists."

The instruction[3] on the issue of insanity are based upon the M'Naughton rule. Defendant did not request instructions presenting any other rule, but from the proceedings during the taking of testimony and from the hereinafter described state of

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The climax of defendant's thinking about Christian hyprocrisy, money, and the importance of his information was his proposal, fantasy, or wish that shortly before his execution some high official, in a televised ceremony, would pay him a large sum in return for the disclosures which he had withheld; with this sum defendant proposed, in order to have the satisfaction of mocking Christianity, to purchase a Catholic funeral and burial because "it is against the Catholic Church laws to bury a person in a Catholic graveyard dying under such circumstances," but "For enough money, they will do anything."

[3] The pertinent instructions (with their relation to California Jury Instructions Criminal (1958) indicated in our bracketed inserts) are as follows:

"[From CALJIC 801.] Insanity, as the word is used in these instructions, means such a diseased and deranged condition of the mental faculties of a person as to render him incapable of knowing the nature and quality of his act and of distinguishing between right and wrong in relation to the act with which he is charged.

"The test of accountability is this: Did the party have sufficient mental capacity to appreciate the character and quality of the act? Did he know and understand that it was a violation of the rights of another, and in itself wrong? If he had the capacity thus to appreciate the character and to comprehend the probable or possible consequences of his act, he was sane under the law, and is responsible to the law for the act thus committed.

"[Formulated by the People.] An offender cannot set up his own standard. The test of accountability, defined in the previous paragraph, when applied by you to the evidence in this case during your deliberations, contemplates the standard of a law abiding society. * *

"[CALJIC 802.] Whenever partial insanity or insane delusion or hallucination is relied upon as a defense to crime, the evidence, to make that defense good, must show that the crime charged was the product or offspring of such insanity, insane delusion, or hallucination, and not the result of some sane reasoning and natural motive.

"Although a person may be laboring under partial insanity or suffers from some insane delusion or hallucination, still if he understands the nature and character of his action and its consequences, and if he knows that it is wrong, such partial insanity or delusion or hallucination will not relieve him from responsibility for the act if it otherwise is criminal.

"[Formulated by the People.] Temporary insanity as a defense to crime is as fully recognized by law as is insanity of long duration. The test is as I previously have stated, and applies to the time when the act charged was committed. If at that time the defendant was insane, he must be found not guilty of the crime charged, even if he was sane at earlier and later times or at any earlier or later period.

"[CALJIC 804.] Where a person charged with crime interposes the defense of insanity, and the proof shows that he was afflicted with a form of insanity wherein at times he was insane and irresponsible and, at other times that we call lucid intervals, he was able to distinguish between right and wrong and to know the nature and quality of his acts, the law, if and after finding that he committed the act, presumes that it was committed during one of the defendant's lucid intervals. That presumption may be rebutted but is controlling until overcome by a preponderance of evidence showing that the defendant was insane at the time when the offense charged was committed. * * *

"[CALJIC 805.] Moral insanity, as an independent state, is not recognized by law as a defense to crime, and does not constitute such insanity as is a legal defense. Moral insanity, in itself, is not a bar to responsibility for criminal acts; hence, howsoever perverted, if at all, the feelings, conscience, affections and sentiments of a person may be, unless the intellectual faculties and reasoning powers are so affected by mental disease as to render him incapable of distinguishing between right and wrong in relation to the act with which he is charged, he is responsible to the law for his criminal acts.

"[CALJIC 806.] The law does not recognize the plea of irresistible impulse as a defense to crime. If a person is conscious of, knows and appreciates the nature and wrongfulness of his act, then he does the act at his peril, and the plea of irresistible impulse will not avail him."

the California law it is obvious that any such request would have been useless and we do not at all base our decision upon defendant's failure to request different or additional instructions. A history of M'Naughton in this state is as follows:

[2] The basic M'Naughton rule (stated ante, footnote 1) was approved in People v. Coffman (1864), 24 Cal. 230, 235. In 1872 when the Legislature enacted the Penal Code (including the provision of section 21 that "All persons are of sound mind who are neither idiots nor lunatics, nor affected with insanity" and the provision of section 26 that "All persons are capable of committing crimes, except * * * 3. Lunatics and insane persons") it presumably had the Coffman decision in mind and intended to leave its definition of insanity in effect (see Cole v. Rush (1955), 45 Cal.2d 345, 355 [8–9], 289 P.2d 450, 54 A.L.R.2d 1137). Also the Political Code, to be construed as passed at the same moment and part of the same statute as the Penal Code (Pol.Code, § 4480), provided (§ 4468) that "The common law of England, so far as it is not repugnant to or inconsistent with the Constitution of the United States, or the Constitution or laws of this State, is the rule of decision in all the courts of this State." And the code commissioners cited the Coffman case in their note to subdivision 3 (supra) of Penal Code section 26 (hereinafter quoted in full) and, quoting from that case in their note to section 1016 of the Penal Code (under which the issue of insanity was formerly raised by the plea of not guilty; as hereinafter stated, our code has since been amended to provide for specific plea of, and separate trial of the issue of, not guilty by reason of insanity), stated that "The unsoundness of mind, or insanity,[4] that will constitute a defense in criminal actions is *well described* by Tindal, C. J.," in M'Naughton. (Italics of the code commissioners.)

Promptly after the adoption of the Penal Code, there was judicial reiteration of the basic M'Naughton rule (People v. M'Donnell (1873), 47 Cal. 134, 135, 136–137) and rejection of the irresistible impulse test (People v. Hoin (1882), 62 Cal. 120, 123). And in People v. Kerrigan (1887), 73 Cal. 222, 224–225, 14 P. 849, 851, the court recognized that authorities cited by the appealing defendant "support his contention that 'moral insanity is now as well understood by medico-jurists, and almost as well established by judicial recognition, as the intellectual form,'" but adhered "with confidence" to the M'Naughton rule and approved an instruction that "In our courts of law there is no such doctrine established or recognized as moral insanity, distinguished from mental derangement, as an excuse for crime."

People v. Hubert (1897), 119 Cal. 216, 221, 51 P. 329, adapted from M'Naughton (p. 932 of 4 St.Tr. (N.S.), p. 723 of 10 Clark & Fin., p. 211 of Eng.Rep.) the following test: "If the defendant had certain special delusions which completely possessed him, but was perfectly sane on all other subjects, * * * then he must be judged as though the facts with respect to which the delusions exist were real."

[3] Rejecting the irresistible impulse test, the Hubert case held (at page 223 of 119 Cal., at page 331 of 51 P.), "conceding that the act was the offspring of an irresistible impulse, and the impulse was irresistible because of mental disease, still the defendant must be held responsible if he at the time had the requisite knowledge as to the nature and quality of the act, and of its wrongfulness." This holding was said to be supported on two policy grounds: difficulty of proof ("We do not know that the impulse was irresistible, but only that it was not resisted"), and the expectation that fear of punishment will restrain persons whose power of self-control is impaired by mental disease ("when the will

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[4] Because of the narrow definition of the insanity which renders a defendant incapable of crime, we have since recognized that "'Sound mind' and 'legal sanity' are not synonymous." (People v. Baker (1954), 42 Cal.2d 550, 568, 268 P.2d 705.)

power is weakened, although the mentality is not at all or only slightly impaired, the fear of punishment must be of some value as a restraint, and the class of people referred to need that restraining influence"). The court (at page 224 of 119 Cal., at page 331 of 51 P.) recognized that "There are doubtless some cases * * * in which the fear of punishment does not restrain, but where the rule works manifest injustice the unfortunate defendant is in some way saved from punishment."[5]

Apparently concerning the question whether the legal formulation as to insanity which renders a defendant incapable of crime should include some express requirement of causal connection between the insanity and the criminal act,[6] the court in People v. Hubert (1897), supra, 119 Cal. 216, 223, 51 P. 329, had this to say:

> "It has been proposed as a rule to leave it to the jury to say whether the act was the offspring of insanity, meaning, I presume, whether the defendant would have committed the act had he not been insane.
>
> "There are many degrees of mental unsoundness. Some cases could only be detected by a very skilled expert. Some cases of mental unsoundness might be known only to very intimate acquaintances, and perhaps by them only noticeable under peculiar conditions. But, however slight the defect, only Omniscience can say whether the act would have been committed had the taint not existed. It is an impracticable rule."

The M'Naughton rule continued to be accepted in California, over arguments that it was unscientific (e. g., People v. Sloper (1926), 198 Cal. 238, 245–246 [1–3]), 244 P. 362, at the time the Legislature in 1927 (Pen.Code, §§ 1016, 1017, 1020, 1026; Stats.1927, ch. 677) provided for the specific plea and separate trial of the issue of not guilty by reason of insanity. The 1927 legislation upon its face effected only procedural changes (People v. Hickman (1928), 204 Cal. 470, 474–480 [1–10], 268 P. 909, 270 P. 1117; People v. Davis (1928), 94 Cal.App. 192, 194–197 [1], 270 P. 715; People v. Troche (1928), 206 Cal. 35, 42–45 [1–5], 48–49 [11–12], 273 P. 767; People v. Leong Fook (1928), 206 Cal. 64, 70 [1], 74–76 [4–5], 273 P. 779) but it is apparent that the Legislature had in mind the substantive law as to insanity because the reason for making the procedural changes was "to overcome some of the abuses which have crept into the administration of justice by reason of the frequent interposition of the defense of insanity in criminal prosecutions." (People v. Hickman (1928), supra, 204 Cal. 470, 477, 268 P. 909, 270 P. 1117; see Shepherd, *Not Guilty by Reason of Insanity* (1928), 2 So.Cal.L.Rev. 54; Shepherd, *The Plea of*

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[5] Naturally, since California has never accepted the irresistible impulse test, it has never had occasion to concern itself with the familiar complaint (see Durham v. United States (1954), 94 U.S.App.D.C. 228, 214 F.2d 862, 873–874, 45 A.L.R. 2d 1430) that the test misleadingly appears to be limited to a sudden inclination to commit an unlawful act, whereas many mental illnesses are characterized by brooding and reflection concerning, and sometimes by long, unsuccessful struggles against, commission of the unlawful act.

[6] State v. Pike (1869), 49 N.H. 399; State v. Jones (1871), 50 N.H. 369; and Durham v. United States (1954), supra, 214 F.2d 862, take the view (as stated in Durham, at pages 874–875 [9] of 214 F.2d) that "an accused is not criminally responsible if his unlawful act was the *product* of mental disease or mental defect" (italics added). Durham says that the jury should be told that, to find the defendant not guilty by reason of insanity, they must find not only that he was suffering from mental disease or defect but also that there was a casual connection between such mental abnormality and the unlawful act (at page 875 [12] of 214 F.2d).

The American Law Institute Model Penal Code (Tent. Draft No. 4, 1955), § 4.01, Comment 5, p. 159, rejects the Durham formulation because of the "ambiguity of 'product'"; i. e., a "but for" test of causality could rarely be answered affirmatively, and the Durham formulation does not make clear whether it intends causality which involves "total incapacity" or causality which involves "substantial incapacity."

Insanity (1929), 3 So.Cal.L.Rev. 1.) Again in 1927, as in 1872, the Legislature presumably knew of the existing domestic decisional law as to the substantive definition of the insanity which constitutes a defense to a charge of crime, and intended not to change it. (Cole v. Rush (1955), supra, 45 Cal.2d 345, 355 [8–9], 289 P. 450, 54 A.L.R.2d 1137.) Rather, its use of the judicially construed word insanity in legislation on that subject indicated its intent that the definition should be continued (Perry v. Jordan (1949), 34 Cal. 2d 87, 93 [5], 207 P.2d 47) and the court promptly recognized that intent by reiterating, in one of the most important cases which upheld the validity of the 1927 legislation, the M'Naughton view with its assumption that reason can operate in a separate compartment of the mind, unaffected by mental disorder such as "partial insanity" or "moral insanity" or "insane delusion or hallucination" or "irrestible impulse," to appraise right and wrong and choose the right, and then reach out of its compartment and prevent wrong conduct which the insane portions of the mind would initiate. (See People v. Troche (1928), supra, at page 46 [7] of 206 Cal., 273 P. 767.) Indeed, the court in People v. Leong Fook (1928), supra, 206 Cal. 64, 72 [3], 273 P. 779, undertook to erect still another wall in the compartmental concept of insanity when it said, in explanation of the legislative provision for a separate trial on the issue of insanity, that "proofs of insanity * * *, in the nature of things, and as a rule, are separable from the facts and circumstances attending the commission of the homicide." (The questionableness of this view is fully presented in the dissents of Justice Preston in the Troche (at page 51 of 206 Cal. at page 774 of 273 P.) and Leong Fook (at page 78 of 206 Cal. at page 785 of 273 P.) cases; we cannot agree with those dissents, however, that the provision for separate trial of the insanity issue is so unreasonable as to make the legislation invalid.)

The issue which the Legislature, by the 1927 enactment, took out of the trial on the general issue was a narrow one—insanity as defined by the M'Naughton rule, not all questions of mental disease or disorder. This was recognized in People v. Selph (1930), 106 Cal.App. 704, 707, 289 P. 918, explained in People v. Wells (1949), 33 Cal.2d 330, 346–357, 202 P.2d 53 (see also the dissenting opinions in Wells), and has since been further developed in such cases as People v. Baker (1954), supra, 42 Cal.2d 550, 268 P.2d 705, and People v. Gorshen (1959), supra, 51 Cal.2d 716, 336 P.2d 492. During the same period that this court was developing the concepts of Wells, Baker, and Gorshen, we had occasion to say (in People v. Daugherty (1953), 40 Cal.2d 876, 894, 256 P.2d 911) that M'Naughton "has been followed consistently [citation] despite voluminous critical writings on the subject. It is the generally accepted rule. [Citations.] Defendant has not offered a more workable test and if it is to be changed his argument should be addressed to the Legislature. Indeed, such attempts have been made without avail." And in People v. Berry (1955), 44 Cal.2d 426, 433 [8], 282 P.2d 861, we unanimously repeated that arguments for change in the test should be made to the Legislature rather than the courts.

Since 1953 (when we decided Daugherty) and 1955 (when we decided Berry) the criticisms of M'Naughton and the reasons for our conclusion that applications for alteration of the rule should be addressed to the Legislature have not significantly changed. A proposal of defense counsel points up reason for our previous and continued reluctance to assume the expertise which would be required to formulate new standards or (as in the formulae proposed on behalf of defendant [7]) to leave the question whether the particular defendant suffers from a "mental disease or defect" which would require a finding of not guilty by reason of insanity to be explained by evidence of experts in medicine and psychology and decided by the jury without any legal test. Defense counsel asked that we appoint not less than three forensic psychiatrists to consult with and advise them and counsel for the People in preparation for oral argument and to appear before this court as its friends and give testimony to aid in a reexamination of M'Naughton and resolution of the "mixed questions of law and fact" which counsel say are presented on this appeal. The advancement of this proposal indicates that the reexamination should be by the Legislature, which is equipped for fact-finding, rather than by this court, which is traditionally disinclined and functionally not equipped to perform the fact-finding operation.

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[7] Defense counsel propose a New Hampshire and Durham-like rule; i. e., defendant is not criminally responsible if his unlawful act was the product of mental disease or defect.

Amicus curiae proposes the following formula:

[4–6] A verdict on a plea of not guilty by reason of insanity is not merely an acceptance or rejection of a medical diagnosis, or a decision that punishing the accused would or would not be therepeutic for him. Nor is it purely a determination that society would be better protected, on the one hand, by execution of the accused or his confinement in an institution set up under the Penal Code, or, on the other hand, by his confinement in an institution set up under the Welfare and Institutions Code. By their decision on the insanity plea the jury are to some extent expressing ancient convictions that society can properly punish the man who offends it because the punishment is a sort of justified collective purge or vengeance; a purge to rid society of the offender and thereby to protect it, and vengeance to show retribution on the transgressor, thereby to deter others and thus to protect society. These strong persuasions of society may seem to some rather strikingly related to the rationalizations of defendant Nash, but such long established convictions cannot be adjudicated out of existence and we think that legal formulae designed to deal with them should come from the broad base of the Legislature, which is presumably more closely in touch with and sensitive to the views of the citizenry on this controversial subject than are the courts. There is danger in judicial changes of long-established rules of law when such changes proceed from a court's assumption that it can recognize what has become a fact of a social science.

The law as it is now understood and applied in California recognizes that all men are not endowed with equal intellectual capacity or similar moral convictions, but it requires, for the protection of society, that all conform to certain minimal standards of social interaction. The general structure of criminal responsibility for an individual's acts is said to be based on the "posit that each normal person intends to do that act which he does do and that such intention is based upon the exercise of free will." (Bernard L. Diamond, M. D., With Malice Aforethought (1957), 2 Archives of

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"(1) A person is not responsible for criminal conduct if at the time of such conduct as a result of mental disease or defect he lacks substantial capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.

"(2) The terms 'mental disease or defect' do not include an abnormality manifested only by repeated criminal or otherwise anti-social conduct.

"(3) 'Substantial capacity' shall be deemed to be lacking if an expression or manifestation of mental disease or defect is a substantially influencing factor in the commission of the unlawful act."

The first two paragraphs of the amicus curiae formula are proposed by the American Law Institute Model Penal Code (Tent. Draft No. 4, 1955), § 4.01, p. 27. The third paragraph introduces a suggestion of the element of causal connection between mental disease or defect and unlawful act. The Institute, as indicated ante, footnote 6, rejected Durham because of the problems of stating the "mode of causality." Instead the Institute recommends a formulation (in this respect like M'Naughton) under which, for acquittal on the ground of not guilty by reason of insanity, the trier of fact is told to find temporal coincidence of mental disease (resulting in a described incapacity) and unlawful act.

Criminal Psychodynamics, No. 1, quoted in People v. Gorshen (1959), supra, 51 Cal.2d 716, 336 P.2d 492, footnote 4.) Although the law requires compliance with its standards by all persons it does not impose criminal sanctions on all persons. Penal Code section 26 provides:

"All persons are capable of committing crimes except those belonging to the following classes:

"One. Children under the age of fourteen, in the absence of clear proof that at the time of committing the act charged against them, they knew its wrongfulness.

"Two. Idiots.

"Three. Lunatics and insane persons.

"Four. Persons who committed the act or made the omission charged under an ignorance or mistake of fact, which disproves any criminal intent.

"Five. Persons who committed the act charged without being conscious thereof.

"Six. Persons who committed the act or made the omission charged through misfortune or by accident, when it appears that there was no evil design, intention, or culpable negligence.

"Seven. Married women (except for felonies) acting under the threats, command, or coercion of their husbands.

"Eight. Persons (unless the crime be punishable with death) who committed the act or made the omission charged under threats or menaces sufficient to show that they had reasonable cause to and did believe their lives would be endangered if they refused."

The law also specifies (Pen.Code, § 1367) that "A person cannot be tried, adjudged to punishment, or punished for a public offense, while he is insane." [8]

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[8] Other pertinent Penal Code provisions concerning the insane defendant in a criminal case are the following:

Generally concerning insanity while the action is pending and prior to judgment:

Pen.Code, § 1368: "If at any time during the pendency of an action and prior to judgment a doubt arises as to the sanity of the defendant, the court must order the question as to his sanity to be determined by a trial * * * and * * * all proceedings in the criminal prosecution shall be suspended until the question of the sanity of the defendant has been determined * * *."

Pen.Code, § 1370: "If the jury finds the defendant sane, the trial must proceed, or judgment be pronounced, as the case may be. If the jury finds the defendant insane, the trial or judgment must be suspended until he becomes sane, and the court must order that he be in the meantime committed * * * to a state hospital for the care and treatment of the insane * * *."

Pen.Code, § 1372: "If the defendant is received into the state hospital he must be detained there until he becomes sane. When he becomes sane, the superintendent must certify that fact" and defendant must be returned to the court for criminal trial or judgment."

Specifically concerning insanity when the court sets the time for pronouncing judgment or thereafter until defendant appears for judgment:

Pen.Code, § 1191: "When the superior court appoints a time for pronouncing judgment of conviction, "If in the opinion of the court there is a reasonable ground of believing a defendant insane, the court may extend the time for pronouncing sentence until the question of insanity has been heard and determined, as provided in this code." (Pen.Code, § 1449, concerns the procedure when this problem arises in an inferior court.)

Specifically concerning insanity when a convicted defendant appears for pronouncement of judgment:

Pen.Code, § 1201: "He may show, for cause against the judgment: 1. That he is insane; and if, in the opinion of the court, there is reasonable ground for believing him insane, the question of insanity must be tried * * *. If, upon the trial of that question, the jury finds that he is sane, judgment must be pronounced, but if they find him insane, he must be committed to the state hospital for the care and treatment of the insane, until he becomes sane; and when notice is given of that fact * * * he must be brought before the court for judgment."

Concerning insanity after delivery of the convicted defendant to the warden for execution of the death sentence:

Pen.Code, § 3701: "If, after his delivery to the warden for execution, there is good reason to believe that a defendant, under judgment of death, has become insane, the warden must call such fact to the attention of the district attorney of the county in which the prison is situated, whose duty it is to im-

From the foregoing discussion and the quoted statutory law it would appear to follow that, excepting only in cases where the death penalty may be imposed, it is

mediately file in the superior court * * a petition * * * asking that the question of his sanity be inquired into. Thereupon the court must at once cause to be summoned and impaneled * * * a jury of 12 persons to hear such inquiry."

Pen.Code, § 3703: "[W]hen it is found that the defendant is insane, the order must direct that he be taken to a State hospital for the insane, and there kept in safe confinement until his reason is restored."

Pen.Code, § 3704: "If it is found that the defendant is sane, the warden must proceed to execute the judgment * *; if it is found that the defendant is insane, the warden must suspend the execution * * * and deliver the defendant * * * to the medical superintendent of the hospital * * *. When the defendant recovers his sanity, the superintendent of such hospital must certify that fact to the judge of the superior court from which the defendant was committed as insane, who must thereupon fix a date upon which * * * a hearing shall be had before said judge sitting without a jury to determine whether or not the defendant has in fact recovered his sanity. * * * If the judge should determine that the defendant has recovered his sanity he must certify that fact to the Governor, who must thereupon issue to the warden his warrant appointing a day for the execution * * *. If, however, the judge should determine that the defendant has not recovered his sanity he shall direct the return of the defendant to a state hospital for the insane, to be there kept in safe confinement until his sanity is restored."

Concerning the defendant who is found not guilty by reason of insanity:

Pen.Code, § 1026: "* * * If the verdict or finding be that the defendant was insane at the time the offense was committed, the court unless it shall appear to the court that the defendant has fully recovered his sanity shall direct that the defendant be confined in the state hospital for the criminal insane * * * If, however, it shall appear to the court that the defendant has fully recovered his sanity such defendant shall be remanded to the custody of the sheriff until his sanity shall have been finally determined in the manner prescribed by law. A defendant committed to a state hospital shall not be released from confinement unless and until the court * * shall, after notice and hearing, find * * that his sanity has been restored."

Pen.Code, § 1026a: "An application for the release of a person who has been committed to a state hospital, as provided in Section 1026, upon the ground that his sanity has been restored, may be made to the superior court * * * No hearing upon such application shall be allowed until the person committed shall have been confined for a period of not less than 90 days from the date of the order of commitment. If the finding of the court be adverse to releasing such person * * he shall not be permitted to file a further application until one year has elapsed from the date of hearing upon his last preceding application."

The Welfare and Institutions Code (§§ 5000–5189) provides for the commitment and treatment of mentally ill persons. "Insane" as used in that code means "mentally ill" (§ 5041). "'Mentally ill persons' means persons who come within either or both of the following descriptions: (a) Who are of such mental condition that they are in need of supervision, treatment, care, or restraint. (b) Who are of such mental condition that they are dangerous to themselves or to the person or property of others, and are in need of supervision, treatment, care, or restraint" (§ 5040). (This is the test which defendant passed in 1945, about the time when he was engaged in a series of "strong-arm robberies" for which he was not apprehended; ante, footnote 2.)

Also the Welfare and Institutions Code (§§ 5500–5521) provides for adjournment of a criminal proceeding while the court determines whether the defendant is a "sexual psychopath" and for disposition of such a person. A "sexual psychopath" is defined (§ 5500) as one "affected, in a form predisposing to the commission of sexual offenses, and in a degree constituting him a menace to the health or safety of others, with any of the following conditions: (a) Mental disease or disorder. (b) Psychopathic personality. (c) Marked departures from normal mentality." (This is the test which defendant passed in 1955 after he had embarked upon his series of homicides; ante, footnote 2.)

Furthermore the Welfare and Institutions Code (§§ 5600–5607) provides for court determination that a person against whom no criminal charge is pending is a "mentally abnormal sex offender," and for commitment and treatment of a per-relatively unimportant to society and to the accused whether the determination as to criminal responsibility *insofar as it may rest on the issue of sanity* is made at the time of initial trial or later. The immediately important question for both the state and the defendant is this: Did the defendant commit the act charged? If he committed it, sane or insane, he should be held under restraints adequate and appropriate to the circumstances. If the circumstances require actual confinement it is not at the moment important what name be applied to the institution. The character of the supervision and study to be given the accused is important. As a result of such study it is conceivable that eventually a more informed diagnosis of the defendant and of his act might be accomplished and treatment appropriate to illness or evil disposition be applied. But our statutes do not yet authorize such procedure and, in this case, the death penalty has been imposed; accordingly, we must resolve the issues on the law as it now stands.

The most difficult problem arises in formulating for the trial process a just, understandable, and workable hypothesis for separating the insane from the sane insofar as criminal responsibility is concerned. Dr. Diamond in the above cited study (*With Malice Aforethought*) concedes that "Medical psychology has embarrassingly few answers to this one question which the criminal law is most interested in. It does no good to proclaim to the jurist that scientific evidence proves that there is no such thing as free will. There is a subjective phenomenon which the normal individual experiences as free will. Illusory or not, free will remains the basis of all criminal law simply because free will is the basis of all normal social behavior."

This quoted statement is of little help to us in connection with the present problem because it concerns "normal social behavior," whereas we are dealing with the *abnormal.* The circle appears complete when we note that the very purpose of criminal law is to prevent abnormal behavior and protect society against it to the extent that such departures from the normal would destroy or impinge on recognized rights of other members of the social order. More directly addressed to our problem, Dr. Diamond's article continues: "In truth, today, we do not have a sufficient foundation of scientific knowledge about the ego functions of decision, choice, and determination of action to justify the formulation of any general principles which could be applied to the law. * * *

"The task then becomes to understand the motivations, intent, and actions of the individual who deviates from the common-sense posit of free will. This can be accomplished without specious generalizations which would attack the very structure of the law itself and would compel non-acceptance by the juridical mind. * * *"

The "alienists" appointed by the court "to examine the defendant and investigate his sanity" (Pen.Code, § 1027) directed their investigations and their testimony to the question whether this defendant met the tests of accountability established by existing California law. The evidence that he did meet those tests is overwhelming. The instructions[3] are intelligently formulated and adequately comprehensive

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son found to be such an offender. A "mentally abnormal sex offender" is one "who is not mentally ill or mentally defective, and who by an habitual course of misconduct in sexual matters has evidenced an utter lack of power to control his sexual impulses and who, as a result is likely to attack or otherwise inflict injury, loss, pain or other evil upon the objects of his uncontrolled and uncontrollable desires." (Note that the Legislature here indicates that in its opinion a person may have "uncontrollable desires" and yet be "not mentally ill.")

Finally, it is noted, under our statutory law "'Insanity' may and does mean a variety of different things. Depending on the pertinent statute, a variety of issues of fact can be the subject of litigation." (In re Zanetti (1949), 34 Cal.2d 136, 141 [3], 208 P.2d 657.)

[3] See Note 3 on page 420.

to inform the jury of that law and require their compliance with it. No prejudicial error appears.

For the reasons above stated the judgment and order appealed from are affirmed.

GIBSON, C. J., and SHENK, TRAYNOR, SPENCE and McCOMB, JJ., concur.

PETERS, Justice.

I concur.

I congratulate the author of the main opinion on a scholarly and correct analysis of the problems involved. I agree with his conclusion that, if there is to be a change in the rule of the M'Naughton case, it should be made by the Legislature and not by this court.

In the past, I have felt some dissatisfaction with the rigid application of the M'Naughton rule. Shortly after the adoption in 1927 of the provisions of the Penal Code providing for a bifurcated trial where an accused pleads not guilty and not guilty by reason of insanity, this court decided a series of cases rigidly restricting the admissibility of evidence of mental condition on the trial of the guilt issue. As the main opinion correctly points out, the rigid rules then adopted are no longer the law of this state. As I understand the recent decisions of this court, relevant evidence of an accused's mental condition affecting intent where intent is an element of the crime charged is now admissible on the trial of the guilt issue. Thus the basis of my dissatisfaction with the rigid application of the M'Naughton rule no longer exists.

For these reasons I concur with the reasoning and holding in the majority opinion.

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52 Cal.2d 95

PEOPLE of State of California, Respondent,
v.
Jack H. CHAPMAN et al., Appellants.
Cr. 6428.

Supreme Court of California,
In Bank.
May 1, 1959.

The appealing defendants were convicted in the Superior Court of Los Angeles County, Richard C. Fildew, J., for violation of Penal Code, § 288a, and the male appellant was also convicted for pimping and for contributing to the delinquency of a minor. The Supreme Court, Gibson, C. J., held that in order to obtain production of prior statement of prosecution witness, defendant is not required to show that there is any inconsistency between statement and testimony of witness.

Reversed.

Opinion, 332 P.2d 382, vacated.

1. Criminal Law ⚷622(2)

That one defendant was charged with only one of crimes did not render joinder improper or deprive court of discretion to deny motion for severance where there was joint charge as to one of crimes and common element of substantial importance in commission of all of them. West's Ann. Pen.Code, §§ 954, 1098.

2. Criminal Law ⚷627½

Defendant in criminal case can, on proper showing, compel production of documents in possession of the People which are relevant and material to the defense.

3. Criminal Law ⚷627½

In order to obtain production of prior statement of prosecution witness, defendant is not required to show that there is any inconsistency between statement and testimony of witness; disapproving People v. Gallardo, 41 Cal.2d 57, 257 P.2d 29, and People v. Riser, 47 Cal.2d 566, 305 P.2d 1.

4. Criminal Law ⟹1166(1)

Where witness' testimony was principal evidence in support of one of convictions and sole evidence in support of remaining convictions, error in denying motion for production of statement, which witness had given police, for use for impeachment purposes, was prejudicial.

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Gerald J. Levie and Burt Marks, Los Angeles, for appellants.

Edmund G. Brown, Atty. Gen. and Jack E. Goertzen, Deputy Atty. Gen., for respondent.

GIBSON, Chief Justice.

Jack H. Chapman and Avis Spears were convicted after a trial by jury of a violation of section 288a of the Penal Code.[1] Chapman was also convicted of violating section 266h of the Penal Code[2] and of contributing to the delinquency of a minor (Welf. & Inst.Code, § 702), a lesser offense necessarily included in a charge of violating subdivision 1 of section 261 of the Penal Code.[3] They have appealed from the judgments and from orders denying a new trial.

Chapman and his wife lived in a house in La Puente with several other people, including Avis Spears. In the first part of 1957 Chapman brought Gloria Jean Woods, who was 16 or 17 years old, to California to help take care of his mother. Gloria, who was given permission by her mother to stay with the Chapmans, remained with them for about three months and then ran away to Los Angeles.

Several months afterward Gloria was arrested on information given to the police that, along with other members of the Chapman household, she had been engaged in illegal sexual activities. During interrogation by officers of the police department attached to the juvenile division, she first denied but later admitted that the alleged offenses had occurred. Chapman and Avis Spears were arrested and brought to trial.

[1] The court properly refused to grant defendants' motion for separate trials for each of them on each count of the information. Section 954 of the Penal Code permits joinder of different offenses which do not relate to the same transaction or event where there is a common element of substantial importance in their commission.[4] People v. Scott, 24 Cal.2d 774, 778–779, 151 P.2d 517; People v. Thorn, 138 Cal. App. 714, 735, 33 P.2d 5. Section 1098 provides for joint trials of two or more defendants who are charged jointly with any public offense.[5] The fact that Avis Spears is charged with only one of the

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[1] Section 288a of the Penal Code reads, in part: "Any person participating in an act of copulating the mouth of one person with the sexual organ of another is punishable by imprisonment in the state prison for not exceeding 15 years, or by imprisonment in the county jail not to exceed one year; * * *."

[2] Section 266h of the Penal Code reads, in part: "Any male person who, knowing a female person is a prostitute, lives or derives support or maintenance in whole or in part from the earnings or proceeds of her prostitution, or from money loaned or advanced to or charged against her by any keeper or manager or inmate of a house or other place where prostitution is practiced or allowed, or who solicits or receives compensation for soliciting for her, is guilty of pimping, a felony, * * *."

[3] Section 261 of the Penal Code reads, in part: "Rape is an act of sexual intercourse, accomplished with a female not the wife of the perpetrator, under either of the following circumstances: 1. Where the female is under the age of eighteen years; * * *."

[4] Section 954 of the Penal Code provides in part: "An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, * * * provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately."

[5] Section 1098 of the Penal Code provides in part: "When two or more defendants

crimes does not render the joinder improper or deprive the court of discretion to deny a motion for severance since there is a joint charge as to one of the crimes and a common element of substantial importance in the commission of all of them. People v. Cohen, 107 Cal.App.2d 334, 342, 237 P.2d 301; People v. Nasworthy, 94 Cal.App.2d 85, 91–92, 210 P.2d 83; People v. Burton, 91 Cal.App.2d 695, 714, 205 P.2d 1065 et seq.; People v. Flores, 62 Cal.App.2d 700, 705, 145 P.2d 318; see People v. Andrews, 165 Cal.App.2d 626, 332 P.2d 408; cf. People v. Duane, 21 Cal.2d 71, 76, 130 P.2d 123. It follows that there was no abuse of discretion in denying separate trials to defendants.

[2–4] The principal question raised on this appeal is whether the court erred in refusing to compel the production of a statement prepared by the police and signed by Gloria. Defendants sought to obtain this statement for impeachment purposes after Gloria, on cross-examination, said that it related to matters covered by her testimony.

The defendant in a criminal case can on a proper showing compel production of documents in the possession of the People which are relevant and material to the defense, and this rule has been applied to written statements of prosecution witnesses relating to the subject matter of their testimony where the statements were sought by the defense for purposes of impeachment. Jencks v. United States, 353 U.S. 657, 666, 77 S.Ct. 1007, 1 L.Ed.2d 1103 et seq.; Tupper v. Superior Court, 51 Cal.2d 263, 264, 266–267, 331 P.2d 977; People v. Riser, 47 Cal.2d 566, 585, 305 P.2d 1 et seq.; cf. Powell v. Superior Court, 48 Cal.2d 704, 312 P.2d 698. The value of obtaining such statements, particularly where they were made before time dulled the memory of the witness, is obvious. The statements may contain contradictions of the testimony of the witness, may omit some facts related by the witness at the trial, or may reveal a contrast in the emphasis placed on the same facts.

In order to obtain production of the prior statement of a prosecution witness, a defendant is not required to show that there is any inconsistency between the statement and the testimony of the witness. Jencks v. United States, 353 U.S. 657, 666–668, 77 S.Ct. 1007, 1 L.Ed.2d 1103. As pointed out in the Jencks case, a requirement of proof of a conflict between the witness' testimony and his earlier statement would, in many cases, deny the accused the benefit of relevant and material evidence. Ordinarily a defendant cannot show that a statement contains contradictory matters until he has seen it, and, if such a showing were a condition precedent to production, his rights would be dependent upon the highly fortuitous circumstance of his detailed knowledge as to the contents of the statement. For these reasons we disapprove any implication in People v. Gallardo, 41 Cal.2d 57, 67, 257 P.2d 29, and People v. Riser, 47 Cal.2d 566, 587, 305 P.2d 1, that the right of a defendant to obtain the production of a statement made by a witness for the prosecution depends upon a showing that the writing contradicts the witness' testimony.

It was error to deny the motion for the production of Gloria's statement, and the error was clearly prejudicial. Her testimony was the principal evidence in support of one of the convictions and the sole evidence in support of the remaining convictions. Moreover, on cross-examination she admitted that she would lie or tell the truth depending on what suited her requirements at the time, and there was evidence that she had been careless with the truth on a number of occasions. In these circumstances there can be no question of the importance to the defense of obtaining her statement.

The judgments and the orders denying a new trial are reversed.

SHENK, TRAYNOR, SCHAUER, SPENCE, McCOMB and PETERS, JJ., concur.

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are jointly charged with any public offense, whether felony or misdemeanor, they must be tried jointly, unless the court order separate trials."

52 Cal.2d 87

In re Jean L. CHESTER, on Habeas Corpus.

Cr. 6058.

Supreme Court of California,
In Bank.
May 1, 1959.
Rehearing Denied May 27, 1959.

Original proceeding by prisoner for writ of habeas corpus. The Supreme Court issued an order to show cause and appointed a referee to take evidence and make findings. The Supreme Court, McComb, J., held that, as found by referee, record revealed that petitioner had been advised of his right to have counsel appointed to represent him when he was arraigned in Superior Court and that he had waived right to counsel, at the time of his arraignment, when he knew, or should have known, of his right thereto.

Order to show cause discharged and petition denied.

1. Habeas Corpus ⚷85.1(2)

In habeas corpus proceeding based on alleged denial of right to counsel, brought after judgment, the court record of proceedings on arraignment creates a presumption of verity. West's Ann.Pen.Code, § 858 et seq.

2. Criminal Law ⚷230

Statutory provisions for arraignment at preliminary examination are integral part of such examination. West's Ann. Pen. Code, § 858 et seq.

3. Habeas Corpus ⚷85.5(4)

In prisoner's proceeding for writ of habeas corpus, record revealed, as found by referee, that petitioner had been advised of right to have counsel appointed to represent him when he was arraigned in Superior Court and that he waived his right to counsel, at time of his arraignment, when he knew, or should have known, of his right thereto. West's Ann.Pen.Code, § 858 et seq.; West's Ann.Code Civ.Proc. § 1963, subd. 15.

Winters & Winters, Robert K. Winters, Benicia, Beeman & Johnson and William L. Beeman, Vallejo, for petitioner.

Edmund G. Brown, Atty. Gen., Doris H. Maier and J. M. Sanderson, Dep. Atty. Gen., for respondent.

McCOMB, Justice.

Jean L. Chester, an inmate of the California Medical Facility, Vacaville, petitioned for a writ of habeas corpus. We issued an order to show cause and appointed a referee to take evidence and make findings on these questions: (1) Was petitioner advised of his right to counsel at the preliminary examination? (2) Did he intelligently waive his right to counsel at the time of the preliminary hearing when he knew, or should have known, of his right thereto? (3) Was petitioner advised of his right to counsel and to have counsel appointed for him in the proceedings in the superior court? (4) Did he intelligently waive his right to counsel in the superior court when he knew, or should have known, of his right thereto?

The referee found (1) that petitioner was not advised of his right to counsel at the preliminary hearing held on June 18, 1947, but that he was fully advised of such right at his arraignment in the justice court on May 28, 1947; (2) that petitioner waived his right to counsel at the time of his arraignment when he knew, or should have known, of his right thereto; (3) that petitioner was advised as to his right to have counsel appointed to represent him when he was arraigned in the superior court; and (4) that petitioner waived his right to counsel when he knew, or should have known, of his right thereto.

We are thus presented with this question: *Does the record disclose (a) that petitioner was advised of his right to have counsel appointed to represent him when he was arraigned in the superior court and (b) that he waived his right to counsel at the time of his arraignment when he knew, or should have known, of his right thereto?*

[1, 2] *Yes.* These rules are here applicable: (1) In a habeas corpus proceeding, after judgment, based on an alleged denial of the right to counsel, the court record of the proceedings on arraignment creates a presumption of verity. (In re Connor, 16 Cal.2d 701, 707 et seq., 108 P.2d 10.* (2) The provisions for arraignment at the preliminary examination are in integral part of such examination. (Pen.Code, § 858 et seq.; In re Tedford, 31 Cal.2d 693, 192 P.2d 3.)

In the present case, the minute entry on the docket of the magistrate's court where petitioner was arraigned on May 28, 1947, reads as follows: "Defendant duly arraigned, being by the Court informed of all his legal rights—including * * * his right to counsel at all stages of the proceedings. * * *"

[3] In addition to the presumption that petitioner was informed of his legal right to counsel at all stages of the proceedings, the referee had before him the testimony of Judge Brusatori, who testified in response to a question as to whether he informed defendants of their right to counsel, "* * * Then I would advise them it was their right to be represented by counsel at all stages." He further testified that he did not inform petitioner of his right to counsel at the preliminary hearing on June 16, 1947, since petitioner had already been informed at the arraignment.

In addition, petitioner himself admitted that he was informed at the arraignment of such right. The question and petitioner's answer were as follows: "Q. What, if anything, was said to you in regard to an attorney to defend you? A. He said I had the right to hire an attorney."

Also, with respect to the preliminary hearing, petitioner testified as follows: "Q. Would you tell the court what was said at that preliminary hearing? A. In what manner? Q. Just in regard to an attorney. A. He said that he saw I was in court without a lawyer, and that if I wanted—was willing to go ahead on it, and I said, yes, sir, I was."

Petitioner further testified that he knew he had a right to an attorney at the superior court hearing. The following question asked petitioner and his answer thereto, relative to the superior court hearing, appear in the record: "Q. Did you know at that time that you had the right to an attorney? A. I knew that I could hire an attorney, yes, sir."

With respect to whether petitioner was informed of his right to have counsel appointed for him in the superior court if he was without funds, the record discloses that there was evidence before the referee which supports his finding that petitioner was so advised. Judge Butler, who presided at the superior court hearing, testified as follows: "Q. Will you state whether or not it is true that when arraigning a defendant, and that defendant answered that he did not have counsel, will you state whether or not it is true that you offered to appoint counsel for that defendant? A. I varied the practice. If a defendant had no counsel I would ask him if he wished time in which to send for counsel of his own choosing; if he said 'no,' then I would ask him if he had means to pay counsel, if he said he had none, then I would say, the Court will appoint counsel for you."

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* Mr. Justice Shenk, in speaking for this court in In re Connor, supra, 16 Cal.2d at page 707 et seq., 108 P.2d at page 14, says: "The docket entry recording the proceedings in the municipal court at the time of petitioner's preliminary arraignment of January 27, 1932, and preliminary examination of February 1, 1932, states: 'Court informs defendant of the charge against defendant and of defendant's right to the aid of counsel in every stage of the proceedings.' This statement is part of the printing in a printed form of docket sheet, which was used to record the proceedings had on January 27th and February 1st. At that time, according to an affidavit of the clerk of the court, it was customary to prepare the docket from the clerk's rough minutes, and after comparison of the two to insure accuracy, to then destroy the rough minutes. The clerk's affidavit also contained the averment that the rough minutes pertaining to petitioner's arraignment of January 27th had been destroyed. There is nothing in these facts, or in the method shown to have been employed in preparing the record, or in any other matter brought out by petitioner, which would cast a doubt upon the verity and authenticity of the docket entry stating that petitioner was duly informed of his right to counsel. The presumption is that in preparing the record, official duty was regularly performed. Code Civ.Proc., sec. 1963, subd. 15. The record imports absolute verity, and in this collateral proceeding must be accepted as speaking the truth. Halpern v. Superior Court, 190 Cal. 384, 212 P. 916; People v. Figueroa, 134 Cal. 159, 66 P. 202; Govea v. Superior Court, 26 Cal.App.2d 27, 78 P.2d 433. It is therefore of itself sufficient to refute petitioner's claim that he was then denied his constitutional right with respect to the aid of counsel."

Judge Brusatorio testified relative to Judge Butler's custom of informing defendants of their right to counsel, as follows: "Q. Do you know if Judge Butler had any particular habit or custom in arraigning a defendant? A. Yes, I do. Q. Will you tell us what that was? A. * * * and his custom was to * * * tell the defendant of his right to be represented by counsel, and would inquire whether or not the man had counsel; of his right to have counsel appointed for him if he were without means to engage his own counsel."

Likewise, Mr. Albert E. Bagshaw, the District Attorney of Marin County in 1947, testified thus: "Q. Do you know whether Judge Butler had any habit or custom in the manner in which he arraigned a defendant upon an information? A. Yes, I do. Q. Would you describe the custom in that regard? A. * * * Judge Butler would * * * always advise the defendant as to the services of counsel at each stage; always ask the defendant if he had counsel, and if he didn't the Judge would ask if he had means of procuring counsel. With the San Quentin cases where he did not have counsel the Judge would always advise him he had the right to have counsel appointed by the court."

Since the record discloses (i) that petitioner was informed of his right to have counsel appointed to represent him when he was arraigned in the superior court and (ii) that he waived his right to counsel at the time of his arraignment, it is clear that he has not met the burden of proof resting upon him with respect to his claim that he was denied the right to counsel.

The order to show cause is discharged, and the petition is denied.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER and SPENCE, JJ., concur.

52 Cal.2d 107

Dolores GARCIA, a Minor, etc., Respondent,

v.

Harry SOOGIAN et al., Appellants.

Sac. 6913.

Supreme Court of California.
In Bank.
May 5, 1959.

Action for injuries sustained by 12-year-old minor while playing on defendants' lot on which were piled prefabricated building panels containing windows and over which minor unsuccessfully tried to jump. The Superior Court, Stanislaus County, David F. Bush, J., entered judgment for minor and defendant lot owners appealed. The Supreme Court, Gibson, J., held that where it appeared that prefabricated building panels were neatly stacked at some distance from the street, and such panels were stacked to be used in erection of certain prefabricated buildings, condition causing minor's injury did not constitute an unreasonably great risk of serious bodily harm which minor was unable to discover or appreciate because of her immaturity.

Reversed.

Spence, Schauer, and McComb, JJ., dissented in part.

Opinion, 319 P.2d 742, vacated.

1. Negligence ⚷33(3)

Possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by structure or other artificial condition which he maintains upon land, if place where condition is maintained is one upon which possessor knows or should know that such children are likely to trespass, condition is one of which possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, children because of their youth do not discover condition or realize risk involved in intermeddling in it or in coming within area made dangerous by it, and utility to possessor of maintaining condition is slight as compared to risk to young children involved therein.

2. Negligence ⚷33(3)

Possessor of land is not under duty to prevent every possibility of harm but only to exercise due care as to those risks which he should realize are unreasonably great and threaten serious bodily harm in a way unlikely to be appreciated by children whose trespass he should foresee.

3. Negligence ⚷33(3)

Where defendant land owners, in preparation for erection of certain prefabricated buildings, firmly stacked at a considerable distance from street heavy panels containing windows in such a manner that the glass could be reached only from the top of piles which were 24 to 30 inches from the ground and 12-year eight-month-old child trespassing on land was cut when she unsuccessfully tried to jump over stack of panels, and there was no evidence that minor was less than average in intelligence for her age, it could not be concluded that condition which caused minor's injury should have been recognized as constituting an unreasonably great risk of serious bodily harm which minor was unable to discover or appreciate because of her immaturity and owners were not liable.

◆

Jack Coffey, San Francisco, for appellants.

Cardozo, Trimbur & Nickerson and John M. Trimbur, Modesto, for respondent.

GIBSON, Chief Justice.

In this action, which was tried by the court sitting without a jury, plaintiff recovered damages for injuries she sustained while playing on defendants' lot, and defendants have appealed.

The accident happened about 8:00 p. m., when it was getting dark. Plaintiff, who was 12 years and 8 months old, had trespassed on defendants' lot in order to play a form of hide-and-seek with other children. She cut her ankle when, running in pursuit of a playmate, she attempted to jump over a stack of prefabricated building panels containing windows, failed to clear the stack, and landed on top, her foot crashing through the glass. The panels over which she jumped were part of building materials stored on the lot by defendants for the purpose of erecting several prefabricated houses. The materials had been placed about 120 to 150 feet back from the street. The panels with glass, each weighing about 200 pounds, had been stacked in firm, orderly piles which were from 24 to 30 inches high, 8 feet long and at least 4 feet wide. Plaintiff's sister, who was one of the children on the lot at the time of the accident, testified that she saw the stacks that evening and that none of them were covered. There was other testimony that at least two of the piles were uncovered. During working hours defendants, who were engaged in building at a nearby site, watched the lot and ordered children away, and, in the absence of defendants, a man who lived in the vicinity did the same on their behalf whenever he saw children on the lot.

The sole question presented on this appeal is whether the judgment is supported by the evidence.

[1] Section 339 of the Restatement of Torts reads: "A possessor of land is subject to liability for bodily harm to young children trespassing thereon caused by a structure or other artificial condition which he maintains upon the land, if (a) the

place where the condition is maintained is one upon which the possessor knows or should know that such children are likely to trespass, and (b) the condition is one of which the possessor knows or should know and which he realizes or should realize as involving an unreasonable risk of death or serious bodily harm to such children, and (c) the children because of their youth do not discover the condition or realize the risk involved in intermeddling in it or in coming within the area made dangerous by it, and (d) the utility to the possesssor of maintaining the condition is slight as compared to the risk to young children involved therein." The rule set forth in section 339 has been adopted as the law of this state. Courtell v. McEachen, 51 Cal.2d 448, 334 P.2d 870; Reynolds v. Willson, 51 Cal.2d 94, 331 P.2d 48.

It is apparent that the application of this rule depends upon a number of variable factors. The question of liability must be decided in the light of all the circumstances and not by arbitrarily placing cases in rigid categories on the basis of the type of condition involved without giving due consideration to the effect of all the factors in a particular situation. There is no inflexible rule which would exclude liability in every case involving building materials or buildings under construction, and each such case must be judged on its own facts. Although there are some cases of this type in which recovery has been denied (Knight v. Kaiser Co., 48 Cal.2d 778, 312 P.2d 1089; Lopez v. Capitol Co., 141 Cal.App.2d 60, 296 P.2d 63; Camp v. Peel, 33 Cal.App.2d 612, 92 P.2d 428), there are others recognizing that liability may exist (Woods v. City and County of San Francisco, 148 Cal.App.2d 958, 307 P.2d 698; Morse v. Douglas, 107 Cal.App. 196, 290 P. 465).

The circumstance that a condition giving rise to injury is common in character does not necessarily exclude liability. Of course, if a dangerous condition is common, children are more likely to be aware of the risk than if the condition is unusual, but it does not follow that common conditions can, under no circumstances, give rise to dangers which are not obvious to children. What is important is not whether conditions are common in character but whether their dangers are fully understood by children. In discussing the duty of care owed by the possessor of land in connection with the ability of children to appreciate the risk presented, the Restatement says, in comment (b) to section 339, that the duty extends to dangerous conditions "which, though observable by adults, are likely not to be observed by children or which contain risks the full extent of which an adult would realize but which are beyond the imperfect realization of children." The duty, of course, does not extend to "those conditions the existence of which is obvious even to children and the risk of which is fully realized by them." Rest., Torts, § 339, comment (b). The further statement in comment (b) that the limitation on the duty operates to remove liability with respect to "the normal, necessary and usual implements which are essential to [the land's] normal use," appears in a sentence which, when taken as a whole, refers only to those situations in which children, knowing the danger of the implements as fully as adults, use them "in a spirit of bravado." [1]

There is thus no justification for regarding the commonness of a condition as having a decisive significance independent of the obviousness of the risk. Unfortunately, several cases, both in allowing and denying recovery, have used broad language which could be understood as meaning that a common condition can never give rise to liability. Knight v. Kaiser Co., 48 Cal.2d 778, 782, 312 P.2d 1089; Doyle v. Pacific Electric R. Co., 6 Cal.2d 550, 552, 59 P.2d 93; Wilford v. Little, 144 Cal.App.2d 477, 301 P.2d 282; Lopez v. Capitol Co., 141 Cal. App.2d 60, 65, 296 P.2d 63; Clark v. Pacific Gas & Electric Co., 118 Cal.App. 344, 348, 5 P.2d 58, 6 P.2d 297; Morse v. Douglas, 107 Cal.App. 196, 201, 290 P. 465. Dean Prosser correctly points out: "Many courts have said that the doctrine does not apply to common conditions * * * or that it is limited to * * * special and unusual conditions of modern industry; but all such statements appear to be made with reference to the particular case, and to be directed at nothing more than the existence of a recognizable and unreasonable risk of harm to the child." Prosser on Torts (2d Ed.1955) 443. See also Reynolds v. Willson, 51 Cal.2d 94, 331 P.2d 48.

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[1] The sentence in question reads: "This limitation of the possessor's liability to conditions dangerous to children, because of their inability to appreciate their surroundings or to realize the risk involved therein, frees the possessor of land from the danger of liability to which he would otherwise be subjected by maintaining on the land the normal, necessary and usual implements which are essential to its normal use but which reckless children can use to their harm in a spirit of bravado or to gratify some other childish desire and with as full a perception of the risks which they are running as though they were adults." Rest., Torts, § 339, comment (b).

A common condition, namely, fire or embers, led to the injuries of the minor plaintiff in the recent case of Courtell v. McEachen, 51 Cal.2d 448, 334 P.2d 870, and we held that, if the condition causing the accident was not obvious to the child, there could be liability under the law applicable to trespassing children. Other cases involving conditions which could be considered as common in character have reached the same result. Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712; Cahill v. E. B. & A. L. Stone & Co., 153 Cal. 571, 96 P. 84, 19 L.R.A.,N.S., 1094; Edler v. Sepulveda Park Apartments, 141 Cal.App.2d 675, 297 P.2d 508; Copfer v. Golden, 135 Cal.App.2d 623, 288 P.2d 90; Long v. Standard Oil Co., 92 Cal.App. 2d 455, 207 P.2d 837. We wish to emphasize that the mere fact that the condition causing an injury is common in character will not prevent recovery by a trespassing child.

[2] With respect to whether the circumstances of this case warrant recovery, it should be kept in mind that a possessor of land is not under a duty to prevent every possibility of harm but only to exercise due care as to those risks which he should realize are unreasonably great and threaten serious bodily harm in a way unlikely to be appreciated by children whose trespass he should foresee. The ability to appreciate danger varies, of course, with the age of the child, and there can be no recovery if the child is of sufficient age and mental capacity to look out for himself under the circumstances presented. See Prosser on Torts (2d Ed.1955) 441, 443–444; 2 Harper and James, The Law of Torts, 1453–1454.

[3] As we have seen, the panels containing windows were heavy and were firmly stacked a considerable distance from the street in such a manner that the glass could be reached only at the top of the piles, 24 to 30 inches from the ground. The chance was slight that a child of plaintiff's age would fail to see the glass or appreciate what risk was presented, and there is no evidence that plaintiff was of less than average intelligence for her age. It may be, as plaintiff in effect testified, that, because it was getting dark, she did not see the glass before jumping, but defendants could not reasonably be required to foresee that there was any substantial likelihood that a normal child of more than 12 would not appreciate the danger of jumping over a large pile of building materials when darkness prevented sufficient perception of the nature of the obstacle. In the light of the undisputed facts now before us, there is no sound basis for concluding that the condition which caused plaintiff's injury should have been recognized as constituting an unreasonably great risk of serious bodily harm which plaintiff was unable to discover or appreciate because of her immaturity. Accordingly, the evidence did not warrant a recovery by plaintiff.

The judgment is reversed.

SHENK, TRAYNOR and PETERS, JJ., concur.

SPENCE, Justice (concurring and dissenting).

I concur in the judgment of reversal, but for the reasons hereinafter stated, I am of the opinion that such reversal should be accompanied with directions to enter judgment in favor of the defendants.

This is another of a series of recent appeals involving the same fundamental question, namely, the nature of the duty owed by the landowner to the trespassing child with respect to the condition of the landowner's premises. While I agree with the majority that "the evidence does not bring the case within the rule set forth in section 339 of the Restatement of Torts," I am further of the opinion that the reversal should be squarely based upon the decisional law of this state involving comparable situations in connection with building materials or with buildings under construction such as Knight v. Kaiser Co., 48 Cal.2d 778, 312 P.2d 1089; Lopez v. Capitol Co., 141 Cal.App.2d 60, 296 P.2d 63; Saba v. Jacobs, 130 Cal.App.2d 717, 279 P.2d 826; and Camp v. Peel, 33 Cal.App.2d 612, 92 P.2d 428. Such reversal finds added support in numerous other "former cases," only a few of which need be cited. Melendez v. City of Los Angeles, 8 Cal.2d 741, 68 P.2d 971; Peters v. Bowman, 115 Cal. 345, 47 P. 113, 598; Wilford v. Little, 144 Cal.App.2d 477, 301 P.2d 282; Lake v. Ferrer, 139 Cal.App.2d 114, 293 P.2d 104; Ward v. Oakley Co., 125 Cal.App.2d 840, 271 P.2d 536; Betts v. City and County of San Francisco, 108 Cal.App.2d 701, 239 P.2d 456; Demmer v. City of Eureka, 78 Cal.App.2d 708, 178 P.2d 472; King v. Simons Brick Co., 52 Cal.App.2d 586, 126 P.2d 627; Beeson v. City of Los Angeles, 115 Cal.App. 122, 300 P. 993; Reardon v. Spring Valley Water Co., 68 Cal.App. 13, 228 P. 406; Polk v. Laurel Hill Cemetery Ass'n, 37 Cal.App. 624, 174 P. 414.

While the reversal ordered by the majority here is entirely consistent with the long line of "former cases," I am of the opinion that such reversal is inconsistent with the majority opinions in Reynolds v. Willson, 51 Cal.2d 94, 331 P.2d 48, and Courtell v. McEachen, 51 Cal.2d 448, 334 P.2d 870. I discussed the inconsistency of the Reynolds and Courtell opinions with the "former cases" in my dissenting opinion in those cases, and need not repeat that discussion here. Suffice it to say that each of those cases, like the present one, involved only a common, obvious risk rather than some uncommon or concealed risk such as had been previously required to bring the condition within any recognized exception to the general rule which limits the duty owed by the landowner to the trespassing child.

If the well-considered rules established by the "former cases" are to be disregarded upon the ground that they put cases "in rigid categories on the basis of the type of condition involved," then the majority should expressly disapprove those cases, rather than being content with giving them passing reference and leaving to possible conflicting implications the question of whether those cases are being approved or disapproved. However, it should be stated in this connection that a legal principle which is supported by sound reason and abundant authority, should not be disregarded merely because it may impart a fair degree of certainty, or even rigidity, to an important phase of the law. Adherence to well-considered and well-established guiding principles makes for stability in the law while, on the other hand, the jumping from case to case, without following any consistent pattern and without regard for established principles, can only create endless confusion.

The guiding principle established by the "former cases" prevented the imposition of liability upon the landowner in favor of the trespassing child when the risk encountered was one which was *"common and obvious."* See dissenting opinion in Reynolds v. Willson, supra, 51 Cal.2d 94, 331 P.2d 48. An objective standard was applied in determining as a matter of law whether any particular risk was "common and obvious," and that standard was properly determined in the light of common knowledge that "There are some dangers common in the community which any child of sufficient age to be allowed at large may be expected to understand and appreciate * * *." Prosser on Torts, 2d Ed., p. 441. The majority opinion here indicates that there are other "variable factors" to be considered, including "the age" and "mental capacity" of the particular child trespasser. No support for this view is to be found in any of the "former cases," and any such rule would obviously place upon the landowner the wholly unjustifiable burden of making his premises safe for trespassing children who are of insufficient age or mental capacity to be allowed at large.

It may be conceded, as the majority opinion declares, that "There is no inflexible rule which would exclude liability in every case involving building materials or buildings under construction, and each such case must be judged on its own facts." No such "inflexible rule" has been declared in any of the "former cases," and no such rule has been suggested in any of the recent dissenting opinions. On the contrary, it has been generally recognized that there may be uncommon or concealed risks in connection with building materials or buildings under construction, but it is clear that the "ordinary conditions, presenting only common and obvious danger or risk of harm to the trespassing child, are not of the type which has heretofore been held to fall within" any exception to the general rule so as to permit the imposition of liability upon the landowner. Reynolds v. Willson, dissenting opinion, supra, 51 Cal.2d 94, 331 P.2d 48.

There are but few cases cited in the majority opinion which have not been previously discussed in the dissenting opinions in the Reynolds and Courtell cases, and those few cases are generally in line with the other "former cases." Woods v. City and County of San Francisco, 148 Cal.App.2d 958, 307 P.2d 698, cited by the majority, merely held that "The defendant's demurrer was properly sustained but it should not have been sustained without leave to amend.' 148 Cal.App.2d at page 966, 307 P.2d at page 703. In so ruling, however, the court recognized the established rule that there could be no recovery by the trespassing child if "there was no novel or hidden danger." 148 Cal.App.2d at page 963, 307 P.2d at page 702.

The majority also cites Morse v. Douglas, 107 Cal.App. 196, 290 P. 465, where a trailer containing a vat of hot tar was left "in the street" with the tongue "resting upon a pile of sand in the space between the sidewalk and the curb" (107 Cal. App., at page 198, 290 P. at page 466) and in a position where the trailer might be easily "tipped backwards" (107 Cal.App. at page 199, 290 P. at page 466), thereby spilling the hot tar. The judgment for plaintiff was properly affirmed, as the equipment obviously "provided an uncommon danger." 107 Cal.App. at page 202, 290 P. at page 467.

The Cahill cases cited by the majority (Cahill v. E. B. & A. L. Stone & Co., 153 Cal. 571, 96 P. 84, 19 L.R.A.,N.S., 1094, and Cahill v. E. B. & A. L. Stone Co., 167 Cal. 126, 138 P. 712) also involved an accident which occurred upon the street, rather than upon private premises. The defendant left a push-car heavily loaded with steel rails on a track in the street, where there was a slight grade, "unguarded by any person, uninclosed, unlocked, and unfastened, without any brake or device for stopping it when started." 153 Cal. 572, 96 P. 85. The judgment imposing liability there was properly affirmed upon the analogy to the "turntable cases" (153 Cal. 573, 96 P. 85; 167 Cal. 136, 138 P. 716), which cases obviously present something other than a risk which is "common and obvious."

The case of Edler v. Sepulveda Park Apartments, 141 Cal.App.2d 675, 297 P.2d 508, cited in the majority opinion, is not in point, as plaintiff's parents were tenants in one of defendant's 60 apartments; and plaintiff was injured by falling in a hole dug by defendant in the lawn surrounding the apartments where the children were accustomed to play. Thus, the child was not a trespasser.

The case of Long v. Standard Oil Co., 92 Cal.App.2d 455, 207 P.2d 837, also cited by the majority, was discussed to some extent in my dissent in the Reynolds case. Reynolds v. Willson, supra, 51 Cal.2d 94, 331 P.2d 48. It should be added, however, that the court there declared that "The instructions drew a proper distinction between conditions which are open and obvious and those that are concealed or hidden." 92 Cal.App.2d at page 463, 207 P.2d at page 842.

Thus, with the possible exception to be hereinafter noted, none of the cases cited in the majority opinion or in the briefs sustain the reasoning employed by the majority here or the reasoning employed by the majority in the Reynolds and the Courtell cases with respect to the fundamental question involved. The exception above mentioned is the case of Copfer v. Golden, 135 Cal.App.2d 623, 288 P.2d 90. That case was relied upon by the respondent, the trial court, and the District Court of Appeal in the Reynolds case. See Reynolds v. Willson, Cal.App., 308 P.2d 464. Similar reliance was placed upon the Copfer case here. See Garcia v. Soogian, Cal. App., 319 P.2d 742. In my opinion, the Copfer case and its erroneous interpretation of section 339 of the Restatement of Torts should be disapproved. See dissenting opinion in Reynolds v. Willson, supra, 51 Cal.2d 94, 331 P.2d 48. The Copfer case cannot be reconciled with the "former cases," and it certainly cannot be reconciled with the majority's reversal in this case. Nevertheless, no mention whatever has been made of the Copfer case in the majority opinion here or in the majority opinions in the Reynolds or Courtell cases. In the absence of any mention of the Copfer case or of any adequate discussion of the "former cases," it therefore becomes difficult, if not impossible, to determine the full implication of any of these recent majority opinions. Hence, the bench and bar will still be required to speculate upon at least two important questions. First, is the majority impliedly approving or, on the other hand, "disapproving the former cases," as advocated by the dissenting Justices in Knight v. Kaiser Co., supra, 48 Cal.2d 778, 785, 312 P.2d 1089, 1097? Second, is the majority impliedly approving or disapproving the decision in Copfer v. Golden, supra, 135 Cal.App.2d 623, 288 P.2d 90, and its erroneous interpretation of section 339 of the Restatement of Torts?

The confusion which is following in the wake of the Copfer case is again illustrated by the decision of the trial court here. Apparently following the holding and accepting some of the reasoning of that case, the trial court made only a finding of "a reasonable risk" rather than "an unreasonable risk" of harm, as required by section 339. Similar confusion will inevitably continue until such time as the majority may clarify the situation by expressly disapproving the Copfer case and by reaffirming the well-considered rules established by Knight v. Kaiser Co., supra, 48 Cal.2d 778, 312 P.2d 1089, and the long line of "former cases" upon which it was based. But regardless of whether the majority may see fit to approve or disapprove the Copfer case, or to approve or disapprove the "former cases" as well as Knight v. Kaiser Co., supra, the position of the majority should be made clear. The existing chaos will only be perpetuated by continuing to quote section 339 of the Restatement of Torts without adequately discussing its relation to the "former cases," and then resting upon the truism that "recovery is granted or denied depending on the facts of each case." Reynolds v. Willson, supra, 51 Cal.2d 94, 331 P.2d 48, 60. Just as the conflict between the two divergent lines of cases and the conflict between the varying constructions placed upon section 339 become more apparent with the filing of each decision, so the duty of this court to resolve those conflicts becomes more imperative. Clarification could be easily accomplished by frankly recognizing the conflict and by meeting the issue squarely; but until that is done, the bench and bar will be compelled to journey on insecure footing over uncertain legal ground in a perplexing situation similar to that described by Justice Learned Hand when he said: "It is quite impossible to establish any rule from the decided cases; we must step from tuft to tuft across the morass." Hutchinson v. Chase & Gilbert, 2 Cir., 45 F.2d 139, 142.

For the reasons stated, and for the added reason that there is no suggestion that any further evidence could be adduced which would justify the imposition of liability upon the defendants, I would reverse the judgment with directions to the trial court to enter judgment in favor of the defendants.

SCHAUER and McCOMB, JJ., concur.

52 Cal.2d 55

TEXAS COMPANY (a Corporation), Appellant,
v.
COUNTY OF LOS ANGELES et al., Respondents.

FORSTER SHIPBUILDING CO., Inc. (a Corporation), et al., Appellants,
v.
COUNTY OF LOS ANGELES et al., Respondents.

L. A. 24968, 25102.

Supreme Court of California,
In Bank.

April 24, 1959.

Rehearing Denied May 20, 1959.

Actions by corporate lessees of tax exempt land owned by city to recover property taxes on corporations' possessory interests in the tax-exempt land. The Superior Court, Los Angeles County, H. Eugene Breitenbach and John F. Aiso, JJ., entered judgment for city and county, and corporations appealed. The Supreme Court, Traynor, J., held that value of corporations' possessory interests in the tax-exempt land for property tax purposes was, under capitalization of income method of valuation, present worth of use of land for unexpired term of leases, not such worth less present worth of rentals to become due.

Judgments affirmed.

McComb, J., dissented.

Opinion, 333 P.2d 97, vacated.

1. Taxation 🔑348

In regard to the legislative standard of value as "full cash value", it is clear that whatever may be rationale of property tax, it is not profitableness of the property to its present owner. West's Ann.Const. art. 11, § 12; West's Ann.Rev. & Tax.Code, §§ 110, 401.

2. Taxation 🔑348

Taxation of property at its value without regard to owner's equity therein is an established principle of ad valorem taxation, and therefore a conditional vendee or a mortgagor is taxable to full value of the property as its owner, even though he can realize little or nothing by its sale. West's Ann.Const. art. 11, § 12; West's Ann. Rev. & Tax.Code, §§ 110, 401.

3. Taxation 🔑80

City, in leasing its land, creates valuable privately-held possessory interests which should carry their share of tax burden, just as lessees of private property do through increased rents. West's Ann. Const. art. 11, § 12; art. 13, § 1; West's Ann.Rev. & Tax.Code, §§ 110, 401.

4. Taxation 🔑217, 348

Where city leases its land, only value of the use for unexpired term of lease is that which is assessed for ad valorem taxation, and city retains its tax exemption as to reversion. West's Ann.Const. art. 11, § 12; art. 13, § 1; West's Ann.Rev. & Tax.Code, §§ 110, 401.

5. Taxation ⚷348

Where city leased its tax-exempt lands to private corporation, value of the corporations' possessory interests in tax-exempt land for property tax purposes was, under capitalization of income method of valuation, present worth of use of land for unexpired term of leases, not such worth less present worth of rentals to become due. West's Ann.Rev. & Tax. Code, §§ 110, 401; West's Ann.Const. art. 11, § 12; art. 13, § 1.

6. Constitutional Law ⚷92

Those who acquire property or make contracts in reliance on existing tax laws may be disappointed in their economic expectations when such laws are changed, but acquire no vested right that such changes shall not be made.

7. Constitutional Law ⚷92

Legislature has full freedom, within constitutional limits, to change taxes on existing interests, and therefore taxes on existing interests are not immutable, and an erroneous interpretation of a tax statute cannot be more immutable than the statute itself.

8. States ⚷119

Revenue and Taxation Code provision that full cash value of possessory interest arising from lease of exempt property is the excess, if any, of value of lease on open market over present worth of rentals under lease for unexpired term of lease could not be given retrospective effect as to property taxes which became due before provision became effective, since to do so would authorize an unconstitutional gift of public funds. West's Ann.Rev. & Tax.Code, § 107.1; West's Ann.Const. art. 4, § 31.

◆

J. A. Tucker, C. L. Mead, Jr., R. K. Barrows, Holbrook, Tarr & O'Neill, W. Sumner Holbrook, Jr., and Francis H. O'Neill, Los Angeles, for appellants.

J. Kerwin Rooney, Port Atty., Oakland, and Robert G. Cockins, City Atty., Santa Monica, amici curiae on behalf of appellants.

Harold W. Kennedy, County Counsel, Los Angeles, and Alfred Charles DeFlon, Deputy County Counsel, Hollywood, for respondents.

Stanley Mosk, Atty. Gen., James E. Sabine, Asst. Atty. Gen., Ernest P. Goodman, Deputy Atty. Gen., Felix S. Wahrhaftig, Sacramento, Albert E. Weller, County Counsel, J. B. Lawrence, Deputy County Counsel, San Bernardino, James Don Keller, Dist. Atty. and County Counsel, San Diego, Carroll H. Smith, Deputy County Counsel, San Diego, Roy A. Gustafson, Dist. Atty., Ventura, Joel E. Ogle, County Counsel, Orange, Stephen K. Tamura, Asst. County Counsel, Santa Ana, and Mandle Rottman, Los Angeles, amici curiae on behalf of respondents.

TRAYNOR, Justice.

Plaintiffs brought these actions to recover taxes for the years 1956 and 1957 on possessory interests in tax-exempt lands owned by the City of Los Angeles. Judgments for defendants were entered after their demurrers were sustained, and plaintiffs appeal.

The basic issue presented is whether the value of a possessory interest in tax-exempt land under the capitalization of income method of valuation is the present worth of the use of the land for the unexpired term of the lease or that worth less the present worth of rentals to become due.

Plaintiffs contend that the county board of equalization erred in sustaining assessments based on the present worth of the use of the land for the unexpired term of the lease. They point out that the "full cash value" standard of assessment (Const. art. XI, § 12; Rev. & Tax.Code, § 401), is defined as "the amount at which property would be taken in payment of a just debt from a solvent debtor" (Rev. & Tax. Code, § 110), or "the price it would bring if offered on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other" (DeLuz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 563, 290 P.2d 544, 554), and that a prospective assignee of the lease would pay only the difference between the value of the use he would receive and the rental obligation he would assume. Accordingly, they conclude that it is that difference or bonus value, if any, that is the taxable value of the leasehold.

Plaintiffs would also arrive at the same valuation for the leasehold by deducting the value of the claimed interests of the lessor in the land from the value of the fee. Thus, the value of the fee is taken as the present worth of the use of the land in perpetuity. The lessor retains the present value of the use of the reversion plus the present value of the rents reserved. If the present value of the rents reserved is equal to the present value of the use for the unexpired term of the lease, the lessor's interest would be equal to the fee value and the lessee's interest would be valueless. Plaintiffs conclude that under either of these approaches a possessory interest has value only if the value of the use of the land exceeds the rent payable under the lease.

Defendants contend that the taxable interest is the right to possession and use of the land for the unexpired term of the lease and that its value is not lessened by the amount the lessee has agreed to pay for it. They contend that there is no distinction for tax purposes between granting the possession and use in perpetuity by a sale of the fee and granting them for a limited period by a lease, that in neither case may the cost of the interest granted be deducted from its value. In the case of a lease, they would divide the total value of the fee as determined by its use according to the value of the uses for the respective periods involved. Thus the value of the lessee's interest would be determined by the present value of the use for the period of the lease and the value of the lessor's interest by the present value of the use thereafter. Together they would equal the present value of the use in perpetuity, or fee value. They conclude that the lessor's right to receive rent is not an interest in the land that must be deducted to determine the value of the lessee's interest but only the price the lessee must pay for it.

DeLuz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 290 P.2d 544; Fairfield Gardens v. County of Solano, 45 Cal.2d 575, 290 P.2d 562; Victor Valley Housing Corp. v. County of San Bernardino, 45 Cal.2d 580, 290 P.2d 565, and El Toro Dev. Co. v. County of Orange, 45 Cal.2d 586, 290 P.2d 569, fully support defendants' contentions. Those cases all involved the valuation of long-term possessory interests in federally owned property by the capitalization of income method. Relying on Blinn Lbr. Co. v. County of Los Angeles, 216 Cal. 474, 14 P.2d 512, 84 A.L.R. 1304, and Hammond Lbr. Co. v. County of Los Angeles, 104 Cal.App. 235, 285 P. 896, the taxpayers contended that deductions from expected gross income should be made both for rent and amortization of the costs of improvements that became the property of the lessor and would revert to it on the termination of the lease. Although the assessors had allowed deductions for the nominal ground rentals of $100 per year applicable to each leasehold, they had denied deductions for amortization. We concluded, however, that no distinction could be made between rent and the cost of improvements that revert to the lessor, for both were part of the purchase price of the leasehold, and held that no deduction could be made for that purchase price. We disapproved statements to the contrary in the Blinn case and pointed out that the assessor's allowance of a deduction for rent in the Hammond case did not control that decision. DeLuz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 567, 570, 290 P.2d 544.

Plaintiffs contend, however, that in the DeLuz case and its companion cases the court was concerned only with deductions for rent paid in the past, not rent to become due in the future. There is no merit in this contention. We were concerned with deductions from *expected* gross income, deductions that would necessarily be made, if allowed, against income to accrue in the future. Obviously only future rent could be relevant in this context. Thus, in Fairfield Gardens v. County of Solano, 45 Cal.2d 575, 578–579, 290 P.2d 562, 564, we stated: "The method used by the assessor in the present case is similar to that approved in DeLuz, but we must disapprove it to the extent that it deducts rent paid by Fairfield to the government from anticipated annual gross income. The rent that a leasehold would command on an open market under conditions in which neither buyer nor seller could take advantage of the exigencies of the other is based on expected future net income from the leasehold without regard to the rent presently paid by the lessee, and therefore such rent is not deducted in estimating the earning power of the leasehold. The assessment of the possessory interest of Fairfield for the tax year 1953–1954, however, need not be set aside because of the erroneous deduction of the $200 rent paid to the government [two leaseholds were involved], for although the error was favorable to the taxpayer, the county did not appeal [citations], and, moreover, *de minimus non curat lex*. [Citations.]" Since the deduction involved had been made from "anticipated annual gross income," it is clear that the $200 rent referred to was not a single payment made in the past but the obligation to pay $200 each year in the future pursuant to the terms of the existing leases.

[1] A leasehold is not less valuable because it has not been paid for in advance, and to draw a distinction between rent paid and rent to be paid confuses the equity the lessee has in the leasehold with its value. That equity may arise either from the lessee's prepayment of rent or from an excess of the value of the use over the future rent agreed to be paid for it. It may not exist at all. In any event it is of no moment to a prospective purchaser interested only in the value of the use and possession of the property for the unexpired term of the lease. Such a purchaser will pay for that interest what it is worth, and since it belongs to the lessee, it is taxable to him at that value whether or not he has assumed rental or other obligations that will prevent his realizing any return to himself. "The present owner may have invested well or poorly, may have contracted to pay very high or very low rent, and may have built expensive improvements or none at all. To value the property by capitalizing his anticipated net earnings would make the value of property equal to the present value of his profits, since, however, the legislative standard of value is 'full cash value', it is clear that whatever may be the rationale of the property tax, it is not the profitableness of property to its present owner. If a purchaser would buy a given property on an open market, the property has a value equal to the price such purchaser might be expected to pay." DeLuz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 566, 290 P.2d 544, 557.

[2] Taxation of property at its value without regard to the owner's equity therein is an established principle of ad valorem taxation. Thus, a conditional vendee or a mortgagor is taxable at the full value of property as its owner even though he could realize little or nothing by its sale. S. R. A., Inc. v. Minnesota, 327 U.S. 558, 569–570, 66 S.Ct. 749, 90 L.Ed. 851; Eisley v. Mohan, 31 Cal.2d 637, 643, 192 P.2d 5; DeLuz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 573, 290 P.2d 562. The continued enjoyment of the benefits of ownership of the fee or a possessory interest is dependent on discharging the obligations assumed to secure such benefits, and there is no logical basis for treating those obligations differently as they happen to run to a lessor, a conditional vendor, or a mortgagee.

The distinction between the value of the lessee's possessory interest and his equity therein demonstrates why the value of that interest is not the same as the damages the lessee would receive if it were taken by eminent domain. In eminent domain the full value of the interest must be paid for, but since the taking discharges the obligation to pay future rent, the value of that obligation to the lessor must be awarded to him. City of Pasadena v. Porter, 201 Cal. 381, 387, 257 P. 526, 53 A.L.R. 679. Although the lessee is awarded damages equal only to the value of his equity, he receives the full value of his possessory interest, for his obligation to pay rent is discharged.

It would be anomalous to hold that a possessory interest has no value merely because the lessee has agreed to pay what it is worth. As we pointed out in the DeLuz case, the value of a long-term possessory interest may approach the value of the fee (45 Cal.2d at page 570, 290 P.2d 562), and even in the case of land that does not depreciate in value, the present value of a reversion that cannot be enjoyed for many years may be small compared to the present value of the use in the interim. Thus, the value of the right to use the land in perpetuity may be little greater than the value of the right to use it for the duration of a long-term lease, and in such a case a purchaser of the fee of unleased land would pay or agree to pay little more than a lessee would for a long-term lease. We would trifle with reality to hold that nevertheless the lessee received nothing of value whereas the purchaser received the full value of the fee.

Plaintiffs contend, however, that unless rent is deducted in computing the net income for valuation purposes, an unconstitutional tax on the city's tax-exempt interest will be imposed. Const. art. XIII, § 1. They point out that the land is tax exempt regardless of how it is used and that therefore the city's exemption is not lost because it uses its land by leasing it to private parties. If its lessees, however, unlike lessees of privately-owned land, must pay taxes on their possessory interests in addition to rent equal to the full rental value, the city will necessarily have to reduce its rents by the amount of such taxes to compete with private lessors. Accordingly, plaintiffs conclude that to value leaseholds without making a deduction for rent will result in imposing a tax on the city's right to use its land by leasing it.

[3-5] When the city leases its land, however, it does not merely use it. It creates valuable privately-held possessory interests, and there is no reason why the owners of such interests should not pay taxes on them just as lessees of private property do through increased rents. Their use is not public, but private, and as such should carry its share of the tax burden. Moreover, the city does not lose its tax exemption by leasing its land. The reversion is not taxed, for it is only the value of the use for the unexpired term of the lease that is assessed. Thus, whereas lessees of private property indirectly pay taxes through increased rent on the full value of the land including the lessor's reversion, the city's lessees pay taxes only on the value of the possessory interests granted to them by the city. The city retains the full benefit of its tax exemption on the interest it has retained. The city is not afforded a competitive advantage over private owners when it sells the fee, for the land is taxable to its new private owner whatever its source. Similarly, the city is not entitled to a competitive advantage over private lessors when it sells lesser interests carved out of the public domain. Of course the city would be able to charge higher rents if it could extend the mantle of its tax exemption over the private interests it creates in its lands, but since it is only its own property that is tax exempt, it is not entitled to that advantage. Since the tax is on the private interest alone, it is immaterial that the denial of that competitive advantage might be an economic burden on the city. General Dynamics Corp. v. County of L. A., 51 Cal.2d 59, 330 P.2d 794, and cases cited.

Plaintiffs contend that since the DeLuz case overruled the Blinn case, it should be given prospective effect only and should not be applied in valuing leaseholds created before it was decided. They rely on County of Los Angeles v. Faus, 48 Cal.2d 672, 681, 312 P.2d 680, 686, decided after the DeLuz case, in which the court stated that "where a constitutional provision or statute has received a given construction by a court of last resort and contracts have been made or property rights acquired under and in accordance with its decision, such contracts will not be invalidated nor will vested rights acquired under the decision be impaired by a change of construction adopted in a subsequent decision. Under those circumstances it has been the rule to give prospective, and not retrospective, effect to the later decision."

[6, 7] The rule of the Faus case is not applicable here, for recognition of the correct rule of valuation of possessory interests for tax purposes neither invalidates the leases nor impairs vested rights. Thus we did not apply the Faus rule in the DeLuz case, although it had been recognized in earlier cases. See People v. Ryan, 152 Cal. 364, 369, 92 P. 853; People v. Maughs, 149 Cal. 253, 263, 86 P. 187. Moreover, in these cases the taxes did not become due before the DeLuz case was decided, defendants are not seeking to collect additional taxes for years prior to that decision, and there is no machinery by which they could do so. The assessor has applied the DeLuz rule in these cases only to taxes on existing interests falling due after the date of that decision. In no proper sense may such application be considered retroactive. Although those who acquire property or make contracts in reliance of the existing tax laws may be disappointed in their economic expectations when those laws are changed, they acquire no vested right that such changes shall not be made. Taxes on existing interests are not immutable, for within constitutional limits the Legislature has full freedom to change them. Surely an erroneous interpretation of a tax statute cannot be more immutable than the statute itself, and if the court failed to give effect to the correction of its own error, it would defeat the legislative purpose not only as to the past but for the indefinite future.

Cases cited by plaintiffs giving prospective effect to tax decisions are fully in accord with our conclusion herein. Although in some of them the court applied the new rule only to taxes falling due after the date of the decision (Button v. Drake, 302 Ky. 517, 195 S.W.2d 66, 70, 167 A.L.R. 1046; German Gymastic Ass'n v. City of Louisville, 306 Ky. 810, 209 S.W.2d 75, 76; Oklahoma County v. Queen City Lodge No. 197, I.O.O.F., 195 Okl. 131, 156 P.2d 340, 358; Board of Equalization v. Tulsa Pythian, etc., 195 Okl. 458, 158 P.2d 904, 906; Mercantile Nat. Bank v. Lander, 6 Cir., 109 F. 21, 25–26; Libby, McNeill & Libby v. Wisconsin Dept. of Tax, 260 Wis. 551, 51 N.W.2d 796, 799–800; Arizona State Tax Commission v. Ensign, 75 Ariz. 376, 257 P.2d 392, 393; Franklin County Court v. Louisville & Nash. R. R. Co., 84 Ky. 59, 64–65), in others the court applied the new rule to determine the tax liability then in litigation but pointed out that it would not apply to taxpayers whose past liability had been determined without litigation in reliance on the overruled decision. Duhame v. State Tax Commission, 65 Ariz. 268, 179 P.2d 252, 259–260, 261–262, 171 A.L.R. 684; Yarbrough v. Oklahoma Tax Commission, 200 Okl. 402, 193 P.2d 1017, 1021; see also, Swank v. Tyndall, 226 Ind. 204, 78 N.E.2d 535, 543. In none of the cases does it appear that the new rule was not to apply to taxes thereafter falling due on existing property, and in several it appears expressly that it was. German Gymastic Ass'n v. City of Louisville, 306 Ky. 810, 209 S.W.2d 75, 76; Oklahoma County v. Queen City Lodge No. 197, I.O.O.F., 195 Okl. 131, 156 P.2d 340, 358; Board of Equalization v. Tulsa Pythian, etc., 195 Okl. 458, 158 P.2d 904, 906.

In 1957 the Legislature added section 107.1[1] to the Revenue and Taxation Code. It provides that the "full cash value" of possessory interests created before the decision in the DeLuz case shall be determined by the formula adopted in that case less "the present worth of the rentals under said lease for the unexpired term thereof." Although the taxes involved in these cases became due before the effective date of section 107.1, plaintiffs contend that the section constitutes curative legislation and should therefore be given retrospective effect. Defendants contend that the section is unconstitutional and that, in any event, it cannot be given retrospective effect.

[8] The constitutionality of section 107.1 is directly involved in a case now pending in the District Court of Appeal, Second Appellate District. For the purposes of the present case we may assume without deciding that the statute is constitutional. Since the taxes became due before the section became effective, it cannot be given retrospective effect, for to do so would authorize an unconstitutional gift of public funds. Const. art. IV, § 31; In re Estate of Skinker, 47 Cal.2d 290, 296, 303 P.2d 745, 62 A.L.R.2d 1137; In re Estate of Potter, 188 Cal. 55, 60, 204 P. 826; In re Estate of Rossi, 169 Cal. 148, 149, 146 P. 430; In re Estate of Martin, 153 Cal. 225, 228, 94 P. 1053; Trippet v. State, 149 Cal. 521, 528, 86 P. 1084, 8 L.R.A.,N.S., 1210; In re Estate of Stanford, 126 Cal. 112, 118–121, 54 P. 259, 58 P. 462, 45 L.R.A. 788; Doctors General Hospital v. County of Santa Clara, 150 Cal.App.2d 53, 55–57, 309 P.2d 501. Allen v. Franchise Tax Board, 39 Cal.2d 109, 245 P.2d 297, and Gartner v. Roth, 26 Cal.2d 184, 157 P.2d 361, are not to the contrary. The Allen case involved a change in the income tax law that became effective before the state's right to the tax vested, and the Gartner case involved not a change in tax liability but a change in the law governing the right to redeem property deeded to the state for nonpayment of taxes.

The judgments are affirmed.

GIBSON, C. J., and SHENK, SPENCE and PETERS, JJ., concur.

McCOMB, Justice.

I dissent. I would reverse the judgments for the reasons stated by Mr. Justice Ashburn in the opinion prepared by him for the District Court of Appeal in Texas Co. v. County of Los Angeles and Forster Shipbuilding Co. v. County of Los Angeles, 166 Cal.App.2d ——, 333 P.2d 97.

Rehearing denied; McCOMB, J., dissenting.

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[1] Section 107.1 of the Revenue and Taxation Code provides:

"A possessory interest, when arising out of a lease of exempt property, consists of the lessee's interest under such lease and is hereby declared to be personal property within the meaning of Section 14 of Article XIII of the Constitution of the State of California.

"The full cash value of such possessory interest is the excess, if any, of the value of the lease on the open market, as determined by the formula contained in the case of DeLuz Homes, Inc. v. County of San Diego (1955), 45 Cal.2d 546 [290 P.2d 544], over the present worth of the rentals under said lease for the unexpired term thereof.

"A possessory interest taxable under the provisions of this section shall be assessed to the lessee on the same basis or percentage of valuation employed as to other tangible property on the same roll.

"This section applies only to possessory interests created prior to the date on which the decision of the California Supreme Court in DeLuz Homes, Inc. v. County of San Diego (1955), 45 Cal.2d 546 [290 P.2d 544], became final. It does not, however, apply to any of such interests created prior to that date that thereafter have been, or may hereafter be, extended or renewed, irrespective of whether the renewal or extension is provided for in the instrument creating the interest.

"This section does not apply to leasehold estates for the production of gas, petroleum and other hydrocarbon substances from beneath the surface of the earth, and other rights relating to such substances which constitute incorporeal hereditaments or profits a prendre."

52 Cal.2d 99

Harold D. CORNELL, Petitioner,

v.

SUPERIOR COURT of the State of California, In and For the COUNTY OF SAN DIEGO, Respondent.

L. A. 25328.

Supreme Court of California,
In Bank.
May 5, 1959.

Proceeding on petition for mandamus to compel superior court to permit counsel to examine with aid of hypnotist accused who was in jail awaiting trial for murder. The Supreme Court, Peters, J., held that where accused could not remember his whereabouts or activities at critical time because of intoxication, shock, or otherwise, and had agreed to submit to examination by counsel with aid of skilled and experienced hypnotist who would try to induce memory recall through hypnosis, and trial court refused to permit examination, trial court abused its discretion, and mandamus was proper remedy to correct situation.

Writ of mandamus issued with instructions.

1. Criminal Law 🔑641(1)

Where accused was confined in jail awaiting trial for murder, could not remember his whereabouts or activities at critical time because of intoxication, shock, or otherwise, and had agreed to submit to examination by counsel with aid of skilled and experienced hypnotist who would try to induce memory recall through hypnosis, counsel was entitled to conduct the examination. West's Ann.Const. art. 1, § 13.

2. Criminal Law 🔑641(1)

Defendant's constitutional right to counsel includes right to consult with counsel before trial in order that accused and attorney may present proper defense. West's Ann.Const. art. 1, § 13.

3. Criminal Law 🔑641(1)

Defendant's constitutional right to counsel is not limited simply to meetings between accused and counsel, but if necessary, third persons may accompany counsel during counsel's consultations with accused. Wests' Ann.Const. art. 1, § 13.

4. Criminal Law 🔑641(1)

Under constitutional provision granting defendant right to counsel, there is no substantial legal difference between right to use hypnotist in attempt to probe accused's subconscious recollection and right to use psychiatrist to determine accused's sanity. West's Ann.Const. art. 1, § 13.

5. Criminal Law 🔑641(1)

Where accused who was confined in jail awaiting trial for murder, could not remember his whereabouts or activities at critical time because of intoxication, shock, or otherwise, and had agreed to submit to examination by counsel with aid of skilled and experienced hypnotist who would try to induce memory recall through hypnosis, right of accused's attorney to conduct examination could not be limited, in absence of waiver by accused, to require examination to be conducted in sheriff's interrogation room under surveillance of officers from county sheriff's office. West's Ann. Const. art. 1, § 13.

6. Criminal Law 🔑641(1)

Right to consultation with counsel means right of private consultation without presence of law enforcement officers. West's Ann.Const. art. 1, § 13.

7. Criminal Law 🔑641(1)
Mandamus 🔑61

Where accused who was confined in jail awaiting trial for murder, could not remember his whereabouts or activities at critical time because of intoxication, shock, or otherwise, and had agreed to submit to examination by counsel with aid of skilled and experienced hypnotist who would try to induce memory recall through hypnosis, and trial court refused to permit examination, trial court abused its discretion, and mandamus was proper remedy to correct situation. West's Ann.Const. art. 1, § 13.

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Harold D. Cornell, San Diego, in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., James Don Keller, Dist. Atty., San Diego, and William H. Low, Deputy Dist. Atty., for respondent.

PETERS, Justice.

Harold D. Cornell, attorney for Paul Le Claire Conrey, by this petition for mandamus, seeks to compel the San Diego Superior Court to permit him to examine his client with the aid of a hypnotist. Cornell requested the sheriff to permit him and the hypnotist to examine Conrey in available accommodations in the county jail. The sheriff refused. The Superior Court of the county denied a motion to compel the sheriff to grant the request. This mandamus proceeding was then instituted.

Cornell contends that the lower court's refusal to grant the requested order was an abuse of discretion, and violated Conrey's constitutional right to consult with his counsel in preparation of his defense. These contentions are meritorious.

The record shows that Conrey is presently in the county jail charged with a murder which he is alleged to have committed on the night of October 1, 1958, or in the early morning of the next day.

Cornell avers that he has made a diligent effort to examine his client; that he believes that Conrey is anxious to assist him in the defense of the case but because of "intoxication, shock, or otherwise" is unable to remember his whereabouts and activities during the critical time involved; that Cornell has been able to ascertain only that Conrey was wandering from bar to bar in an intoxicated condition during the time the alleged crime was committed; that Cornell has made an independent investigation of Conrey's whereabouts and activities during this period without satisfactory results.

It is next averred that Cornell has been advised that recall of memory lost through intoxication, shock or passage of time may sometimes be induced by hypnosis, and that Cornell has observed one Richard N. Mikesell, a skilled and experienced hypnotist, successfully induce memory recall through hypnosis. Petitioner seeks to have Mikesell place Conrey under hypnosis for the purpose of trying to recall Conrey's memories of the time involved. Cornell avers that he believes this proposed hypnotic examination is essential to the proper preparation of a defense to the charge. Conrey has agreed to submit himself to such examination.

Mikesell avers that he is a practicing demonstrator and teacher of the art of hypnotism and that he has been engaged in such activity for the past fourteen years; that he has had a "great deal of success" with hypnotic "recession recall wherein the subject is unable to recall memories by reason of shock, amnesia, intoxication or the passage of time by voluntary recall and that under hypnotic influence recall of memories is induced and the subject is able to relate in detail incidents and activities which he was unable to recall voluntarily * * *"; that he is of the opinion that defendant Conrey would prove a responsive subject to hypnotic influence and that such "recession recall under hypnosis appears to promise the revelation of much information which Mr. Cornell desires."

As already pointed out, the sheriff refused to permit the proposed examination, and the trial court denied Cornell's motion for an order directing the sheriff to grant the request. This mandamus proceeding was then instituted.

Respondent argues that the writ should not issue for the reason that such an examination could be of no assistance to petitioner or to his client because any statements made by Conrey during such an examination would not be admissible at the trial. Such cases as People v. Ebanks, 117 Cal. 652, 49 P. 1049, 40 L.R.A. 269, upholding the trial court's refusal to admit statements made by a defendant while hypnotized; People v. Jones, 42 Cal.2d 219, 266 P.2d 38, and People v. McNichol, 100 Cal.App.2d 554, 224 P.2d 21, involving the admissibility of evidence gained by use of a so-called truth serum; and People v. Wochnick, 98 Cal.App.2d 124, 219 P.2d 70; People v. Porter, 99 Cal.App.2d 506, 222

P.2d 151; People v. Carter, 48 Cal.2d 737, 312 P.2d 665; People v. Schiers, 160 Cal. App.2d 364, 324 P.2d 981, 329 P.2d 1, involving admissibility of statements secured during lie detector tests, are cited.

[1, 2] These cases have no application to the problem here presented. They all deal with the admissibility of evidence. Admissibility of any evidence that may be secured during such an examination is not the question here presented. Cornell is now seeking to learn facts that may be of assistance in preparing for the defense of the crime charged. He wants to ascertain, if possible, the accused's whereabouts on the night in question. His hope, of course, is that he may learn of a bona fide alibi. Whether the evidence so secured would or would not be admissible is a false factor. Obviously, it is reasonably possible that evidence so secured, whether or not it is admissible, may put Cornell in possession of facts which, when followed up, would result in the discovery of admissible evidence that might constitute a complete defense to the charge. This being so, Cornell, with the consent of his client, is entitled to conduct the proposed examination. Article I, Section 13 of the Constitution confers upon a defendant the right to counsel. In re Levi, 39 Cal.2d 41, 244 P.2d 403; In re Roberts, 40 Cal.2d 745, 255 P.2d 782. This right includes the right of the accused to consult with his counsel before trial in order that the accused and his attorney may present a proper defense. Powell v. State of Alabama, 287 U.S. 45, 53 S.Ct. 55, 77 L.Ed. 158; People v. Sarazzawski, 27 Cal. 2d 7, 161 P.2d 934; People v. Boyden, 116 Cal.App.2d 278, 253 P.2d 773; People v. Mattson, 51 Cal.2d 777, 336 P.2d 937. Without such a privilege the constitutional right to counsel would be a sham. If the attorney is not given a reasonable opportunity to ascertain the facts surrounding the charged crime so he can prepare a proper defense, the accused's basic right to effective representation would be denied. People v. Chesser, 29 Cal.2d 815, 178 P.2d 761; In re Ochse, 38 Cal.2d 230, 238 P.2d 561.

[3] The basic right involved is not limited simply to meetings between the client and his counsel. If necessary, third persons may accompany counsel during his consultations with his client. Thus, where an interpreter is needed so that the two may communicate, he may be present at such interviews. People v. Larrios, 220 Cal. 236, 30 P.2d 404. It has also been held that the attorney may be accompanied by a psychiatrist during such consultations where a possible issue of sanity may be involved. In re Ochse, 38 Cal.2d 230, 238 P.2d 561. In that case, at page 231 of 38 Cal.2d, at page 561 of 238 P.2d, it is stated: "A fundamental part of the constitutional right of an accused to be represented by counsel is that his attorney must be afforded reasonable opportunity to prepare for trial. [Citing cases.] To make that right effective, counsel is obviously entitled to the aid of such expert assistance as he may need in determining the sanity of his client and in preparing the defense. (Cf. Pen.Code, § 1027.)"

[4] The use of hypnotism for the purpose desired is recognized by medical authorities. Encyclopedia Britannica, 1954 Edition, Vol. 12, pp. 22–24. This being so, the rationale of the Ochse case is applicable. There is no substantial legal difference between the right to use a hypnotist in an attempt to probe into the client's subconscious recollection, and the use of a psychiatrist to determine sanity.

[5, 6] In the request filed in the Superior Court, Cornell prayed that the requested examination be conducted in the sheriff's interrogation room "under the surveillance of officers from the San Diego County Sheriff's Office." The petition for the present writ does not so limit the request. In the absence of a waiver by the client, such limitation is not proper. The right to consultation with counsel means the right of private consultation without the presence of law enforcement officers. In re Ochse, 38 Cal.2d 230, 238 P.2d 561; In re Qualls, 58 Cal.App.2d 330, 136 P.2d 341; In re Snyder, 62 Cal.App. 697, 217 P. 777; see Notes 23 A.L.R. 1382;

54 A.L.R. 1225; see cases collected 14 Cal. Jur.2d 398, § 163.

[7] For the foregoing reasons, it must be held that, as a matter of law, the trial court abused its discretion in refusing to permit the requested examination. Mandamus is the proper remedy to correct the situation. Sharff v. Superior Court, 44 Cal.2d 508, 282 P.2d 896.

It is ordered that the writ of mandamus issue requiring the trial court to issue an order to the sheriff permitting the petitioner to examine the accused with the aid of a hypnotist. The order shall further provide that such examination be conducted in private unless the accused waives that right.

GIBSON, C. J., and SHENK, TRAYNOR, SCHAUER, SPENCE and McCOMB, JJ., concur.

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52 Cal.2d 118

Masako GOTO, Appellant,

v.

James GOTO, Respondent.

L.A. 24946, 24947.

Supreme Court of California,
In Bank.
May 8, 1959.

Proceeding on an order to show cause why custody of minor children of divorced parties should not be changed from mother to father. The Superior Court, Los Angeles County, Elmer D. Doyle, J., entered an order awarding custody to father and also entered an order denying attorney's fees on appeal, and appeals were taken by mother. The Supreme Court, Shenk, J., held, inter alia, that trial court, under the circumstances, did not abuse its discretion in changing custody of fourteen-year-old daughter and six-year-old son of the parties from mother to the father.

Orders affirmed.

Opinion, 330 P.2d 863, vacated.

1. Divorce 🔑303(2)

A showing of changed circumstances is required to support an order changing custody between divorced parents.

2. Divorce 🔑296, 312.6(5)

Determination of what is best for the children, as a basis for entry of a custody order in a divorce action, lies in the first instance in the discretion of the court, and upon review that determination will not be set aside without a showing of an abuse of discretion.

3. Divorce 🔑303(3)

In proceeding on an order to show cause why custody of minor children should not be changed to divorced father from mother, trial court, under the circumstances, did not abuse its discretion in changing custody of fourteen-year-old daughter and six-year-old son of the parties from mother to the father.

4. Divorce 🔑226, 312½

In proceeding on motion by mother for attorney's fees and costs on appeal from an order taking custody of minor children of divorced parties from mother and awarding it to father, evidence sustained implied finding that wife was not in necessitous circumstances and that appeal was not taken in good faith.

5. Appeal and Error 🔑1008(3)

Where an issue is submitted on affidavits, scope of review is limited to whether there is sufficient evidence there disclosed to support questioned order.

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Macbeth & Ford, Los Angeles, Malcolm S. Millard, Carmel, James E. Fagan, Scott Raymond and Moira Deirdre Ford, Los Angeles, for appellant.

William H. Neblett, Los Angeles, for respondent.

SHENK, Justice.

These appeals are by the the plaintiff from a part of an order awarding the custody of the minor children of the parties to the defendant and from an order denying attorney's fees on appeal.

The parties married on February 12, 1942. Denise and Hans Goto are the issue of that marriage. On November 3, 1953, they separated and on February 18, 1955, an interlocutory decree of divorce was granted to the plaintiff wife. The decree provided that the plaintiff should have custody of the children then aged 12 and 4. The defendant was given visitation privileges between noon and 7:30 p. m. on alternate Sundays and alternate national holidays. The decree contained provisions for the support of the children. The final decree of divorce, entered April 19, 1956, incorporated the provisions of the interlocutory decree relating to the custody and support of the children. The decree made no provision as to where the plaintiff should reside with the childern. In July 1955 she resigned her position as a physician with the Los Angeles public school department. She then moved to Oakland, California, taking the children with her. Two months after the decree of divorce became final, the plaintiff remarried and moved to Carmel with her new husband, Mr. Miura.

In September 1956 the defendant obtained an order to show cause why the custody of the children should not be changed to himself. The matter was referred to a commissioner who continued the hearing to January 16, 1957, pending the completion of a report by a court investigator. An order was made on October 29 directing that "during the period of continuance the defendant shall be entitled to physical possession of the minor children on the weekend of December 19 to December 27 providing the defendant pays and provides airplane transportation for the minor children from Carmel to Los Angeles and return."

On January 16, 1957, the court ordered: "Custody of the minor children is to remain with plaintiff until the end of the school term, in June, with right of reasonable visitation to the defendant, as heretofore ordered. * * * Further hearing on custody is to be had at a date prior to next September. * * *"

Again the matter came on for hearing on October 28 and 29, 1957. Denise was then 14 years old and Hans was 6 years, ten and one-half months old. The plaintiff, the defendant, and the court investigator testified at this hearing. With the consent of both parties, Hans and Denise were interviewed by the court in chambers, without a reporter, and in the absence of the parties and their counsel. The court, on October 29, 1957, ordered: "After talking with the two minor children of the parties in chambers, the Court makes the following order and findings: The Court finds that both parents are fit and proper persons to have custody of the minor children. The Court further finds that the daughter being over the age of 14 years has expressed a preference to live with the defendant and that both children should remain together under the custody of the same parent. It is therefore ordered that custody of the minor children is awarded to the defendant; the plaintiff may have physical custody of the minor children during the months of July and August of each year, at which time the defendant shall have rights of reasonable visitation. The order for support of the minor children is vacated except for the months of July and August when the children are with the plaintiff at which time the defendant shall pay support to the plaintiff in the same amounts he has been paying. Plaintiff is to have physical custody of the minor children for one-half of the Christmas vacation and one-half of the Easter vacation to alternate each year so that the children will actually be with her on Christmas Day of one year and on Easter of the following year."

The present appeals are from those parts of the order which award the custody of Hans to the defendant and modify the final decree relating to Hans' support and from an order requiring the defendant to pay the plaintiff $100 for attorney's fees and denying the plaintiff's motion for attorney's fees and costs on appeal.

It is the plaintiff's contention that the defendant has failed to show a change of circumstances detrimental to Hans' welfare and that in the absence of such a showing, the order changing Hans' custody must be reversed. Before reviewing the applicable legal principles, the circumstances relating to Hans' custody as it affects his welfare should be considered.

The record shows that two and one-half months after the entry of the interlocutory decree, the plaintiff removed the children from a "fine" home in Los Angeles to a one bedroom apartment in Oakland. The plaintiff notified the defendant by letter of the move and that he could visit the children in Oakland at the times and under the conditions specified in the decree. She stated in her letter that she had moved to take a better job. She testified to the foregoing and also that she had moved to avoid the defendant's harassment and influence upon the children. Her counsel conceded that she had violated the defendant's right of visitation. The plaintiff stated that the children were difficult to control and that it was to their benefit that they move; that during that period while she was at work, Hans' care was entrusted to Denise; that after her remarriage, she worked in the mornings as a civilian physician at Fort Ord and was free in the afternoons to care for the children; that since the separation of the parents, Denise has shown difficulty in adjusting herself to living under her mother's custody; that in 1955 she took Denise to a psychiatrist for counseling. At that time, the plaintiff testified, Denise was "terribly confused." For a time, her interest in other children of her own age increased. Later, her interest waned, and in the words of the plaintiff, Denise became "very defiant" and "hard to handle", showed no interest in keeping her friends in Carmel, and maintained the attitude that she would be satisfied with nothing less than a change of custody. During one period when the children were visiting the defendant in Los Angeles, a private detective was hired to follow the defendant and the children. This caused Hans to become upset and ill. During the period when the children were in the plaintiff's custody, the plaintiff's sister told Denise that her father was a "rat" and that she also was "behaving like a rat." The defendant has offered to provide a new home for the children if the custody is changed to him. The defendant appears to have no disciplinary problems with them. The record shows a deterioration of the relations between the plaintiff and Denise. Hans, apparently, is well disposed toward both parents.

On this record, the trial court impliedly found that the welfare of both children would be best served by a change of custody. From the evidence, it may be inferred that the mother was not capable of exercising the necessary discipline and control over the children; that exposure to further calumny on the part of the plaintiff's sister would estrange them from their natural father; that the relationship between Denise and Hans was very close and that it would be for the benefit of both children that they be not separated. In the exercise of its discretion, the trial court could well conclude that the mother's personality was such that in the maturing of Hans her control over him would weaken, as it had with the elder Denise, and that Hans' best interests would therefore, be best served by placing him under his father's guidance. Without doubt the court properly appreciated that the welfare of the children was of primary concern. At the beginning of the proceedings, the court stated: "That is the question here, what is best for the children * * * It is a matter of what is best for the children now."

[1,2] A showing of changed circumstances is required to support an order changing custody. Holsinger v. Holsinger, 44 Cal.2d 132, 279 P.2d 961; Davis v. Davis, 41 Cal.2d 563, 261 P.2d 729; 2 Armstrong, Family Law, 973ff. The determination of what is best for the children lies in the first instance in the discretion of the court and upon review, that determination will not

be set aside without a showing of an abuse of discretion. "It is the settled rule that, in determining who should have the custody of the minor children of the parties to divorce actions, a very broad discretion is vested in trial courts. It is only when a clear case of abuses of said discretion is made out that this court will interfere with the determination of the trial court on appeal." Prouty v. Prouty, 16 Cal.2d 190, 191, 105 P.2d 295, 296.

This court has declared the so-called "changed circumstance" rule to be subject to exceptions where the welfare of the child requires it. "We do not wish to be understood as holding that 'the change of circumstance' rule is an absolutely ironclad rule, and that there can be no possible exception to it. It is perhaps possible to conceive of a case in which, despite the fact that there was apparently no change of circumstances, nevertheless the welfare of the child might require that the previous order of custody be changed. * * *" Foster v. Foster, 8 Cal.2d 719, 728, 68 P.2d 719, 723.

[3] Section 138 of the Civil Code relied upon by the plaintiff provides: "In awarding the custody the court is to be guided by the following considerations: (1) By what appears to be for the best interest of the child in respect to its temporal and its mental and moral welfare; and if the child is of a sufficient age to form an intelligent preference, the court may consider that preference in determining the question; (2) As between parents adversely claiming the custody, neither parent is entitled to it as of right; but other things being equal, if the child is of tender years, it should be given to the mother; if it is of an age to require education and preparation for labor and business, then to the father." As stated in Fine v. Denny, 111 Cal.App.2d 402, 403, 244 P.2d 983, 984, "In the application of this statutory provision the court has a wide discretion and in determining whether other things are equal the primary consideration is what will promote the best interests of the child." In view of the inferences drawn from the evidence in this case, the claims of both parents are not equal and it was within the discretion of the trial court to change the custody of both children to the defendant.

The second appeal is from an order of the trial court denying attorney's fees and costs on appeal. The motion for attorney's fees was submitted on affidavits of the parties. The defendant's counter affidavit charged that the appeal was not taken in good faith, but for the purpose of embarrassing him and vexatious. The order denying attorney's fees on appeal recites that the motion was denied on the ground that the appeal was not taken in good faith.

[4, 5] From these affidavits it may readily be inferred that the plaintiff wife was not in necessitous circumstances. The plaintiff in her affidavit averred that she was employed part time as a civilian physician at Fort Ord; that her net pay was $249 a month from which she paid annual insurance premiums of approximately $1,100; that she received $800 a year as income from separate property, and that she was chiefly dependent upon her present husband for support. In his counter affidavit the defendant averred that the plaintiff's present husband who is now supporting her earns $12,000 a year. The trial court could have concluded from these affidavits that the plaintiff was well provided for and could have paid attorney's fees and costs from her current earnings. Where an issue is submitted on affidavits, the scope of review is limited to whether there is sufficient evidence there disclosed to support the order. The express and implied findings of fact are sustained by the affidavits and are sufficient to support the order. Murray v. Superior Court, 44 Cal.2d 611, 619, 620, 284 P.2d 1.

The orders are affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER, SPENCE, McCOMB and PETERS, JJ., concur.

170 Cal.App.2d 31

PEOPLE of the State of California, Plaintiff and Respondent,
v.
John W. POSTELL, Defendant and Appellant.
Cr. 6481.

District Court of Appeal, Second District, Division 1, California.
April 29, 1959.

Defendant was convicted of possession of marijuana. The Superior Court, Los Angeles County, Lewis Drucker, J., entered judgment, and defendant appealed. The District Court of Appeal, Lillie, J., held that defendant could not contend, for first time on appeal, that he had been deprived of due process of law by trial court's refusal to permit cross-examination of police officer concerning general description of the informant, in absence of showing in record that name of informant had ever been requested, or that defendant had properly and timely objected in trial court regarding reasonableness of arrest and search based on any alleged failure to disclose identity of informant.

Judgment affirmed.

1. Criminal Law ⚿1086(14)

In prosecution for possession of marijuana, defendant could not contend, for first time on appeal, that he had been deprived of due process of law by trial court's refusal to permit cross-examination of police officer concerning general description of the informant, in absence of showing in record that name of informant had ever been requested, or that defendant had properly and timely objected in trial court regarding reasonableness of arrest and search based on any alleged failure to disclose identity of informant. West's Ann.Health & Safety Code, § 11500.

2. Criminal Law ⚿1028, 1044

Accused, who seeks to rely upon refusal to identify an informer as ground for establishing illegality of an arrest and search, must establish that informer's name was requested and refused and that motion was made to strike officer's testimony regarding his conduct based upon information received from him.

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H. Clay Jacke, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Robert M. Sweet, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

Defendant was convicted of possession of marijuana in violation of Section 11500, Health & Safety Code, denied probation and sentenced to the state prison. He waived his right to a trial by jury and by stipulation submitted the matter to the trial court upon the reporter's transcript of the preliminary hearing, subject to the right to offer additional testimony. Defendant offered no defense and did not testify on his own behalf.

Appellant's sole contention is that the trial court erred in refusing to permit cross-examination of the officer relative to the general description of the informant. There is no question relative to the sufficiency of the evidence to support the judgment.

Police officer Leeds testified at the preliminary hearing that approximately two weeks before defendant's arrest, he received a communication from a reliable confidential informant, who had previously supplied him with information resulting in an arrest, that defendant, out of his home at 1621 E. 45th Street, was dealing in narcotics in large quantities, which he obtained in nothing less than one-half pound packages, using a 1957 Chrysler to make pickups; that for two weeks he and three other officers kept defendant's house under surveillance and noticed an uncommon amount of vehicular and pedestrian traffic around and in and out of the premises, with people going into the house, staying a few minutes, and leaving with small packages; that on April 24, 1958, approximately one-half hour before the arrest, the same informant advised him defendant would arrive at his (defendant's) house about 8 p. m., driving a 1957 Chrysler, with two kilo packages of narcotics; that he and other officers arrived at the location at approximately 7:50 p. m. and observed defendant drive up alone at approximately 8:15 p. m., and that they went up to the car, identified themselves, arrested him, and as he opened the driver's side of the vehicle, found a large paper bag on the floorboards containing two smaller bundles of marijuana. The officer further testified that they then searched defendant's house with his consent and found nothing. In a conversation at that time, defendant told them he did not know where he got the narcotic, he had just met a "guy" and picked it up on the street at 56th and Avalon, had just scored for it at approximately 7:30 p. m., was going to break it up into smaller portions and sell it (as he had been doing), this was approximately the sixth week he had been scoring from the same person, and he had been peddling approximately two kilos a week.

At the police station defendant further stated to Officer Leeds that he made his contact through a Mexican who came to his house, usually once a week, and that the Mexican would drop in and ask him how much he wanted and arrange for a pickup at a certain place from another on the street. Later defendant told the officers "that's not really right," "this isn't my connection" but it is actually a Negro in Watts known as "Sonny."

[1, 2] Citing extensively from People v. Cahan, 44 Cal.2d 434, 282 P.2d 905, 50 A.L.R.2d 513, and Priestly v. Superior Court, 50 Cal.2d 812, 330 P.2d 39, appellant argues that the trial court, in refusing to permit cross-examination of the police officer concerning a general description of the informant, deprived him of due process of law. We deem this contention to be without merit, absent any showing in the record that the name of the informer was ever requested, or that defendant properly and timely made objection in the court below regarding the reasonableness of the arrest and search based upon any alleged failure to disclose the identity of the informant.

The record before us consists almost entirely of testimony taken at the preliminary hearing, the cause having been submitted to the trial court on the reporter's transcript of the preliminary hearing and defendant having offered no defense. Officer Leeds testified that in going to the location and arresting defendant, he relied upon information given to him by a confidential informant about one-half hour before. At no time did defendant ever ask the officer the name of the informer or his address; nor did defendant make a motion to strike the testimony of the officer concerning his conduct based upon the informant's communication. At the close of the preliminary hearing when the People offered into evidence the marijuana seized from defendant's possession at the time of his arrest, defendant made no objection; nor did he interpose any objection in this connection in the court below where he stipulated that all exhibits received in evidence at the preliminary hearing be deemed again received in evidence at the trial. Defendant made no motion to dismiss the proceedings at the preliminary hearing, and no mention of the People's failure to identify or describe the informant was made by defendant. At the trial no objection was made concerning the identity of the informer, and upon being asked if he had any argument to make, appellant's counsel indicated he had not, and submitted the matter; nor did defendant make a motion for a new trial. The record does not disclose that the informant had anything to do with the commission of the offense and affirmatively shows that he was not present at the time of the arrest.

Defendant's counsel asked neither the identity nor the address of the informant, but did ask general questions concerning his physical description, race, employment, residence in the eastern area of the city, and whether he was an undercover officer in the police department, to which objections were interposed and sustained.

We hold that appellant may not for the first time on this appeal raise the objection of nondisclosure of the identity of the informer, not having ever requested his name or properly interposed the appropriate objection in the court below. It is incumbent upon an appellant seeking to rely upon a refusal to identify an informer to constitute the illegality of the arrest and search, to first establish that the name of the informant was requested and refused, and thereupon a motion was made to strike the officer's testimony regarding his conduct based upon the information received from him.

Controlling is the case of Coy v. Superior Court, 51 Cal.2d 471, 334 P.2d 569, wherein a writ of prohibition to prevent defendant's trial on the ground that the officer at the preliminary hearing refused to divulge the name of the informer, was denied. No motion to strike the officer's testimony was made upon his refusal to identify him and defendant neither objected to the introduction of the narcotics in evidence, nor argued the legality of the arrest and search. The Supreme Court affirmed the magistrate's ruling sustaining the objection of the People interposed to the question concerning the name of the informant, and held that the prosecution was entitled to elect between disclosure and having the officer's testimony struck. The court relied on Priestly v. Superior Court, 50 Cal.2d 812, at page 819, 330 P.2d 39, at page 43, that "when the prosecution seeks to show reasonable cause for a search by testimony as to communications from an informer, either the identity of the informer must be disclosed when the defendant seeks disclosure, or such testimony must be struck on proper motion of the defendant." The court stated, at page 473 of 51 Cal.2d, at page 570 of 334 P.2d: "It was incumbent on defendant to compel this election, however, by moving to strike or otherwise making his position clear. The prosecution may have had evidence other than the information of the informer to justify the search or it may have been willing to waive the privilege of nondisclosure if its case would otherwise fail, and it was entitled to an opportunity to produce such evidence or waive nondisclosure. It was not called upon to do so, however, while evidence of reasonable cause stood unchallenged in the record." Commenting further that neither the magistrate nor trial court has the duty to strike the evidence on its own motion, and defendant should not be permitted to gamble on an acquittal at his trial secure in the knowledge the conviction would be reversed on appeal, the court continued: "No undue burden is placed on the defendant by requiring him to make a motion to strike when the basis for excluding evidence theretofore properly admitted becomes apparent, and there is no basis for departing from the settled rule requiring such a motion (City of Venice v. Short Line Beach Land Co., 1919, 180 Cal. 447, 453, 181 P. 658; Ballos v. Natural, 1928, 93 Cal.App. 601, 608, 269 P. 972; Brandt v. Krogh, 1910, 14 Cal.App. 39, 56, 111 P. 275; Fricke, California Criminal Evidence, 444, 445 (4th ed. 1957)) in the present situation."

In addition, the record before us reveals that at no time was an objection made to the admission in evidence of the marijuana. In this connection, the Supreme Court, in People v. Richardson, 51 Cal.2d 445, at page 447, 334 P.2d 573, at page 575, stated: "Defendant did not object at any point in the trial to the admission of evidence on the ground that it was obtained by an unlawful search and seizure, and she may not raise the matter for the first time on appeal, People v. Goldberg, 152 Cal.App.2d 562, 572, 314 P.2d 151; People v. Williams, 148 Cal.App.2d 525, 532, 307 P.2d 48; see People v. Kitchens, 46 Cal.2d 260, 262, 294 P.2d 17; cf. Robison v. Superior Court, 49 Cal.2d 186, 187, 316 P.2d 1"

For the foregoing reasons, the judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

170 Cal.App.2d 103

In the Matter of the ESTATE OF W. S. GORMLY, also known as William S. Gormly, Deceased.

Esther Estelle CORWIN, Devisee, Administratrix and Appellant,

v.

Anna Mae GORMLY, Petitioner and Respondent.

Civ. 5665.

District Court of Appeal, Fourth District, California.

May 1, 1959.

Proceeding in the matter of the estate of the deceased. From a judgment of the Superior Court of Kern County, Norman F. Main, J., devisee and administratrix appealed. The District Court of Appeal, Stone, J. pro tem., held that where testator made an unequivocal devise to the wife of a house as well as other property and then stated that the house at the wife's death should go to another, will was construed to provide a bequest of all of the testator's property to the surviving widow and the second clause was properly disregarded.

Judgment affirmed.

1. Wills ⚷439

Court must construe a will according to the testator's intent. West's Ann.Prob. Code, § 101.

2. Courts ⚷89

In construing a will with reference to the testator's intent, each case depends upon its peculiar facts.

3. Wills ⚷601(2)

Where testator made an unequivocal devise to the wife of the house as well as other property and then stated that the house at the wife's death should go to another, will was construed to provide a bequest of all of the testator's property to the surviving widow and the second clause was properly disregarded as qualifying the clear and unambiguous provision of the first clause. West's Ann.Prob.Code, § 101.

Baker, Palmer, Wall & Raymond, Bakersfield, for appellant.

Siemon & Siemon, Bakersfield, for petitioner and respondent.

STONE, Justice pro tem.

The holographic will of W. S. Gormly was admitted to probate and letters of administration with the will annexed were issued to appellant. The will reads as follows:

> "Bakersfield, Calif
> "Jan. 22–1952
>
> "To Whom it May Consern:
> This is my Last Will:
> I give, bequeath and devise to my Wife, Anna Mae Gormly in complete and perfect ownership, all my rights and property whether real or personal.
> The house on 702 T St. Bakersfield. —And at her death, house to go to Esther Estelle Corwin Address. 807 Bayview Way—
> Redwood City, California
> Witness W. S. Gormly
> 702 T St.
> Gertrude S. Gore Bakersfield
> Nellie L. Parker Calif."

The clerk's transcript reflects that the house referred to in the second paragraph of the will was sold during the course of probate proceedings. The sale was necessary because there were not sufficient assets in the estate to pay creditors' claims and the expenses of administration. In fact, the entire residue of the estate consists of $2,110.98 cash. This sum appellant petitioned the probate court to distribute to her as residuary legatee, leaving nothing to the widow. The petition for distribution was predicated upon an interpretation of the will which would devise to the widow a life estate in the real property described in the will, with a remainder over to appellant. The court ordered distribution to the widow of the residue of the estate in the hands of the administratrix, being cash in the sum of $2,110.98.

[1–3] The two clauses of devise are in direct conflict. No case has been cited construing or interpreting an ambiguity in a will of this nature. The cases cited by counsel refer to conflicts wherein a testator has made an unequivocal devise by one clause followed by another clause expressing a desire, a wish, a hope or an opinion, but not an outright contradictory devise. Here we have an unequivocal devise to the wife of the house, as well as all other property. Then follows a statement that the house at her death shall go to appellant. All that this court can do is attempt to construe the will according to the testator's intent. Probate Code, Sec. 101; In re Estate of Clippinger, 75 Cal.App.2d 426, 429, 171 P.2d 567. In construing a will and attempting to determine a testator's intent one appellate court, ostensibly relying upon experience for its authority, said: "* * * that each case depends upon its own peculiar facts, and that precedents have comparatively small value." In re Estate of Bjors, 103 Cal.App.2d 361, 371, 229 P.2d 468, 474. From the will before us it seems apparent that the testator intended to provide for his widow. In the absence of unusual circumstances that would be a man's natural inclination, and the testator justified the presumption by the first provision of his will. To distribute the only remaining asset of the estate to appellant would be to cut off completely the surviving widow. The probate court interpreted the language of the will to provide a devise or bequest of all of the testator's property to the surviving widow by the first paragraph of the will. The court did not recognize the second clause as qualifying the clear and unambiguous provision of the first clause. Pursuant to such an interpretation of the will the court ordered the $2,110.98 residue of the estate distributed to the surviving widow. We cannot say that the trial court's interpretation of the will is illogical or that it is not in accord with the testator's intent, implied from the provision made for his widow.

The judgment is affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

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170 Cal.App.2d 212

PEOPLE of the State of Califorina, Plaintiff and Respondent,

v.

Frank E. JUDD, Defendant and Appellant.

Cr. 2954.

District Court of Appeal, Third District, California.

May 6, 1959.

The defendant was convicted for sale of heroin. The Superior Court, Sacramento County, Raymond T. Coughlin, J., entered judgment, and defendant appealed. The District Court of Appeal, Schottky, J., held that where defendant called informer as witness, refusal to permit defendant, who was seeking to prove entrapment, to question informer on direct examination as to informer's purpose in going to an establishment to introduce narcotic agent to defendant and as to whether there had been any conversation between informer and defendant about defendant selling narcotics to agent and as to whether informer had on other occasions arranged sales or purchases between individuals and agent was reversible error, notwithstanding that defendant had not taken the stand and had not adduced any evidence of entrapment.

Reversed.

1. Constitutional Law ⊂⇒266

In prosecution for sale of heroin, defendant was not denied due process of law by the refusal to permit defendant to question informer as to informer's purpose in introducing defendant to inspector and as to whether informer had ever arranged any sales between individuals and inspectors, where identity of informer had not been concealed and informer had been called as a witness by defendant. West's Ann.Health & Safety Code, § 11500.

2. Witnesses ⊂⇒270(2)

In prosecution for sale of heroin, refusal to permit defendant to cross-examine narcotic agent as to whether or not informer was a narcotics user, and as to the reason the agent had for believing that defendant was the person the agent had information about, was not error as immaterial and did not prejudice defendant. West's Ann.Health & Safety Code, § 11500.

3. Criminal Law ⚷347, 1170(1)

In prosecution for sale of heroin, where defendant called informer as a witness, refusal to permit defendant, who was seeking to prove entrapment, to question informer on direct examination as to informer's purpose in going to an establishment to introduce narcotic agent to defendant and as to whether there had been any conversation between informer and defendant about defendant selling narcotics to agent and as to whether informer had on other occasions arranged sales or purchases between individuals and agent was reversible error, notwithstanding that defendant had not taken the stand and had not adduced any evidence of entrapment. West's Ann.Health & Safety Code, § 11500.

4. Criminal Law ⚷37

"Entrapment" is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer.

See publication Words and Phrases, for other judicial constructions and definitions of "Entrapment".

5. Criminal Law ⚷1037(1), 1044

Where defendant failed to object to prosecutor's remark at the time the remark was made and defendant did not move to strike the remark, defendant could not complain of the remark for the first time on appeal.

6. Criminal Law ⚷260(11)

In non-jury trial, prosecutor's remark that defense had perpetrated a fraud on the court, did not prejudice the defendant.

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Richard G. Hendrix, Sacramento, for appellant.

Stanley Mosk, Atty. Gen., Doris H. Maier and Robert K. Puglia, Deputy Attys. Gen., for respondent.

SCHOTTKY, Justice.

Defendant was charged with two counts of selling heroin in violation of section 11500 of the Health and Safety Code. He waived a jury trial and was found guilty on both counts. Judgment was pronounced and defendant has appealed therefrom.

The principal witness for the People was Jess Ojeda, an inspector with the Bureau of Narcotic Enforcement, who testified that on the night of October 1, 1958, he entered Joe's Place with Jeannine Engl, who had informed him they would meet some one there. Ojeda was out to contact a dope peddler who, Ojeda had been informed, had 27 bindles of narcotics he was willing to sell for $95. After Ojeda and Engl were in the bar the defendant entered and Miss Engl pointed him out to Ojeda. Defendant spoke to Engl and she introduced him to Ojeda. The three left the bar and walked toward an alley. Miss Engl walked across the street, and defendant and Ojeda conversed and reached an agreement governing the sale of narcotics. Ojeda entered his car which was parked in the alley. Defendant walked out of Ojeda's sight. Defendant returned and entered the car and then delivered 6 white paper bindles, later determined to be heroin, to Ojeda. Ojeda paid him $20 for the heroin. The next day defendant sold more heroin to Ojeda.

At the conclusion of the People's evidence counsel for appellant called Miss Engl as a witness, stating that he was doing so because appellant insisted upon it. During the direct examination she testified that she knew Ojeda was a narcotic agent; that after she met him they went to Joe's Place so that she could introduce him to the defendant. She was then asked what was the purpose of introducing defendant to Ojeda. An objection to the question was sustained. The question was asked again and again, and objection was sustained.

Later she was asked if prior to the meeting there had been any conversation between defendant and herself about selling narcotics. She answered yes before an objection was interposed which the court sustained. Defense counsel then told the court that if it should develop that the dealings between Miss Engl and the agent were to the effect that at the instigation of the narcotic agents she went to the defendant with a proposition to sell some narcotics to the agent, the idea having originated in the mind of the agent, and having been presented to the defendant, entrapment would be proved. The court asked defense counsel if he was going to prove that Miss Engl went to the narcotic agent and made a deal with him and then went to the defendant and made a deal with him to sell to the agent. Defense counsel stated that he did not know what Miss Engl's testimony would be. Thereafter the court sustained an objection to a question whether or not Miss Engl had ever arranged any sales between individuals and Ojeda.

Defense counsel stated that he had not interviewed Miss Engl prior to the time she was called as a witness and that he did not know what her testimony would be, but it is apparent that he was seeking by his questions to show that appellant was entrapped. The appellant did not testify in his own behalf, so there was no testimony by him which would show entrapment.

[1] Appellant's first contention is that his conviction was obtained in violation of due process. He argues that "[t]he defendant is entitled as a matter of due process of law to be allowed to interview and produce any witness who *Might* give evidence favorable to his defense. * * * Where the informer, as in this case, is a material witness there is even more reason to allow the witness to testify. * * * Thus, it is clear that the defendant had a right to put the percipient witness and informer Miss Engl on the stand and inquire as to testimony that might be beneficial to his case." Appellant states that he was prevented from exercising his right in his cross-examination of Ojeda and in his direct examination of Miss Engl. He quotes from the case of Roviaro v. United States, 353 U.S. 53, 60–61, 77 S.Ct. 623, 628, 1 L.Ed.2d 639, in which the court said: "[W]here the disclosure of an informer's identity, or of the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way."

Appellant also cites People v. Alvarez, 154 Cal.App.2d 694, 316 P.2d 1006; and People v. Lawrence, 149 Cal.App.2d 435, 308 P.2d 821, 831. These cases hold that "[w]hen an informant becomes a participant in the crime charged against the defendant, he and the People lose the right to keep his identity anonymous." People v. Lawrence, supra.

The authorities relied upon by appellant are not in point in the instant case because the identity of the informant, Jeannine Engl, was not concealed, but she was called as a witness by appellant and testified. There is therefore no basis for appellant's contention that he was denied due process of law.

[2] Appellant contends also that there was undue restriction of cross-examination of the witness Ojeda. Defense counsel apparently was trying to show entrapment. A reading of the record discloses that the defense counsel was given wide latitude by the court. An objection was sustained to a question whether or not Engl was a narcotics user. This would seem to be immaterial. Ojeda was also asked if he had reason to believe that defendant was the one he had information about. He answered yes, and then he was asked what the reason was. The court correctly sustained an objection to the question as to Ojeda's reason for believing appellant was the one he had information about as being immaterial. Furthermore, in view of the fact it was admitted that Miss Engl was the informer, no possible prejudice could have resulted to appellant from these rulings of the court.

[3] Appellant contends further that the court unduly restricted his direct examination of Miss Engl. The rulings complained of appear in the record as follows:

> "Q. What was the purpose of going to Joe's Place to introduce him to the defendant?
>
> "Mr. Wells: I am going to object as not material—not material to any defense outlined by the defendant; it is not material to the issues of the case.
>
> "The Court: Sustained.
>
> * * * * * *
>
> "Q. Prior to that time, had there been any conversation between you and the defendant about the defendant selling narcotics to Ojeda?
>
> "Mr. Wells: Object again as not material, and beyond the scope—not material. * * *
>
> "The Court: Didn't she testify she didn't hear any conversation in that regard, or indicate she didn't hear any conversation in the bar?
>
> "Mr. Gibbert: Let me clarify the question. At any time, regardless of whether it is in Joe's Place, or prior to going to Joe's Place, had you had any conversation with the defendant about the defendant's selling narcotics to Mr. Ojeda? A. Yes.
>
> "Mr. Wells: Just a moment—object again.
>
> "The Court: I sustain the objection.
>
> * * * * * *
>
> "Q. Miss Engl, prior to October first had you ever on any other occasions arranged any sales or purchases between individuals and Mr. Ojeda?
>
> "Mr. Wells: I am going to object.
>
> "The Court: Sustain the objection."

[4] It is evident that appellant was seeking to prove entrapment, and the court should have permitted the witness to answer the questions. As stated in People v. Schwartz, 109 Cal.App.2d 450, at page 454, 240 P.2d 1024, at page 1027: "Entrapment is the conception and planning of an offense by an officer and his procurement of its commission by one who would not have perpetrated it except for the trickery, persuasion, or fraud of the officer." Appellant was entitled to show by the witness Miss Engl, if he could, that he had been induced by the officers to make the sale to Ojeda. In view of the fact that Miss Engl was admittedly working in conjunction with the Bureau of Narcotic Enforcement, such testimony might well have laid the basis for the defense of entrapment. It is difficult to understand why the prosecutor would object to these questions because if there was no basis for defense of entrapment Miss Engl's answers would have been to that effect; and if there was any basis for the defense of entrapment, appellant was entitled to have the questions answered.

Respondent argues that unless the defendant takes the stand and admits the commission of that act, or adduces evidence affirmatively showing that he committed the crime charged, the defense of entrapment is not put into issue. Respondent quotes the following from People v. Schwartz, supra, 109 Cal.App.2d at page 455, 240 P.2d at page 1027:

> "'* * * [T]he defense of entrapment is a positive defense imposing upon an accused the burden of showing that he was induced to commit the act for which he is on trial. * * * To invoke the defense it must necessarily be assumed that the act charged as a public offense was committed. In the instant case, appellant did not take the stand in his own defense. In the court below *he made no claim that he committed the crime charged* but was induced, lured, persuaded or inveigled into having in his possession the morphine tablets in question. His claim in that regard lacks substance here. * * *' (Emphasis added.)"

Respondent argues:

> "He did not take the stand. Neither did he adduce any evidence that he committed the crime charged yet was induced or inveigled into its commission. In this state of facts, the defense of entrapment has not been put into issue and the excluded testimony which the appellant attempted to elicit from Jeannine Engl was clearly immaterial to any issue in the case."

We are unable to agree with respondent that the evidence which appellant sought to introduce was immaterial because appellant did not take the stand or adduce any evidence of entrapment. The fact that appellant did not testify would affect the weight of the evidence but would not affect its materiality. Defense counsel might well conclude that it would avail nothing to have appellant testify unless he could elicit some testimony from Miss Engl to support a defense of entrapment.

We believe that the court erred in sustaining the objections to the questions asked of Miss Engl as hereinbefore set forth. We, of course, do not know what the answers to the questions would have been; but appellant was entitled to have them answered and depriving him of that right constitutes very serious error, requiring in our opinion a reversal of the judgment. We cannot assume that because there may have been ample evidence to support the judgment a different result would not have been probable if Miss Engl had been permitted to answer the questions and had given evidence upon which the defense of entrapment could have been based.

[5] Appellant contends further the prosecutor was guilty of prejudicial misconduct in making the following remark:

"Mr. Wells: In this matter, I am going to again ask the Court to ask defense counsel if that is what he expects to prove through this, his own witness, whom he subpenaed, and undoubtedly has talked to, and knows what she is going to testify to—otherwise, these are wild schemes, and it is only in bad faith he's called this witness in this instance." However, appellant failed to object to the remark at the time, nor did he move to strike it, so he may not complain of it for the first time on appeal.

[6] Appellant also assigns as misconduct a remark of the prosecuting attorney that the defense had perpetrated a fraud on the court. A motion to strike does not appear to have been ruled on. We do not believe that appellant suffered any prejudice from this remark made in a non-jury trial.

For the error hereinbefore noted the judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

170 Cal.App.2d 111

George E. SULLIVAN, Plaintiff and Respondent,

v.

William SCHELLINGER, Defendant and Appellant.

Civ. 9486.

District Court of Appeal, Third District, California.

May 4, 1959.

Rehearing Denied May 27, 1959.

Action by injured employee against fellow employee. The Superior Court, Mendocino County, Lilburn Gibson, J., entered judgment for injured employee and fellow employee appealed. The District Court of Appeal, Peek, J., held that there was substantial evidence to sustain findings that fellow employee although sharing in profits, was not in fact a partner of employer, and that fellow employee in ordering introduction of compressed air into heating main without checking to see if plug had been properly secured was negligent.

Affirmed.

1. Appeal and Error ⚿991
Partnership ⚿53

Even though party produced an alleged agreement by him and another to share profits and showed that profits were shared, question of whether or not a partnership had been created was still one of fact and since there was no proof of written agreement proof of partnership must be clear and convincing with the decision of trial judge carrying the same finality as in any other controverted question of fact. West's Ann.Corp.Code, § 15007(4).

2. Partnership ⚿55

In action by injured employee receiving workmen's compensation benefits against fellow employee for negligence, evidence sustained finding of trial court that fellow employee although sharing profits, was not in fact a partner of employer. West's Ann.Corp.Code, § 15007(4).

3. Master and Servant ⚿330(3)

In injured employee's action against fellow employee for injuries received from "blowout" of a plug in a heating main, evidence sustained finding of negligence of fellow employee who, while expressing fear that plug would not hold, introduced compressed air into system without first ascertaining if plug had been secured.

4. Appeal and Error ⚿173(11)

Issue of setoff, which was not pleaded in negligence action, could not be raised for the first time on appeal.

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Kasch & Cook by Leo M. Cook, Ukiah, for appellant.

Falk, Johnson & Cleland, Ukiah, for respondent.

PEEK, Justice.

This is an appeal by defendant from a judgment in favor of plaintiff Sullivan in an action for personal injuries resulting from a "blowout" of a plug in a heating main which the court found occurred as a result of defendant's negligence.

By his complaint plaintiff alleged that defendant was a fellow employee; that the defendant negligently and carelessly connected an air compressor to a water line and released compressed air into the line thereby causing plaintiff to be struck in the face and in the eye. Prior to instituting the present action plaintiff applied for and received workmen's compensation benefits.

Defendant, by his answer, presented three defenses: First the allegations that he was a partner of one Charles Harris, that the injuries if any suffered by plaintiff arose out of and in the course and scope of his employment for said partners, and that by reason thereof jurisdiction over the alleged cause of action was vested solely in the Industrial Accident Commission and was without the jurisdiction of the superior court; second, a general denial of the allegations of negligence as charged in plaintiff's complaint; and third the affirmative defense of contributory negligence.

Pursuant to a stipulation of the parties, the partnership issue was tried specially and the court found that defendant was not a partner with Harris but, to the contrary, was an employee, and therefore the superior court had jurisdiction of the cause. The issues of negligence and contributory negligence were thereafter tried by a jury which disagreed. The same issues were subsequently tried by the court which found in favor of plaintiff, and this appeal by defendant followed.

Defendant's contention that he was a partner and not an employee is but a reargument of the evidence. The record discloses that the subcontract was in Harris's name alone, as were the workmen's compensation insurance policy, the plumbing permit, the union contract, the bank account, and the contractor's license. No partnership income tax return was ever filed. Additionally in the report of the injury filed by Harris he stated he was the employer of plaintiff and that only his employees were involved. On another occasion Harris stated that the defendant was his foreman. Also the hospital records show that defendant also reported Harris as his employer.

[1] Under the provisions of the Uniform Partnership Act the receipt by a person of a share of the profits of a business is prima facie evidence that he is a partner in that business. Corp.Code, sec. 15007(4). Necessarily, therefore, the agreement relied upon by defendant by which Harris and defendant agreed to share the profits, and which he refers to throughout as the partnership agreement, and the undisputed fact that they actually did so share the profits, established a prima facie case of the existence of the partnership. But the question as to whether or not a partnership has been created is still one of fact (Nelson v. Abraham, 29 Cal.2d 745, 177 P.2d 931), and where, as here, there is no written agreement, proof of the partnership must be clear and convincing (Lyon v. MacQuarrie, 46 Cal.App.2d 119, 115 P.2d 594), and the decision of the trial judge carries the same finality as in any other controverted question of fact. Lyon v. MacQuarrie, supra.

[2] As noted, the trial court, upon substantial evidence, concluded that a partnership did not exist, and hence such conclusion must be sustained on appeal. What we have heretofore said likewise disposes of the remaining contentions of defendant since the basis therefor was the assumption by defendant of the existence of the alleged partnership. Although the issue of contributory negligence was raised by the pleadings, no question in that regard has been made on appeal, and hence we assume it has been waived.

[3] We find no merit in the further contention of defendant that the evidence of negligence was insufficient to support the judgment. The record, as noted by the trial court in its memorandum opinion, shows without conflict that plaintiff, as well as defendant and the other employees present, expressed a fear that the plug in the heating main was not sufficient to hold the amount of compressed air which was to be used. Plaintiff was told by defendant to secure it with wire, and shortly thereafter defendant, without checking to determine whether plaintiff had in fact completed the task, either ordered the introduction of compressed air into the main or did so personally, with the result that the plug blew out and injured plaintiff. Defendant acknowledged he knew it was dangerous to release air while anyone was working on the plug; that he had intended to see if the caps were in place, but "he didn't do it."

[4] Additionally we note that defendant argues for the first time on appeal that since he secured the payment of compensation to plaintiff within the meaning of section 3706 of the Labor Code, he is therefore entitled to credit for all payments and benefits received by plaintiff from insurance obtained, secured or provided by the defendant. Again the basis of his contention in this regard is the same —that he was a copartner with Harris; that he was to share one-half of all expenses of the construction operation, including one-half of the premiums on the policy of workmen's compensation; and that in fact, one-half the premiums paid were deducted from the gross receipts and the net proceeds divided equally between the alleged copartners. Thus he concludes since such costs were deducted, he in effect paid one-half the premiums of the compensation policy and is entitled to a setoff. But here again he fails to consider that the court found that he was not a co-partner, and the money he received at the termination of the job, his compensation, was not a sharing of the profits as a partner but was a bonus predicated on profits. Although the trial court found generally that appellant and Harris were not copartners, it made no special finding concerning appellant's alleged contribution to the workmen's compensation premiums, nor did appellant request such a

finding. Moreover, the issue of set-off was not pleaded and hence it cannot be raised for the first time on appeal.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

Jack OWENS, Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR THE COUNTY OF LOS ANGELES, Respondent.

Jessie Thiele, Real Party in Interest.*

Civ. 23745.

District Court of Appeal, Second District, Division 1, California.

April 24, 1959.

Hearing Granted June 18, 1959.

Original prohibition proceeding, which was treated as a petition for writ of mandate, was brought in the District Court of Appeal against the Superior Court of the State of California, in and for the County of Los Angeles. The District Court of Appeal, Nourse, J., pro tempore, held that where petitioner was domiciled in the County of Los Angeles when the real party in interest was bitten by petitioner's dog in the County of Los Angeles, but petitioner was domiciled in Arizona at time of commencement of action against petitioner by the real party in interest for injuries, the petitioner was not subject to the process of California courts.

Peremptory writ of mandate issued directing that Superior Court vacate order denying petitioner's motion to quash service of summons and to enter order granting that motion.

1. Prohibition 🔑3(1)

Writ of prohibition in District Court of Appeal to annul order of Superior Court denying motion of petitioner to quash service of summons on petitioner in action brought against him in Superior Court was not the proper remedy, and petitioner should have applied for writ of mandate. West's Ann.Code Civ.Proc. § 416.3.

2. Mandamus 🔑1

Where petitioner mistook his remedy when he brought prohibition proceeding in District Court of Appeal to annul order of Superior Court denying motion of petitioner to quash service of summons on him in action brought against him in Superior Court, and he should have applied for writ of mandate, but facts alleged were sufficient to invoke jurisdiction of District Court of Appeal to grant writ of mandate, District Court of Appeal could treat the petition as one for writ of mandate. West's Ann. Code Civ.Proc. § 416.3.

3. Judgment 🔑17(1)

Word "residence" as used in amended statute extending power of courts of State to render personal judgments against one who is absent from the State, but who was domiciled in the State at time cause of action arose, provided he was personally served with process, is used in sense of "domicile". West's Ann.Code Civ.Proc. § 417.

See publication Words and Phrases, for other judicial constructions and definitions of "Residence".

4. Constitutional Law 🔑178

Judgment 🔑17(1)

Amended statute extending power of courts of the State to render personal judgments against one who is absent from the State, but who was domiciled in the State at time cause of action arose, provided that he was personally served with process, does not purport to give validity to service of summons made on defendant in pending action where service was accomplished prior to enactment of statute, but only gives courts jurisdiction to enter judgment where effective service is made after effective date of statute, and therefore it operates not in retrospect but prospectively and does not impair the obligation of any contract, create any new obligation on part of defendant, or create any cause of action against him, or deprive him of any defense on the merits that he might have to the action. West's Ann.Code Civ.Proc. § 417; West's Ann. Const. art. 1, §§ 13, 16; U.S.C.A.Const. Amend. 14.

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* Opinion vacated 345 P.2d 921.

5. Judgment ⚷17(1)

Amended statute extending power of courts of the State to render personal judgments against one who is absent from the State, but who was domiciled in the State at time cause of action arose, provided that he was personally served with process, does not purport to make process of courts effective outside territorial limits of the State, and its only application is to cases where jurisdiction has been obtained pursuant to Sections 412 and 413 of the Code of Civil Procedure by order of publication of summons and personal service of summons and complaint on defendant. West's Ann.Code Civ.Proc. §§ 412, 413, 417.

6. Corporations ⚷675

Word "person" as used in statute providing that where jurisdiction is acquired over a "person" who is outside of the State, by publication of summons in accordance with Sections 412 and 413, court shall have power to render a personal judgment against such person only if he was personally served with a copy of summons and complaint, and was a resident of the State at time of commencement of action, or at time cause of action arose, or at time of service, was intended to include only domestic corporations and natural persons and not foreign corporations. West's Ann.Code Civ. Proc. §§ 412, 413, 417.

See publication Words and Phrases, for other judicial constructions and definitions of "Person".

7. Process ⚷17

Where defendant was domiciled in California at time cause of action arose against him in California for injuries sustained by plaintiff when plaintiff was bitten by defendant's dog in California, but defendant was domiciled in Arizona at time of commencement of personal injury action against him in California, defendant was not subject to process of California courts. West's Ann.Code Civ.Proc. § 417.

◆

Parker, Stanbury, Reese & McGee, Los Angeles, for petitioner.

Harold W. Kennedy, County Counsel, and Edward A. Nugent, Deputy County Counsel, Los Angeles, for respondent.

Charles F. Legeman, Long Beach, for real party in interest.

NOURSE, Justice pro tem.

[1, 2] By his petition, petitioner seeks a writ of prohibition to annul an order of the respondent court denying petitioner's motion to quash the service of summons upon him in an action brought against him in the respondent court by one Thiele. Petitioner has mistaken his remedy; he should have applied for a writ of mandate pursuant to the provisions of section 416.3 of the Code of Civil Procedure, but inasmuch as the facts alleged are sufficient to invoke the jurisdiction of this court to grant that writ we may treat his petition as one for such. Simmons v. Superior Court, 96 Cal.App.2d 119, 132–133, 214 P.2d 844, 19 A.L.R.2d 288; Mash v. Superior Court, 192 Cal. 258, 259, 219 P. 742.

The facts: On August 6, 1956, one Jessie Thiele, the real party in interest respondent, was bitten by a dog owned by petitioner on the premises of petitioner in the County of Los Angeles; on the 10th of January, 1957, she commenced an action against petitioner for damages in the superior court of that county. On September 29, 1958, an order for publication of summons having been made, petitioner was personally served with process in the State of Arizona.

At the time plaintiff's alleged cause of action arose, that is, on August 5, 1956, petitioner was a domiciliary of the County of Los Angeles, State of California. In December 1956, petitioner became domiciled in the State of Arizona and ever since that time has been a citizen and domiciliary of that state.

The petition and the return thereto present the following questions: First, is section 417 of the Code of Civil Procedure as amended in 1957 applicable to actions pending at the time of its enactment? Second, is one who was domiciled in this state at the time a cause of action arose against him, but who was not domiciled in this state at the time of the commencement of the action, subject to the process of the courts of this state served upon him at his foreign domicile?

At the time the cause of action arose against petitioner and at the time petitioner forsook his domicile in this state and established domicile in Arizona, the courts of this state could not, under the provisions of section 417 of the Code of Civil Procedure, obtain jurisdiction over the person of one absent from the state and domiciled in another state for the power of the courts to render a personal judgment was by the express provision of that section limited to those persons who were domiciled in the state either at the time of the commencement of the action or at the time of the service of process. Code Civ.Proc. § 417, as enacted in 1951. See Stats.1951, ch. 935, p. 2537.

[3, 4] In 1957 section 417 of the Code of Civil Procedure was amended so as to extend the power of the courts of this state to render personal judgments against one absent from the state but who was domiciled[1] in the state at the time the cause of action arose provided that he was personally served with process. This amendment to the statute did not become effective until after petitioner had established his domicile in Arizona. Petitioner asserts that the amendment to section 417 may not be applied retrospectively so as to give it effect as against a defendant in an action pending at the time of its enactment and that if so construed it violates sections 13 and 16 of article I of the Constitution of this state and the Fourteenth Amendment to the Constitution of the United States. This contention cannot be sustained. The amendment to section 417 does not purport to give validity to a service of summons made upon a defendant in a pending action where service was accomplished prior to the enactment of the statute; it only gives the courts jurisdiction to enter a judgment where effective service is made upon the defendant after the effective date of the statute. It therefore operates not in retrospect but prospectively. By empowering the courts of this state to render a personal judgment against one domiciled in California at the time of the commission of a tort, the statute does not contravene any of petitioner's constitutional rights inasmuch as it does not impair the obligation of any contract, create any new obligation on his part, create any cause of action against him or deprive him of any defense on the merits that he might have to the action brought by the real party in interest. It is remedial in character and as petitioner had no vested right to have the jurisdiction of the court limited as it was by section 417 at the time he left the state, his rights were not affected by the amendment. Campbell v. Holt, 115 U.S. 620, 6 S.Ct. 209, 29 L.Ed. 483, at page 486; Ex parte Collett, 337 U.S. 55, 69 S.Ct. 944, 93 L.Ed. 1207, at page 1217; Casey v. Katz, 114 Cal.App.2d 391, 250 P.2d 291; Halbert v. Berlinger, 127 Cal.App.2d 6, 273 P.2d 274; Allen v. Superior Court, 41 Cal.2d 306, 259 P.2d 905.

[5] Section 417 of the Code of Civil Procedure does not purport to make the process of the courts of this state effective outside the territorial limits of the state. Its only application is to cases where jurisdiction has been obtained pursuant to the provisions of sections 412 and 413 of the Code of Civil Procedure by an order for the publication of summons and the personal service of summons and complaint upon the defendant.

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[1] "Residence" in section 417 is used in the sense of "domicile." Smith v. Smith, 45 Cal.2d 235, at pages 239–240, 288 P.2d 497.

[6] The question posed therefore is: Does the process of the courts of this state extend beyond its borders so as to give the courts of this state jurisdiction over the person of an absent natural person who is not domiciled in the state at the time of the commencement of the action, to the end that a personal judgment may be rendered against him on a cause of action arising out of a tort committed in this state? Before proceeding with the determination of the question posed, it is well that we state the limitations upon the scope of the question. It does not encompass the rights of this state to render a personal judgment against a foreign corporation "doing business" in this state within the meaning of section 411, paragraph 2 of the Code of Civil Procedure as that section has been interpreted by the Supreme Court (Henry R. Jahn & Son, Inc. v. Superior Court, 49 Cal.2d 855, 323 P.2d 437), for it is evident that by the use of the words "a person" in section 417 in connection with its reference to sections 412 and 413 of the Code of Civil Procedure the Legislature intended to include only domestic corporations and natural persons and did not intend to include foreign corporations as such corporations are not subject to service in the manner provided for by sections 412 and 413, but only in accordance with sections 6500–6504 of the Corporations Code (Code Civ.Proc. § 411, subd. 2). Nor are we concerned with actions arising out of the operation of an automobile upon the highways of this state where the defendant has, by accepting a certificate of ownership or registration of the motor vehicle involved in the accident or collision out of which the cause of action arose, or by accepting an operator's or chauffeur's license under the Vehicle Code of this state, consented to the service of process upon him outside of the state. See Vehicle Code, §§ 404.1 to 404.4; Chesin v. Superior Court, 142 Cal.App.2d 360, 298 P.2d 593.

In answering this question we are bound by the principles laid down by the United States Supreme Court in Pennoyer v. Neff, 95 U.S. 714, 24 L.Ed. 565, unless the principles there laid down by the Supreme Court have been altered or modified by later decisions of that court. In the case last cited, Mr. Justice Field speaking for the court said in part: "But it was also contended in that court, [Circuit Court of United States] and is insisted upon here, that the judgment in the State Court against the plaintiff was void for want of personal service of process on him or of his appearance in the action. * * * If these positions are sound, the ruling of the Circuit Court as to the invalidity of that judgment must be sustained. * * * And that they are sound would seem to follow from two well established principles of public law respecting the jurisdiction of an independent State over persons and property. The several States of the Union are not, it is true, in every respect independent, many of the rights and powers which originally belonged to them being now vested in the government created by the Constitution. But, except as restrained and limited by that instrument, they possess and exercise the authority of independent States, and the principles of public law to which we have referred are applicable to them. One of these principles is, that every State possesses exclusive jurisdiction and sovereignty over persons and property within its territory. * * * The other principle of public law referred to follows from the one mentioned; that is, that no State can exercise direct jurisdiction and authority over persons or property without its territory. (Citations.) The several States are of equal dignity and authority and the independence of one implies the exclusion of power from all others. And so it is laid down by jurists, as an elementary principle, that the laws of one State have no operation outside of its territory, except so far as is allowed by comity; and *that no tribunal established by it can extend its process beyond that territory so as to subject either persons or property to its decisions.* 'Any exertion of authority of this sort beyond this limit * * * is a mere nullity, and incapable of binding such persons * * * in any other tribunals.' * * * Process from the tribunals of one State cannot run into another State, and summon parties there domiciled to leave its territory and respond to proceedings against them. Publication of process or notice within the State where the tribunal sits cannot create any greater obligation upon the non-resident to appear. *Process sent to him out of the State*, and process published within it, *are equally unavailing in proceedings to establish his personal liability.* * * * Since the adoption of the 14th Amendment to the Federal Constitution, the validity of such judgments [personal judgments] may be directly questioned, and their enforcement in the State resisted, on the ground that proceedings in a court of justice to determine the personal rights and obligations of parties over whom that court has no jurisdiction, do not constitute due process of law. * * * To give such proceedings any validity, there must be a tribunal competent by its constitution—that is, by the law of its creation—to pass upon the subject-matter of the suit; and, if that involves merely a *determination of the personal liability of the defendant, he must be brought within its jurisdiction by service of process within the State, or his voluntary appearance.*" (Emphasis added.)

Counsel has not cited to us nor has our research disclosed any decisions of the Supreme Court of the United States which qualifies or limits the principles announced by that court in Pennoyer v. Neff, supra, as set forth in the parts of the opinion therein which we have quoted, insofar as they apply to one not domiciled in the state at the time of the commencement of the action.

In Milliken v. Meyer, 311 U.S. 457, 61 S.Ct. 339, 85 L.Ed. 278, the Supreme Court of the United States held that the state might make its process effective outside of its territorial limits as against one *domiciled* in the state at the time of the commencement of an action. In the cited case the court had before it for decision the question as to whether a judgment rendered in Wyoming against the defendant Meyer after personal service of process upon him in the State of Colorado, was entitled to full faith and credit in an action brought thereon in the courts of Colorado.[2] In reversing the judgment of the Supreme Court of Colorado which denied full faith and credit to the Wyoming judgment the Supreme Court of the United States based its decision solely upon the ground that Wyoming had the power to make its citizens (domiciliaries) subject to the process of its courts even though at the time of the commencement of the action and service of process they were temporarily absent from their domicile. That this was the basis of the decision is made clear by the language used by Mr. Justice Douglas in speaking for the court. After alluding to the fact that the trial court in Colorado had found as a fact that the defendant *was domiciled in Wyoming at the time of the commencement of the action*, he said (61 S.Ct. at page 342, 85 L.Ed. at page 283): "On the findings of the Colorado trial court, not impaired by the Colorado Supreme Court, it is clear that Wyoming had jurisdiction over Meyer in the 1931 suit. Domicile in the state is alone sufficient to bring an absent defendant within the reach of the state's jurisdiction for purposes of a personal judgment by means of appropriate substituted service. * * * Certainly then *Meyer's domicile in Wyoming was a sufficient basis for that extraterritorial service.* As in case of the authority of the United States over its *absent citizens* (citations) the authority of a state over one of *its citizens* is not terminated by the mere fact of his absence from the state. The state which accords him privileges and affords protection to him and his property by virtue of his domicile may also exact reciprocal duties. 'Enjoyment of the privileges of residence within the state, and the attendant right to invoke the protection of its laws, are inseparable' from the various incidences of state citizenship. (Citations.) The responsibilities of that citizenship arise out of the relationship to the state which domicile creates. That relationship is not dissolved by *mere absence from the state.* The attendant duties, like the rights and privileges incident to domicile, are not dependent on continuous presence in the state. One such incident of *domicile* is amenability to suit within the state even *during sojourns* without the state * * *." (Emphasis added.)

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[2] The opinion of the Supreme Court does not make it clear whether the cause of action sued upon arose in Wyoming or Colorado but the opinions filed by the Supreme Court of Colorado indicate that the cause of action sued upon, arose from a breach of a contract to be performed in Colorado.

It is apparent that Milliken v. Meyer, supra, does not uphold the service of process upon the defendant in the present case. At the time of the commencement of the subject action as well as at the time of the service of process petitioner was not merely temporarily absent [3] from the state of California, he was then no longer a domiciliary or citizen of California and owed no obligation to California as such.

Respondent here relies upon the decision of the United States Supreme Court in the case of International Shoe Co. v. State of Washington, 326 U.S. 310, 66 S.Ct. 154, 90 L.Ed. 95. There is dictum in the opinion of the court in that case which would seemingly support respondent's position. The Supreme Court, however, in that case was not called upon to decide whether the process of a state court had force beyond its borders as against a natural person of foreign domicile, for in that case the plaintiff in error was a corporation doing business in the state of Washington at the time of the commencement of the proceedings and service upon it was made by the service of process upon its agent within the state as well as by registered mail addressed to the corporation at its office outside the state. See 326 U.S. 320, 66 S.Ct. 160, 90 L.Ed. at page 104, Headnote 12. The Supreme Court did not, in the International Shoe Company case, purport to overrule Pennoyer v. Neff and the language used by it in its dictum (66 S.Ct. at page 158, 90 L.Ed. at page 102) with reference to *"capias ad respondendum"* having given way to the personal service of summons must be read in the light of the fact that the writ mentioned had in Oregon given way to the personal service of summons at the time of the decisions by the court in Pennoyer v. Neff. Further, the Supreme Court in the late case of Hanson v. Denckla, 357 U.S. 235, 78 S.Ct. 1228, 2 L.Ed.2d 1283, at page 1296, makes it clear that the court is not retreating from the declarations as to the territorial limits of process and the powers of the respective states as set forth in Pennoyer v. Neff.

We do not believe that the decision of the Supreme Court of the United States in McGee v. International Life Ins. Co., 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223, is controlling here for as is pointed out by the majority opinion in Hanson v. Denckla, supra, that case dealt with a contract of insurance which by its terms was to be performed in the State of California and the state had a manifest interest in providing effective redress to its citizens who had been injured by a corporation engaged in an activity that the state treated as subject to special regulation.

[7] Inasmuch as the petitioner here had, before the commencement of the subject action, severed his relationship with California, he is in no different position than if he had, at the time of the incident out of which the cause of action arose, been domiciled in Arizona and but a sojourner in California and to hold that he is subject to the process of the courts of this state would be tantamount to holding that any non-resident committing a tort in California subjects himself, without his consent, either express or statutorily implied, to the jurisdiction of the courts of California in an action commenced after he has returned to his own domicile, unless it be said that once a person is domiciled

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[3] The noun "sojourn" is defined as "a temporary stay." Webster's International Dictionary, Second Edition.

in a state his obligation to the state to be "amenable" to its process clings to him wherever he may go despite the severance of his relations with the state.

We have been cited to no authority that holds that one not domiciled in a state is subject to the process of the courts of that state outside of its territorial limits merely because he committed a tort in that state,[4] except the case of Nelson v. Miller, 11 Ill.2d 378, 143 N.E.2d 673. In the case cited the Supreme Court of Illinois upheld a statute of that state which purported to render any person who committed a tort within the state subject to the process of the courts of that state at any place either within or without the state. The court there extended the effect of the decisions of the United States Supreme Court which have upheld statutes which make a nonresident motorist subject to the process of the courts of the state in actions arising out of negligent use of the highways of the state to all tortious acts committed within the state and in effect sets at naught Pennoyer v. Neff. While this case is clearly in point here its reasoning does not appeal to us and we are not bound by it as authority. If Pennoyer v. Neff, supra, is no longer controlling, it is for the Supreme Court of the United States to so hold; it is not within the province of this court so to do.

That the territorial limitations upon the process of state courts as set forth in Pennoyer v. Neff still have vitality is illustrated by May v. Anderson, 345 U.S. 528, 73 S.Ct. 840, 97 L.Ed. 1221. In that case plaintiff and defendant were married in the state of Wisconsin. After the marriage they continued to reside there and two children were there born of the marriage. The wife left the state taking her children with her and established her domicile in Ohio. The husband sued for divorce in Wisconsin and as an incident to that action sought custody of the minor children. Defendant wife *was served with process in Ohio.* The Supreme Court without discussion held that the Wisconsin courts did not by such service obtain jurisdiction over the wife's person and that the judgment insofar as it awarded custody of the children to the husband was not entitled to full faith and credit in Ohio. We can only interpret this decision as holding that the wife's obligation to respond to the process of the courts of Wisconsin which arose out of her domicile there and in reference to rights that accrued to her there, did not cling to her when she severed that domicile and established one in Ohio, for certainly personal service of process upon her in Ohio was sufficient to constitute "due process" as it is defined in International Shoe Co. v. State of Washington, supra, and Milliken v. Meyer, supra, if the process of the courts of Wisconsin had vitality outside of the territorial limits of Wisconsin.

To hold that a person once domiciled in this state remains amenable to the process of the courts of this state after he has left the state and established a different domicile, upon any cause of action arising against him during the period of his domicile in the state, places him in a position less advantageous than those who remain residents of the state for the statute of limitations will not run against the cause of action (Code Civ.Proc. § 351, cf. § 404.4 Vehicle Code) nor if the action be commenced may it be dismissed for want of prosecution pursuant to the provisions of either sections 581a or 583 of the Code of Civil Procedure; and in a tort action his property in the state may be attached while that of a resident similarly subject to process may not (Code Civ.Proc. § 537, subd. 3). We advert to these matters for we believe they demonstrate that it is not the intent of the Legislature to attempt to give the processes of the courts of this state extraterritoriality against the natural person except in those cases where special statutes such as sections 404.1, 404.2 and

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[4] We of course exclude vehicular torts where the statutes of the state make the use of the highways a consent to such service.

404.3 of the Vehicle Code have been enacted.

Let a peremptory writ of mandate issue directing the respondent court to vacate its order denying the petitioner's motion to quash service of summons and to enter its order granting that motion.

WHITE, P. J., and FOURT, J., concur.

170 Cal.App.2d 121

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Charles J. THURMOND, Defendant and Appellant.

Cr. 2830.

District Court of Appeal,
Third District.
Division Sacramento, California.
May 4, 1959.
Rehearing Denied May 27, 1959.
Hearing Denied July 1, 1959.

Prosecution for violation of section 288a of the Penal Code. From an order of the Superior Court, Solano County, Joseph M. Raines, J., denying defendant's motion for a new trial, the defendant appealed. The District Court of Appeal, Peek, J., held that evidence corroborating testimony of two accomplices was insufficient.

Order reversed.

1. Criminal Law 🔑511(1)

In prosecution for violation of section 288a of the Penal Code, evidence corroborating testimony of two accomplices was insufficient. West's Ann.Pen.Code, §§ 288a, 1111.

2. Criminal Law 🔑511(1)

Corroborating testimony must tend to implicate defendant and therefore must relate to some act or fact which is an element of crime but it is not necessary that corroborative evidence be sufficient in itself to establish every element of offense charged and it need not corroborate accomplice as to every fact to which he testifies and is sufficient if it does not require interpretation and direction from testimony of accomplice. West's Ann.Pen.Code, § 1111.

3. Criminal Law 🔑511(5)

In prosecution for violation of section 288a of the Penal Code, evidence that defendant was teacher of 14 year old accomplice and that defendant on numerous occasions picked up accomplice at boy's home and that 17 year old accomplice stayed at defendant's home and that defendant was in boy's room both in mornings and evenings was insufficient to corroborate testimony of such accomplices. West's Ann.Pen.Code, §§ 288a 1111.

4. Criminal Law 🔑511(4)

Evidence as to opportunity to commit an offense is not sufficient as corroborating evidence. West's Ann.Pen.Code, § 1111.

5. Criminal Law 🔑511(4)

In prosecution for violation of section 288a of the Penal Code, evidence that defendant permitted two accomplices, aged 14 and 17, to use his automobile and motorcycle, was insufficient to corroborate testimony of accomplices. West's Ann.Pen. Code, §§ 288a, 1111.

6. Criminal Law 🔑511(4)

In prosecution for violation of section 288a of the Penal Code, evidence that defendant admittedly had a boot fetish in that he supplied 14 year old and 17 year old accomplices with boots and that he took pictures of one of them wearing boots and that he was attracted to boys because they wore boots was insufficient as corroborating evidence since it lacked direction as to connecting defendant with acts charged. West's Ann.Pen.Code, §§ 288a, 1111.

7. Criminal Law 🔑511(4)

In prosecution for violation of section 288a of the Penal Code, evidence that defendant adopted same pattern of operation with each of two accomplices in commission of offenses could not be considered as corroboration. West's Ann.Pen. Code, §§ 288a, 1111.

8. Criminal Law ⚷511(7)

In prosecution for violation of section 288a of the Penal Code, the fact, standing alone, that defendant made statements which he later admitted were false did not corroborate accomplices' testimony. West's Ann.Pen.Code, §§ 288a, 1111.

9. Criminal Law ⚷511(7)

If false statements of a defendant are of such nature that they indicate a consciousness of guilt, they may have probative effect as corroborative evidence. West's Ann.Pen.Code, § 1111.

10. Criminal Law ⚷511(7)

In prosecution for violation of section 288a of the Penal Code, false statement by defendant that he picked up 14 year old accomplice to help him in doing some electrical wiring in defendant's home was insufficient as corroborative evidence when defendant explained that true reason for picking him up was to let boy ride his motorcycle. West's Ann.Pen.Code, §§ 288a, 1111.

11. Criminal Law ⚷511(7)

In prosecution for violation of section 288a of the Penal Code, testimony that defendant first denied and then admitted that he had been in trouble of a similar nature was insufficient as corroborative evidence. West's Ann.Pen.Code, §§ 288a, 1111.

12. Criminal Law ⚷511(4)

Mere suspicion of a defendant is not sufficient as corroboration. West's Ann. Pen.Code, § 1111.

13. Criminal Law ⚷511(7)

In prosecution for violation of section 288a, testimony that during trial, defendant, who had given boots to accomplices, was overheard asking one of accomplices what he had done with boots and threatening to get such accomplice, who replied that he had given boots to his mother, was uncorroborative of testimony given by accomplice concerning acts charged. West's Ann.Pen.Code, §§ 288a, 1111.

14. Criminal Law ⚷407(1), 511(7)

In prosecution for violation of section 288a of the Penal Code, defendant's equivocation when he was faced with certain accusatory statements made by 17 year old accomplice did not amount to a tacit admission of offenses when defendant had previously repeatedly denied accusation which had been made by accomplices, and such alleged equivocation did not corroborate testimony of such accomplice. West's Ann.Pen.Code, §§ 288a, 1111.

15. Criminal Law ⚷511(7)

A tacit admission corroborates the testimony of an accomplice. West's Ann.Pen. Code, § 1111.

16. Criminal Law ⚷511(1)

In prosecution for violation of section 288a of the Penal Code, even if there were unusual aspects of relationship between defendant, who was a well-educated adult and 14 and 17 year old accomplices, such did no more than create a mere suspicion when related to acts with which defendant was charged and such alleged relationship was not sufficient corroboration of testimony of accomplices. West's Ann.Pen. Code, §§ 288a, 1111.

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C. K. Curtright, Sacramento, for appellant.

Atty. Gen., by Doris H. Maier, Dep. Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal by defendant from an order denying his motion for a new trial following his conviction of 20 counts of violation of section 288a of the Penal Code. The first nine counts charged related to acts alleged to have been committed by defendant on one Clarence, and the remaining 11 counts related to separate acts alleged to have been committed on one Donnie. It was stipulated that both Clarence and Donnie were accomplices.

[1] It is defendant's primary contention that there was not sufficient corroboration of the testimony of the two accomplices. He further contends that the testimony of certain prosecution witnesses, one Pritchard and one Montoya, which was intended as corroboration was inadmissible. Defendant did not take the stand.

Since the two accomplices testified in detail as to each of the acts charged, there can be no question as to the sufficiency thereof except for the prohibition contained in section 1111 of the Penal Code relative to accomplices which reads in part as follows:

> "A conviction cannot be had upon the testimony of an accomplice unless it be corroborated by such other evidence as shall tend to connect the defendant with the commission of the offense; and the corroboration is not sufficient if it merely shows the commission of the offense or the circumstances thereof. * * *"

[2] In discussing the sufficiency of the corroborating testimony under the express statutory rule, the court in the recent case of People v. Lyons, 50 Cal.2d 245, 257, 324 P.2d 556, 562, held: "The evidence need not corroborate the accomplice as to every fact to which he testifies but is sufficient if it does not require interpretation and direction from the testimony of the accomplice yet tends to connect the defendant with the commission of the offense in such a way as reasonably may satisfy a jury that the accomplice is telling the truth; it must tend to implicate the defendant and therefore must relate to some act or fact which is an element of the crime but it is not necessary that the corroborative evidence be sufficient in itself to establish every element of the offense charged. [Citing cases.]"

[3] The prosecution, in support of the judgment, has set forth in its brief the evidence upon which it relies to supply the necessary corroboration as required by the Penal Code. It is there contended that corroboration as to Donnie's testimony was supplied by evidence that he was 14 years of age, that defendant was his school teacher and that defendant on numerous occasions, during the period in which the acts were alleged to have taken place, picked the boy up at the boy's home. As to Clarence, the prosecution points to the evidence that Clarence was a boy approximately 17 years of age who met defendant at Donnie's house; that Clarence stayed at defendant's home and that defendant admittedly was in the boy's room in both the mornings and evenings as stated by the boy; and also that defendant wrote to Clarence's mother telling her that the boy was staying with him.

[4] As to the above evidence, the most that can be said is that it indicates that defendant had the opportunity to commit the offenses, but mere opportunity has never been held sufficient as corroboration. People v. Robbins, 171 Cal. 466, 154 P. 317.

[5] The prosecution points to further evidence that defendant admittedly permitted both boys to use his car and motorcycle, even though the boys had been in an accident resulting in damage. Certainly the lending of a car or motorcycle is not corroboration of any element of the crime. It is possible to conceive of situations where such fact, together with additional evidence giving it interpretation and direction, would be material; that is, an inducement to participate in the acts charged, but such is not the case here. The record is wholly barren of any connection.

[6] It is also urged by the prosecution that corroboration is supplied by evidence that defendant admittedly had a boot fetish, in that boots had a sexual attraction for him (although it was denied such attraction was homosexual in nature). It was established that defendant supplied the boys with boots; that defendant took pictures of Donnie wearing boots; and that defendant admittedly was attracted to the boys because they wore boots. Without the testimony of the accomplices that boots were involved in the commission of the acts charged, such evidence lacks direction as to connecting defendant therewith. As

was noted in People v. Lyons, supra, such interpretation and direction must be supplied by testimony other than that of the accomplices. Hence in the absence of some evidence that such a fetish is related to homosexuality in some manner, the testimony relied upon lacks both interpretation and direction.

[7] It is further argued that there is evidence that defendant adopted the same pattern of operation with each boy in the commission of the offenses. Such evidence, however, rests solely upon the testimony of the accomplices, and for the reasons given above may not be considered as corroboration.

The prosecution contends that the necessary corroboration is supplied by certain false statements made by defendant. In this connection it is contended that defendant first denied and then admitted that he supplied Clarence with beer. However, the record discloses that defendant only denied giving the boy liquor. It was not denied that beer was made available to Clarence. The record does show that on one occasion during the period in which the acts were alleged to have taken place, defendant gave as a reason for picking Donnie up that he needed the boy's services to aid in some electrical wiring at defendant's home. There was testimony that defendant admitted that this was a pretense. There was also testimony that defendant first denied and then admitted that he had been in trouble of a similar nature before.

[8, 9] The fact, standing alone, that defendant made statements which he later admitted were false does not corroborate the accomplices' testimony. If such statements are of such nature that they indicate a consciousness of guilt, they then may have probative effect as corroborative evidence. This rule of corroborative evidence is set forth in the case of People v. Wayne, 41 Cal.2d 814, 264 P.2d 547. However, as is therein noted at page 823 of 41 Cal. 2d, at page 551 of 264 P.2d: "It should be emphasized that no inference of consciousness of guilt can be drawn from the mere fact that the jury, in order to convict, must have disbelieved defendant's explanation * * *; only where the false statement or testimony is intentional rather than merely mistaken and where such statement or testimony suggests that defendant has no true exculpatory explanation can it be considered as an admission of guilt." It is to be noted that in the Wayne case the false explanation made by the accused related to an element of the crime with which he had been charged—receiving money from a bookmaker where the charge was that the accused was a "go between" in a bribery arrangement.

[10] In the instant case defendant's false statement as to needing Donnie's services was not made to the authorities after he had been accused but was given as an explanation to Donnie's mother. Such statement does not suggest that defendant had no true exculpatory explanation for wanting Donnie's companionship. This is particularly so since defendant explained to the authorities that the true reason for picking Donnie up was to let the boy ride defendant's motorcycle. It is not unusual that one who is allowing a 14-year-old boy to ride his motorcycle would attempt to conceal this fact from the boy's mother.

[11, 12] Defendant's attempt to conceal the fact that he had had previous trouble of like nature was not an attempt to explain away any activity with the boys. Whether or not defendant had been "in trouble" before was not material to the question of whether he had committed the acts charged herein. His false denial of such prior trouble adds nothing to his later admission that he had been in trouble. Such admission does no more than cast suspicion upon defendant, and mere suspicion has never been held sufficient as corroboration.

[13] Likewise without merit as corroborative evidence is the testimony given by one of the officers that during the trial he had overheard defendant ask Clarence

what he had done with the boots; that Clarence replied he had given them to his mother who in turn had taken them to Los Angeles; and that defendant then swore at Clarence, stating, "I'll get you * * *." Surely such testimony is wholly uncorroborative of the testimony given by Clarence concerning the acts charged.

[14, 15] It is next contended by the prosecution that defendant's equivocation when he was faced with certain accusatory statements made by Clarence amounts to a tacit admission of the offenses and as such corroborates Clarence's testimony. While there is ample authority that a tacit admission corroborates the testimony of an accomplice (People v. Watkins, 126 Cal.App.2d 199, 271 P.2d 641; People v. Hambright, 113 Cal.App.2d 40, 247 P.2d 607; People v. Coakley, 108 Cal.App.2d 223, 238 P.2d 633; People v. Griffin, 98 Cal.App.2d 1, 219 P.2d 519; People v. King, 40 Cal.App.2d 137, 104 P.2d 521; People v. Collins, 4 Cal.App.2d 86, 40 P.2d 542), the primary issue is whether the accusation has been made under circumstances calling for a reply, whether the accused understood the statement, and whether his conduct or response was such as to give rise to an inference of acquiescence or guilty consciousness. People v. Simmons, 28 Cal.2d 699, 172 P.2d 18.

The testimony relied upon by the prosecution relative to the alleged tacit admission shows that prior to the trial the district attorney and two officers questioned defendant for a period of about five and one-half hours. During the course of this interrogation, and after he had repeatedly denied the accusations which had been made by the boys, defendant was asked what he would think about Clarence being brought face to face with him. Defendant stated that he would like to hear the boy make the accusations himself. Clarence was then brought into the room and in direct terms accused the defendant of performing the acts denounced by section 288a. Defendant did not immediately respond to the accusations, and when asked if he had any questions to ask the boy said that he did not. Upon being asked a second time if he had any questions, defendant again stated that he had no questions. When asked a third time, defendant said, "Well, Don—well, Clarence, why are you saying this?" Clarence responded, "You know why, * * * because it is the truth." Defendant said, "I can't understand, Clarence, why you said these things," and Clarence said "Well, the only answer I can give you is because it is the truth." Defendant asked, "Is it because of the automobile?" And Clarence replied, "No, the automobile has nothing to do with it * * It is the truth * * * That's it." Defendant then stated that he had no more questions to ask the boy.

Even if it were to be conceded that defendant's comments wherein he asked Clarence why he said the things were an equivocation amounting to a failure to deny the accusations, such would not amount to a tacit admission. Here, as in People v. Staker, 154 Cal.App.2d 773, 316 P.2d 725, in view of defendant's consistent denials of the charges, what further need he have said in addition to what he had already said, since it is conceded that he had consistently denied the commission of the acts charged?

[16] The final contention of the prosecution is that the defendant was engaging in a course of conduct which was not a normal relationship. There is no question but that defendant is a well-educated adult, but as the court noted in People v. Robbins, supra, if friendship of a well-educated adult for a teenager were to cast suspicion upon the former, then thousands of men who have associated in juvenile programs would be suspect. Even granting that there are unusual aspects of the relationship between defendant and the two boys, such does no more than create a mere suspicion when related to the acts with which defendant has been charged. The record is barren of evidence (other than the testimony of the accomplices) giving the relationship of defendant with the boys direction so as to connect defendant with any of the elements of the offense charged.

Inasmuch as we have concluded that there is not sufficient corroboration of the testimony of the accomplices, it is unnecessary to deal with defendant's further contentions as to the admissibility of the testimony which was intended as corroboration.

The order denying defendant's motion for a new trial is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

170 Cal.App.2d 177

Gertrude BARNETT, Plaintiff and Appellant,

v.

William E. KEILIG, Defendant and Respondent.

Civ. 18252.

District Court of Appeal, First District, Division 2, California.

May 6, 1959.

Pedestrian's action for personal injuries. From judgment of the Superior Court, City and County of San Francisco, William T. Sweigert, J., for pedestrian, she appealed on ground of inadequacy. The District Court of Appeal, O'Donnell, J. pro tem., held that award of $1,500 to pedestrian sustaining somewhere between $640 and $880 special damages and who was confined to bed for about a month and a half because of a subcutaneous hematoma on the back of the head, bruises on elbow and buttock, an abrasion of the knee, and cerebral concussion, was not inadequate.

Affirmed.

1. Appeal and Error 🔑1004(1)

Verdict of jury on damages will not be disturbed if there is any substantial evidence to support it.

2. Appeal and Error 🔑979(3)
New Trial 🔑70

Motion for new trial on ground of insufficiency of evidence to justify verdict appeals peculiarly to the discretion of the trial court, and its order refusing a new trial will not be disturbed on appeal in absence of a clear showing of an abuse of discretion.

3. New Trial 🔑74

An abuse of discretion in denying motion for new trial on ground of inadequacy or excessiveness of damages is not shown unless it appears that the verdict is the result of passion or prejudice.

4. Damages 🔑130(4)

Award of $1,500 including $640 or $880 special damages to female pedestrian who sustained a subcutaneous hematoma on the back of the head, bruises on elbow and buttock, abrasion of knee and an alleged cerebral concussion resulting in bed confinement for about a month and a half, was not so inadequate as to require granting of new trial on ground of inadequacy of award.

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Barnett & Robertson, San Francisco, for appellant.

Pelton, Gunther, Durney & Gudmundson, San Francisco, for respondent.

O'DONNELL, Justice pro tem.

This is an action for damages for personal injuries sustained by plaintiff when she was struck by defendant's automobile while walking across a street intersection in the city of San Francisco. The jury returned a verdict in plaintiff's favor in the sum of $1,500. After judgment was entered on the verdict, plaintiff moved for a new trial on the ground, among others, of the insufficiency of the evidence to justify the verdict. The trial judge denied the motion and this appeal from the judgment ensued.

Plaintiff's sole contention on this appeal is that the verdict of the jury is so grossly inadequate as to require reversal of the judgment. We shall briefly review the evidence relevant to that contention.

Following the accident, plaintiff was hospitalized for two weeks. Thereafter, she was confined to her bed in her home, in the care of a practical nurse, for about a month. Dr. Leeds, who had been plaintiff's physician for some years and who had ministered to her following the accident, diagnosed plaintiff's injuries as follows: A subcutaneous hematoma on the back of the head; bruises on the elbow and buttock; an abrasion of the knee; and, cerebral concussion. Plaintiff also testified that she has been nervous and emotionally upset ever since the accident.

The hematoma cleared within five days of the accident. The bruises and abrasions were completely gone in two weeks' time. Dr. Leeds testified that his diagnosis of cerebral concussion was predicated on plaintiff's statement to him that she had been rendered unconscious by the impact of the automobile. However, there was testimony of a witness to the accident that plaintiff never lost consciousness. Moreover, Dr. Lawrence Custer, called as a witness by defendant, testified that a cerebral concussion, as distinguished from a cerebral contusion and cerebral laceration, does not result in damage to the brain. His examination of plaintiff revealed no brain damage. Dr. Knox Finley, also called by defendant, testified he examined plaintiff and he found no evidence of damage to the skull, brain, or nervous system. With respect to plaintiff's nervous and emotional condition, her medical history prior to the date of the accident, as revealed both from the testimony of Dr. Leeds and from hospital records, discloses that such condition has existed as far back as the year 1944. While plaintiff's nervous condition was undoubtedly aggravated by the experience of being knocked to the pavement by an automobile, still, the jury might have concluded that the aggravated condition was transient. Dr. Leeds testified on cross-examination that plaintiff's present nervous and emotionally upset condition might well date back many years.

[1-3] From the foregoing summary of the evidence it seems quite clear that the jury, whose function it was to weigh the evidence, might well have concluded that plaintiff's injuries were of a minor nature and assessed damages accordingly. The verdict of the jury will not be disturbed on appeal, of course, if there is any substantial evidence to support it. (4 Cal.Jur.2d p. 485.) Also, "It is well settled that a motion for a new trial on the ground of insufficiency of the evidence to justify the verdict appeals peculiarly to the discretion of the trial court, and its order refusing a new trial will not be disturbed on appeal in the absence of a clear showing of an abuse of discretion." Whyatt v. Kukura, 157 Cal.App.2d 803, 804, 321 P.2d 860, 861. An abuse of discretion in denying a motion for new trial on the ground of the inadequacy or excessiveness of damages is not shown unless it appears that the verdict is the result of passion or prejudice. State Rubbish Collectors Ass'n v. Siliznoff, 38 Cal.2d 330, 240 P.2d 282; Quirk v. City and County of San Francisco, 105 Cal.App.2d 85, 232 P.2d 893.

[4] Appellant cites four decisions which she contends to be supportive of her position that the inadequacy of the award here made requires reversal of the judgment. Those cases are: Belyew v. United Parcel Service, 49 Cal.App.2d 516, 122 P.2d 73; Reilley v. McIntire, 29 Cal.App.2d 559, 85 P.2d 169; Cunha v. Lewis, 31 Cal.App.2d 1, 76 P.2d 1198; and Sanford v. Wilcox, 13 Cal.App.2d 193, 56 P.2d 548. Those cases all present the converse of the situation presented here. In each of them the trial court had *granted* a motion for new trial based on the inadequacy of the award. In each of them the appellate court simply held that the order granting a new trial would not be disturbed on appeal unless it appeared that the trial court abused its discretion in determining that the damages awarded were inadequate.

Plaintiff's special damages were somewhere between $640 and $880, there being a dispute between the parties as to a $240 item plaintiff claims to have expended for drugs. Even assuming that the jury accepted the higher amount of $880, still we cannot say, as a matter of law, that the gross award of $1,500 in the instant case does not find substantial support in the evidence, nor that it resulted from passion or prejudice of the jury.

The judgment is affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

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170 Cal.App.2d 181

PEOPLE of the State of California, Plaintiff and Respondent,
v.
J. T. CARR, Defendant and Appellant.
Cr. 6569.

District Court of Appeal, Second District, Division 1, California.
May 6, 1959.

Defendant was convicted of unlawfully selling heroin and from a judgment of the Superior Court of Los Angeles County and order denying a motion for new trial, Clement D. Nye, J., the defendant appeals. The District Court of Appeal, Lillie, J., held that the evidence sustained conviction.

Judgment affirmed.

1. Criminal Law 🔑1159(2, 3)

The function of the Appellate Court is neither to reweigh the evidence nor resolve the factual conflicts in favor of the defendant, since the credibility of witnesses and the weight to be given their testimony are committed exclusively to the trier of fact.

2. Criminal Law 🔑1144(13), 1159(2)

The Appellate Court cannot substitute its findings of the ultimate facts for those reached by the jury, and must assume, in favor of the verdict, the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict.

3. Criminal Law 🔑1159(2)

If defendant relied on contention that there was something unusual in the conduct of the trial and the circumstances surrounding the offense which might create in the minds of a jury a passion or prejudice against the defendant, defendant must show such a lack of evidence in the record to support the verdict as would reasonably infer the existence of a condition which might influence the jury or that the evidence relied on by the prosecution is apparently so improbable as to be incredible, or the evidence so clearly preponderates against the verdict as to convince the Appellate Court that the verdict was result of passion or prejudice.

4. Criminal Law 🔑553

The jury may believe all of the testimony of a witness, believe part of it, and give no credits to the balance.

5. Poisons 🔑9

Evidence sustained conviction for unlawfully selling heroin. West's Ann. Health & Safety Code, § 11500.

6. Poisons 🔑9

In prosecution for the unlawful sale of narcotics corroboration is not necessary and testimony of a single witness who identifies the defendant as one who made the sale is sufficient. West's Ann.Health & Safety Code, § 11500.

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John H. Marshall, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Jack K. Weber, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

Defendant was convicted by a jury of selling heroin in violation of section 11500, Health and Safety Code. His motion for a new trial denied, he was sentenced to the State Prison. He appeals from the judgment and order denying the motion.

[1, 2] Appellant's sole point on appeal is the sufficiency of the evidence to support the verdict. The function of this court is neither to reweigh the evidence nor resolve the factual conflicts in favor of the defendant, for the credibility of the witnesses and the weight to be given their testimony are committed exclusively to the trier of the fact (People v. Flummerfelt, 153 Cal.App.2d 104, 313 P.2d 912). We cannot substitute our findings of the ultimate fact for those reached by the jury (People v. Perkins, 8 Cal.2d 502, 66 P.2d 631); and "(W)e must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict." People v. Newland, 15 Cal.2d 678, 104 P.2d 778, 780.

Mindful of the foregoing rules, we briefly summarize the evidence in the light most favorable to respondent. Sheriff's deputy Brown testified that around 3 or 3:30 p. m. on March 29, 1957, he was engaged in a narcotics investigation and had as a passenger in his car one Moses Walker. While cruising around they observed defendant northbound on Compton Avenue, driving a 1957 Buick, two-door Century hardtop, red over white, paper license No. 0134457; Walker said: "There goes 'Stick' and he sometimes deals in junk or narcotics," and they turned left on Compton following him. Shortly thereafter he stopped and Walker left the deputy's car to go over to defendant's vehicle where they talked for a few minutes. Walker returned and defendant continued northerly on Compton. After talking with Walker, they continued to follow defendant until he stopped at Success Avenue south of 92nd Street where he left his car, walked over to the parkway and picked up an object from the weeds. He returned to his car, bent over the seat, again got out and walked back to Brown's vehicle parked directly behind him. Defendant got into the deputy's car and sat in the front next to Walker. Defendant asked Brown for money so he handed a $5 bill to Walker, who gave it and four $1 bills (which he had previously obtained from Brown) to defendant. Upon receiving the $9, defendant handed Walker a red balloon containing 3 capsules of heroin, which Walker passed to Brown. Walker then introduced him to defendant: "This is Joe," to which the deputy said, "How do you do." They got out of the car and he and defendant discussed the newness and operation of the latter's car. Defendant said he had it "a couple of days" and it ran "real good." He asked defendant if he could meet him at a future date, but defendant made no answer.

As to the informer, Moses Walker, the deputy testified he had met him for the first time on that day at the Sheriff's station.

Deputy Vacio testified that he and his partner kept Brown and Walker under surveillance on March 29. He observed them on Compton Avenue drive up to a 1957 red and white Buick and later park behind it. Walker got out of Brown's car and went to the Buick for a few minutes. Returning to the deputy's vehicle, they drove north again. At the corner of 103rd and Compton, Vacio passed alongside both vehicles and followed defendant to 97th Street and Compton where the latter turned east. They drove to 91st Street, where they were able to observe defendant park on 92nd, get out of his car, go to the curb and then back to the vehicle. In a few minutes, defendant again got out and walked back to deputy Brown's car. In a short time he left, got into his own vehicle and drove away. Immediately thereafter Vacio and his partner met Brown at the Sheriff's station where he showed them the red rubber balloon. Vacio identified defendant as the person in the Buick and testified he looked at him when he drove within three or four feet alongside defendant's car at 103rd and Compton.

Gunther, an automobile dealer, testified that on March 28, 1957, he sold and delivered to defendant a 1957 Buick Century two-door hardtop, bearing temporary license No. 134457 on the paper sticker in the back window.

The defense consisted of the testimony of defendant, Moses Walker, and Gunther, who had also been a witness for the People. Defendant testified he had never gone by the name of "Stick," had no conversation with Walker and Brown on March 29, 1957, had handed neither Brown nor Walker a balloon, took no money from either and had never seen Brown prior to his arrest. He said he bought a blue 1957 Century hardtop Buick on March 28, but had never owned a red and white one and had never had a conversation with Brown or Walker concerning the purchase or sale of narcotics. Moses Walker denied he ever rode with Brown on March 29, 1957, pulled up behind defendant, or got out of the deputy's car and talked to him, that he was present in Brown's car while the latter gave him $9 to give to defendant or ever received a balloon from defendant. He said he knew defendant only slightly and had seen him around, but never mixed with him socially or for business. Gunther for the defendant testified the car he sold and delivered to him on March 28, 1957, was blue.

Appellant argues that although "the evidence adduced by the prosecution, while probably sufficient to establish a prima facie case of guilt of the defendant," is not sufficient to establish the identity of the defendant, due to the inaccuracy of Brown's observations concerning other interrelated facts, mainly the license number and color of defendant's car. He contends that the only way in which the verdict can be accounted for is that it was rendered "under a state of great excitement" or "was the result of passion or prejudice on the part of the jury."

[3] An examination of the record discloses nothing unusual concerning the nature of the charge, the persons involved, the conduct of the trial or the circumstances surrounding the offense, which might reasonably create in the minds of the jury a "state of excitement" or "passion or prejudice" against the accused. Therefore, if appellant relies on this contention, he must show such a lack of evidence in the record to support the verdict as would reasonably infer the existence of a condition which might influence the jury; or that the evidence relied upon by the prosecution is apparently so improbable or false as to be incredible; or the evidence so clearly and unquestionably preponderates against the verdict as to convince this court the verdict was the result of passion or prejudice. People v. Willard, 150 Cal. 543, 89 P. 124; People v. Niino, 183 Cal. 126, 190 P. 626. This he has failed to do.

Appellant advances the position that in view of his and Walker's denial of their participation in the heroin sale, and since both Brown and Vacio described the car as "red and white" bearing paper license No. 0134457, while defendant's witness testified his car was blue, bearing license No. 134457; the deputies, who claimed no prior acquaintance with defendant, did not arrest him until later; and it was not proved defendant had any connection with narcotics, that not only does the evidence preponderate in favor of the innocence of defendant, but the deputies' testimony is so inherently false or improbable as to be incredible, or any apparent falsity without resorting to inferences or deductions.

We note that the alleged contradictions do not occur in their own testimony, for the statements of both Brown and Vacio are consistent in themselves and with each other. Appellant relies upon what he terms a contradiction created by the testimony of Gunther, who testified for both the prosecution and defendant, concerning the license number and color of defendant's car.

[4, 5] In exercising its duty of deciding which witnesses told the truth, and

what evidence was entitled to the greater weight, and resolving any factual conflict in the testimony, it is obvious that the jury did not believe defendant's denial rejected Walker's version of what occurred, and accepted the deputies' testimony as worthy of belief. In doing so, the jury either believed all of the deputies' testimony and disbelieved that of Gunther; believed part of Gunther's testimony giving no credence to the balance, as it had a right to do (People v. Thomas, 103 Cal.App.2d 669, 229 P.2d 836); discounted the asserted discrepancies as not sufficiently substantial or material to render the rest of the deputies' testimony unworthy of belief (People v. Baserto, 162 Cal.App.2d 123, 327 P.2d 558); or reconciled the testimony of all three witnesses. However the jury resolved the matter we find nothing in the record to justify a reversal of its verdict.

It is not difficult to understand why the jury discredited the testimony of the defendant and Walker against that of Brown and Vacio. Defendant's testimony was succinct and guarded. He swore he was working for Willie Hill junking automobiles at 3:30 p. m. on March 29, 1957, yet he offered no corroboration. Moses Walker, a self-admitted felon, categorically denied his participation in the transaction although he did admit that in March, 1957, he went out to Watts with Brown, who "wanted me to get somebody 'busted,' to buy some narcotics from another man." Walker was serving time in San Quentin for "sale of narcotics." When asked if he gave evidence here to help convict someone the inmates wouldn't be "pretty rough" on him when he returned, Walker first said "It wouldn't go hard with me any place," and when asked again: "Wouldn't make any difference to the boys up there, is that right?" he repeated, "I say it wouldn't go hard with me any place." Later, upon further questioning he became less evasive and said he hadn't done anything and had no cause to be afraid of anyone.

As to either the license number or color of defendant's car, there appears to be no definite contradiction of the deputies' testimony. They said there were seven digits starting with a "zero" in the temporary number they saw on the removable paper sticker in the rear window of defendant's car. Gunther testified his records disclose the license number of defendant's car to be the same (134457), with the exception of the "zero." Referring to the paper stickers bearing temporary license numbers, Gunther was asked "Now, are there any zeros on these stickers, sir?" to which he answered: "That, I can't answer. *There might be one in the front.*" Then, "Is there any particular reason why there could be a zero on the front of the stickers that appear in the window but not in your record pertaining to it * * *" and he replied, "Not unless there's seven numbers in the temporary license."

As to the color of the defendant's car, Brown simply described it as "red over white." Vacio testified "to the best of my recollection, it was" a red and white car. Gunther, who was then called by defendant, said the car he sold defendant was blue. Consistent with his denials, of course, Walker gave no testimony concerning defendant's car. Defendant, whose work was junking automobiles, only said that the car he bought on March 28 was a blue Buick and that he did not *own* a red and white one. He could not recall his temporary license number on the paper sticker. He at no time testified he had not *driven* a red and white Buick on March 29.

Inconsistencies, contradictions and conflicts in testimony are common to almost every case on appeal. In the instant one, if the several alleged contradictions are deemed to exist, in view of their character and the nature of the rest of the evidence, they at most afforded only an opportunity for a persuasive argument to the jury against the reliability of the testimony of the deputies (People v. Janisse, 162 Cal.App.2d 117, 328 P.2d 11). However, we find nothing in their testimony from which we could justly conclude it is *per se* unbelievable.

[6] That there is sufficient evidence in the record before us to support the verdict, is manifest from the testimony of one witness (Brown) who positively identified defendant as the man who sold him the heroin, and the corroboration of another (Vacio), who observed the parties during the transaction and positively identified the defendant as the person who was present and participated therein, and Walker as the one with defendant and Brown. Although it here exists, corroboration is not necessary in a narcotics case, and the testimony of one witness who identified the defendant as the one who made the sale is sufficient (People v. Johnson, 99 Cal. App.2d 559, 222 P.2d 58). No reversal is warranted.

For the foregoing reasons the judgment and order denying the motion for new trial are and each of them is affirmed.

WHITE, P. J., and FOURT, J., concur.

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170 Cal.App.2d 301

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Dewey ELY, Defendant and Appellant.
Cr. 3561.

District Court of Appeal, First District, Division 2, California.
May 11, 1959.

Prosecution for violation of Penal Code, § 288. The Superior Court, City and County of San Francisco, Melvyn I. Cronin, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Draper, J., held that where revolting acts testified to in detail by prosecution witnesses compelled the conclusion that they evidenced intent of defendant of gratifying his lust, jury, upon accepting direct evidence that the acts were performed, could not question their motivation, and therefore, there was no prejudice in failing to instruct jury on circumstantial evidence, even though such instruction should have been given in view of fact that requisite lustful intent could be determined only by inferences drawn by the jury from testimony as to the acts.

Judgment affirmed.

Criminal Law 🔑1173(2)

In prosecution for violation of Penal Code, § 288, where revolting acts testified to in detail by prosecution witnesses compelled the conclusion that they evidenced intent of defendant of gratifying his lust, jury, upon accepting direct evidence that the acts were performed, could not question their motivation, and therefore, there was no prejudice in failing to instruct jury on circumstantial evidence, even though such instruction should have been given in view of fact that requisite lustful intent could be determined only by inferences drawn by the jury from testimony as to the acts. West's Ann.Pen.Code, § 288.

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Wainwright & Fleishell, San Francisco, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Asst. Atty. Gen., Raymond M. Momboisse, Deputy Atty. Gen., for respondent.

DRAPER, Justice.

Defendant appeals from judgment entered upon jury verdict finding him guilty of violation of Penal Code Section 288.

This case is a rarity, in that two persons who observed the occurrences from the window of an apartment, as well as the child involved, were witnesses for the prosecution. In view of these facts, appellant's concession that he does not urge insufficiency of the evidence is somewhat superfluous.

Appellant asserts error in the failure of the trial court to instruct as to the test of circumstantial evidence (CALJIC 27). The intent of "arousing, appealing to, or gratifying the lust or passions or sexual desires" of defendant or the child is, of course, an essential element of the crime charged (Pen.Code, § 288). Appellant contends that, lacking any admission by him, his intent can be determined only by inferences drawn by the jury from his physical acts, and that such inferences constitute indirect or circumstantial evidence. In strict definition, he is correct. Thus, even though not requested, the instruction on circumstantial evidence should have been given. People v. Yrigoyen, 45 Cal.2d 46, 49, 286 P.2d 1; People v. Bender, 27 Cal.2d 164, 174, 163 P.2d 8. However, in the light of the conduct of appellant testified to by the child and the two eyewitnesses, it is difficult to find prejudice to appellant in the omission of the instruction.

Appellant did not, as his brief attempts to suggest, admit all the physical acts charged against him and deny only his wrongful intent. Rather, he admitted only the equivocal acts of placing his arm around the child (his daughter) and kissing her. He flatly denied each and all of the revolting acts testified to in detail by the three prosecution witnesses. It would serve no purpose to recite these acts here. As detailed in the transcript, they compel the conclusion that they evidenced the requisite lustful intent. The jury, accepting the direct evidence that these acts were performed, could not question their motivation. Thus there was no prejudice. People v. Norton, 141 Cal.App.2d 790, 794, 297 P.2d 439; People v. Andrus, 159 Cal.App.2d 673, 684, 324 P.2d 617.

This conclusion is not weakened by the fact that a previous jury failed to agree. Rather, it seems clear that the disagreement could concern only the physical facts, and not the intent to be inferred from them once their existence was found.

Judgment affirmed.

KAUFMAN, P. J., and DOOLING, J., concur

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170 Cal.App.2d 145

PEOPLE of State of California, Plaintiff and Respondent,

v.

Alonzo Charles SPENCER, Defendant and Appellant.

Cr. 1413.

District Court of Appeal, Fourth District, California.

May 4, 1959.

Rehearing Denied May 22, 1959.

Hearing Denied July 1, 1959.

Defendant was convicted of conspiracy to commit forgery and on two counts of uttering a forgery. The Superior Court of San Diego County, James C. Toothaker, J., entered judgment, and defendant appealed. The District Court of Appeal, Shepard, J., held that information was sufficient to charge crime of conspiracy and crimes of uttering forgeries, and that evidence sustained conviction.

Judgment affirmed.

1. Conspiracy 🔑43(6)

Count of information charging defendants with conspiracy to commit crime of forgery on or about certain date in certain county, and that before filing of information they unlawfully conspired to commit forgery, and setting forth three overt acts, was sufficient to charge conspiracy. West's Ann.Pen.Code, §§ 182, 470.

2. Forgery 🔑32

Count of information charging that defendants uttered a forgery on or about certain date in certain county, and that before filing of information they unlawfully uttered a false and forged check with intent to defraud named person and certain bank, was sufficient to allege forgery. West's Ann.Pen.Code, § 470.

3. Jury 🔑29(2, 6)

Defendant's counsel and the district attorney must both consent to a waiver by defendant of defendant's right of trial by jury before waiver becomes effectual.

4. Criminal Law 🔑260(11)

Where evidence is conflicting, decision of trial court on matters of fact will not be disturbed on appeal.

5. Criminal Law ⚷1159(2)

The District Court of Appeal on appeal cannot weigh the evidence.

6. Criminal Law ⚷1163(2)

Burden was on defendant to show any prejudice resulting to him because of fact that counsel for the defense and the prosecution at times conferred with trial judge privately out of hearing of defendant and out of hearing of jury.

7. Criminal Law ⚷1114(1)

The District Court of Appeal on appeal cannot consider matters which record does not support.

8. Conspiracy ⚷47

Evidence sustained conviction for conspiracy to commit forgery. West's Ann. Pen.Code §§ 182, 470.

9. Forgery ⚷44(3)

Evidence sustained convictions for uttering forgeries. West's Ann.Pen.Code, § 470.

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Manuel L. Kugler, San Diego, Alonzo Charles Spencer, in pro. per., for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., S. Clark Moore, Deputy Atty. Gen., for respondent.

SHEPARD, Justice.

Defendants Alonzo Charles Spencer, John Henry O'Neal and Phillip O'Neal were charged in Count 1 of the information with a violation of Penal Code Section 182 (conspiracy to commit the crime of forgery) on July 6, 1958. Said count alleged four overt acts but before trial overt act No. 4 was dismissed on motion of the district attorney. By the second count of the information they were charged with a violation of Penal Code Section 470 (uttering a forgery) on or about July 7, 1958. By the third count of the information they were charged with a violation of Penal Code Section 470 (uttering a forgery) on or about the 8th day of July, 1958. Defendant Alonzo Charles Spencer was charged with having, prior to the date of the offenses alleged in the information, been convicted of six separate felonies; (1) house breaking in South Carolina in 1943; (2) house breaking and larceny in South Carolina in 1943; (3) house breaking and larceny in South Carolina in 1943; (4) assault and battery with a dangerous weapon in Massachusetts in 1950; (5) armed robbery in California in 1953; and (6) grand theft in California in 1953.

Defendant Spencer admitted the three prior convictions alleged to have occurred in Massachusetts and in California, but denied the three prior convictions alleged to have occurred in South Carolina. Upon the conclusion of the trial the jury found defendant Spencer guilty of all three counts charged in the information, and further found that the allegation as to the three prior convictions which had been denied were true. Defendants John Henry O'Neal and Phillip O'Neal were each found guilty on Count 1 (the conspiracy charge) and of Count 3 (uttering a forgery on July 8), but the O'Neals were acquitted on Count 2 (uttering a forgery on July 7). Thus, the defendant Spencer stands convicted on the count of conspiracy, on both counts of uttering a forgery, and with six prior felony convictions. Defendant Spencer alone has appealed.

The attorney for appellant has filed a report with this court stating that he had reviewed the record and his own memory of the whole proceeding, and that he has found no reversible error in the proceedings.

The defendant on his own behalf has filed a brief in which he contends that the court committed prejudicial error in five different respects.

[1] The first contention apparently is that the information is insufficient to charge the crime of conspiracy. We have examined Count 1 of the information carefully and if this is, in fact, defendant's contention it is without merit. The count in general substance charges the three defendants with "Conspiracy to Commit the Crime of Forgery * * * on or about the 6th day of July, 1958, at the said County of San Diego, State of California, and before

the filing of this information did wilfully, unlawfully and feloniously conspire, combine and agree together to commit the crime of Forgery, a felony;" Thereafter follows the allegations of the three overt acts retained for trial purposes, the quotation of the first of which will serve to exemplify all three. It states:

> "That thereafter, at and in the County of San Diego, on or about the 7th day of July, and in the pursuance of the object of said conspiracy, the said Alonzo Charles Spencer went to the Bank of America National Trust and Savings Association, Main Office, San Diego, California, and attempted to pass a check";

It is clear from the foregoing that the language of the information gave to the defendant a clear and concise information as to what he was charged with, and sufficiently followed the charging requirements of Penal Code Section 182.

[2] The second contention of the defendant is that Count 3 of the information failed to show the existence of forgery or fraud. Said count of the information reads as follows:

> "And the said Alonzo Charles Spencer, John Henry O'Neal and Phillip O'Neal are further accused by the said District Attorney of the County of San Diego, State of California, by this Information of the crime of Uttering a Forgery (PC 470) committed as follows: The said Alonzo Charles Spencer, John Henry O'Neal and Phillip O'Neal on or about the 8th day of July 1958, in said County of San Diego, State of California, and before the filing of this Information, did unlawfully and fraudulently utter, publish and pass as maker thereof, knowing that said check was false and forged, with intent to defraud Victor Petriks, and the Bank of America National Trust and Savings Association, La Jolla Branch, La Jolla, California, a national banking association;"

A reading of this shows that the appellant was informed that he was charged with the crime of uttering a forgery. He was told the names of the people that he tried to defraud, the date of the offense, the fact that the check was false and forged, and that he did unlawfully and fraudulently utter the same. An examination of the transcript of the trial shows that the district attorney in his opening statement identified the check as one uttered by John Henry O'Neal in the amount of $650 on July 8. It was identified by several witnesses, placed in evidence, referred to by defense counsel for all defendants, and not once was any question raised about the sufficiency of said Count 3 of the information. From an examination of the entire record it is beyond question that defendant, both through his attorney and personally, fully understood with what crime he was charged and what check was identified to which count of the information. We are unable to see that the typographical deficiency caused the slightest misapprehension on the part of the defendant or in any other way prejudiced him. Penal Code, Section 960, 1404; People v. Haagen, 139 Cal. 115, 116 [2], 72 P. 836; People v. Williams, 27 Cal.2d 220, 226 [3], 163 P.2d 692.

[3] Defendant next contends that he was unlawfully compelled to be tried before a jury in that he waived trial by jury so that he could be tried by the judge sitting without a jury. While it is perfectly true that a trial by jury may be waived in criminal cases by the consent of both parties, an examination of the record in this case shows that the district attorney refused to waive trial by jury. It is necessary for a waiver of trial by jury to become effectual for the defendant, his counsel and the district attorney to all consent. Art. I, Sec. 7, Cal.Const.; People v. Barnum, 147 Cal.App.2d 803, 808 [7], 305 P.2d 986; People v. Garcia, 98 Cal.App. 702, 277 P. 747; People v. Eubanks, 7 Cal.App.2d 588, 589 [1], 46 P.2d 789.

Defendant next contends that the district attorney made improper statements to the jury. We have examined all of the specifications in this respect and we can find nothing in any of them that even remotely resembles impropriety. In addition thereto, we have examined the entire record and we nowhere find any statements by the district attorney which in our opinion constitute prejudicial misconduct.

[4, 5] Next the defendant contends there were inconsistencies in the testimony and cites conflicts between the defense testimony and the prosecution testimony. As we have said many times before, where the evidence is conflicting, the decision of the trial court on matters of fact will not be disturbed. This court cannot weigh the evidence. Buckhantz v. R. G. Hamilton & Co., 71 Cal.App.2d 777, 163 P.2d 756; Burrows v. Burrows, 18 Cal.App.2d 275, 63 P.2d 1135; Berniker v. Berniker, 30 Cal.2d 439, 182 P.2d 557.

[6] Next the defendant contends that defendant was denied a fair trial because counsel for defense and prosecution at times conferred with the judge privately out of the hearing of defendant and out of the hearing of the jury. Some of these conversations appear in the record and some do not. Those that do show in the record show affirmatively that nothing was said which could possibly prejudice the defendant. Furthermore, all were out of the hearing of the jury and could not have prejudiced the defendant in any event. The defendant has not suggested to us how he might have been prejudiced. Defendant's attorney was present at all times and it is apparent from reading the entire record that he was assiduously and alertly protecting the rights of the defendant. The burden is on the appellant to show any prejudice resulting to him. People v. Isby, 30 Cal.2d 879, 894, [13], 186 P.2d 405; People v. Justice, 167 Cal.App.2d 616, 334 P.2d 1031.

[7] The next contention contains the suggestion that there was an alternate juror who retired with the jury to deliberate. The record does not support this suggestion in any way, and we cannot consider matters which the record does not support. People v. Hernandez, 150 Cal.App.2d 398, 402 [2b], 309 P.2d 969; People v. McKinney, 152 Cal.App.2d 332, 336 [7], 313 P.2d 163.

[8, 9] This court has been at pains to read the entire record of this case and it appears to us therefrom that defendant was represented by alert and conscientious counsel, that he was accorded a full and fair trial, and that the evidence, although partially circumstantial and conflicting, was amply sufficient to support the verdict of the jury and the judgment of the court.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

Hearing denied; GIBSON, C. J., and PETERS, J., dissenting.

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170 Cal.App.2d 167

E. M. CARSE and E. I. Carse, Plaintiffs and Respondents,

v.

Pete ZAREVICH, Defendant and Appellant.

Civ. 9541.

District Court of Appeal, Third District, California.

May 5, 1959.

Action for breach of contract to purchase real property and for damages on ground that plaintiffs in reliance on defendant's agreement refrained from maintaining and caring for an orchard on the property. From an order denying the defendant's motion for a change of venue to the county of defendant's residence in Superior Court, Nevada County, Vernon Stoll, J., the defendant appeals. The District Court of Appeal, Peek, J., held that the venue was properly laid in Nevada County where the contract was to be performed.

Order affirmed.

1. Venue ⚷7

The county of defendant's residence is not a preferred place of trial over the county in which the contract was entered into or is to be performed. West's Ann. Code Civ.Proc. § 395.

2. Venue ⚷7

In action for breach of contract to buy real property where the contract of sale was consummated in Nevada County, such county was a proper county for the trial of the action and defendant was not entitled to have the venue changed to Santa Clara County which was the county of his residence. West's Ann.Code Civ.Proc. § 395.

3. Venue ⚷7

Where plaintiffs alleged that in reliance on defendant's agreement to buy real property plaintiffs refrained from caring for an orchard thereon and were damaged as result of the failure of defendant to perform the contract, action sounded in damages for breach of contract and not for fraud, and hence did not defeat the plaintiffs' right to have the action tried in Nevada County where the contract was entered into or was to be performed as against defendant's claim that the venue should have been placed in the county of defendant's residence. West's Ann.Code Civ.Proc. § 395.

Silvio E. Borello, San Jose, for appellant.

Leo J. Todd, Grass Valley, for respondents.

PEEK, Justice.

This is an appeal from an order denying defendant's motion for a change of venue to the county of defendant's residence.

Plaintiffs' complaint alleges as a first cause of action that defendant entered into a contract to buy certain real property from plaintiffs; that defendant deposited a check for $3,000 with the real estate broker pursuant to the terms of a deposit receipt contract; and that thereafter defendant stopped payment on the check. The contract provided that in the event the defendant purchaser failed to pay the balance of the purchase price or to complete the purchase, the amount deposited "* * * shall at the option of the seller, be retained as consideration for the execution of this agreement * * *." Plaintiffs seek judgment on said cause of action in the amount of $3,000.

For a second cause of action plaintiffs allege that in reliance upon defendant's written agreement to buy the real property, they, the plaintiffs, refrained from maintaining and caring for an orchard on the property, and that as a result they have been damaged in the further sum of $3,000 by the failure of the defendant to perform the contract as agreed.

Defendant demurred to the complaint and in addition filed a motion for change of venue on the ground that his residence is in Santa Clara County. The motion was denied and he now appeals.

Code of Civil Procedure, section 395, insofar as pertinent to this proceeding, provides: "* * * When a defendant has contracted to perform an obligation in a particular county, either the county where such obligation is to be performed, or in which the contract in fact was entered into, * * * shall be a proper county for the trial of an action founded on such obligation, * * *."

[1, 2] It is uncontradicted that the contract of sale was consummated in Nevada County, and since the county of a defendant's residence is not a preferred place of trial over the county in which the contract was entered into or is to be performed (Gilman v. Nordin, 112 Cal.App.2d 788, 247 P.2d 394), it follows that by reason of said code section Nevada County was a proper county for the trial of the action.

[3] Defendant contends, however, that the second cause of action sounds in tort; that is, an action of fraud is alleged and therefore the action becomes transitory and the county of defendant's residence the only proper county for trial. An examination of the complaint clearly indicates that plaintiffs' second cause of action is for damages flowing from the breach of the contract and not for fraud. Hence the second cause of action does not defeat plaintiffs' right to have the cause tried in Nevada County. Bloom v. Carpenter, 74 Cal. App.2d 790, 169 P.2d 388.

The order is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

* * *

170 Cal.App.2d 277

Willie H. METTLER, Plaintiff and Appellant,

v.

Donald H. HEDLEY, Edmund M. Stevens, Denzil Nadean Hedley, Cre Eugenie Cooper, La Verne Alene Siebert and Catherine Emma Zahn, Defendants and Respondents.

Civ. 5695.

District Court of Appeal, Fourth District, California.

May 8, 1959.

Hearing Denied July 1, 1959.

Action for reformation of written contract. From an order of the Superior Court of Kern County, W. L. Bradshaw, J., granting defendants' motion for change of venue and denying plaintiff's motion to retain action on ground of convenience of witnesses, an appeal was taken. The District Court of Appeal, Griffin, P. J., held that the uncontradicted evidence showed that convenience of witnesses would be better served by trial in Kern county.

Order reversed.

1. Reformation of Instruments 🔑1, 30

Action to reform contract was a proceeding in equity and was not founded on obligation itself.

2. Venue 🔑52(1)

Any inconvenience to parties to action, as distinguished from other witnesses, is not ordinarily considered on motion for change of venue. West's Ann.Code Civ. Proc. § 395.

3. Venue 🔑70

In action for reformation of written contract, uncontradicted evidence showed that convenience of witnesses would be better served by trial in county where action was brought; and it was, therefore, an abuse of discretion to deny plaintiff's motion to retain action there. West's Ann. Code Civ.Proc. § 395.

Maas & Nairn, Bakersfield, for appellant.

Geo. W. Trammell, Long Beach, for respondents.

GRIFFIN, Presiding Justice.

Plaintiff-appellant brought this action against defendants-respondents for reformation of a written contract, alleging generally that on January 31, 1957, defendants, except Hedley, made and entered into a written agreement in Kern County involving a written lease of land between one R. E. Stevens and Willie H. Mettler. A copy of this agreement is attached to the complaint. From the allegations thereof it appears that the People of the State of California instituted a proceeding in eminent domain in Kern County involving certain rights in a portion of the subject land. Plaintiff, by this action, seeks to reform the written agreement by striking subdivisions 2 and 3 of paragraph V therefrom. Paragraph V provides:

> "Mettler hereby agrees to secure from each person (including himself), firm, association and corporation who now has, or had on the 28th day of June, 1956, any right, title, interest or

> estate in or to any part of said Parcel 1–C, a written assignment, in favor of Stevens, of any and all awards, damages and sums of money which may be awarded to such person, firm, association or corporation, in said action on account of: * * *
>
> "2. The taking, from the portion of the Subject Land not sought to be condemned, of the right or easement of access to the State highway, heretofore declared a freeway, adjacent on the East, to the Subject Land; and
>
> "3. Damages incidental to each of the aforesaid takings, other than damages for improvements upon said Parcel 1–C.
>
> "In the event Mettler does not secure any one of the aforesaid assignments, or in the event any one of such persons, firms, associations or corporations settles with the State, out of court, or before executing such assignment, then, and in either of such events, Mettler agrees to pay to Stevens a sum of money equal to the sum of money Stevens would have received had Mettler secured such assignment as aforesaid."

The allegation of the complaint is that plaintiff failed and neglected to read these paragraphs of the agreement and signed it in ignorance of the fact that these particular paragraphs were contained therein.

Defendants filed a motion for change of venue to Los Angeles County. The answer of defendants denied generally the allegations of the complaint, admitted that on January 31, 1957, in Kern County, plaintiff signed the agreement and delivered it to defendant Donald Hedley so he might obtain the signatures of defendant Stevens thereto, and alleged that on January 31, 1957, defendant Stevens, in San Bernardino County, executed the agreement; that on February 3, 1957, defendant Siebert executed said agreement in San Mateo County and on February 5, 1957, defendants Hedley, Cooper and Zahn executed it in Los Angeles County. The motion for change of venue was accompanied by an affidavit of merit of the several individual defendants showing at the time of the commencement of the action they were residents of the counties indicated other than Kern County, and alleged that the agreement was signed in those counties.

Thereafter, plaintiff filed a motion for an order retaining the action in Kern County for trial on the ground of convenience of witnesses and that the ends of justice would be thereby promoted. By affidavit, plaintiff alleged that all arrangements and negotiations for such agreement were carried on and entered into between himself and defendant Hedley, on behalf of the remaining defendants, in Kern County, except one conversation in Santa Barbara County, and that none were carried on in Los Angeles County; that to his best information none of the witnesses, other than the named defendant, resided outside of Kern County. He then set forth the names of the five witnesses living near the real property involved, which is the subject of the lease and contract. He then reiterated what he believed they would testify to at the trial and alleged they were material witnesses. In addition, he claimed that the obligations of defendants under the written agreement were incurred and were to be performed in Kern County and therefore that county was proper for the trial of the action, citing such authority as section 395 of the Code of Civil Procedure; Dawson v. Goff, 43 Cal.2d 310, 317, 273 P.2d 1; Limited Mutual Compensation Insurance Co. v. Curtis, 45 Cal.App.2d 507, 508, 114 P.2d 404; and the dissenting opinion in Yedor v. Ocean Accident & Guarantee Corporation, 85 Cal.App.2d 698, 194 P.2d 95.

After the hearing of the motions, on this showing, the court denied plaintiff's motion to retain and granted defendants' motion to change venue to Los Angeles County. It is from this order that plaintiff has perfected this appeal. Section 395, supra, provides:

> "In all other cases, except as in this section otherwise provided * * * the county in which the defendants, or some of them, reside at the commence-

ment of the action, is the proper county for the trial of the action."

It was held in Peiser v. Mettler, 50 Cal. 2d 594, 328 P.2d 953, 958:

> "The question of the transitory or local character of the causes of action must be determined from the allegations of the complaint on file at the time the motion was made and from the nature of the judgment which might be rendered thereon, assuming the truth of the allegations." See also Kaluzok v. Brisson, 27 Cal.2d 760, 763, 167 P.2d 481, 163 A.L.R. 1308; and Neet v. Holmes, 19 Cal.2d 605, 613, 122 P.2d 557.

[1] Plaintiff's action is a proceeding in equity. The only relief he seeks is that the court order certain paragraphs of the agreement stricken. The action is not founded on the obligation itself. Plaintiff is not suing on or seeking to enforce the obligation which defendants contracted to perform in Kern County. As to certain defendants, it does not affirmatively appear that the agreement was in fact entered into in Kern County. This court held in Martinez v. Martinez, 99 Cal.App.2d 425, 428, 221 P.2d 986, that an action to reform a contract is a proceeding in equity and is essentially a personal action. The cases relied upon by plaintiff were, in the main, actions founded upon a policy of insurance or written contract. Although the portion of the order changing venue to Los Angeles County on account of the residence of the defendants might be authorized, if the court had granted the motion to retain the trial of the action in Kern County because of convenience of witnesses, the latter order would prevail. Hall v. Central P. R. Co., 49 Cal. 454; Gordon v. Perkins, 203 Cal. 183, 263 P. 231; Loehr v. Latham, 15 Cal. 418; Rolph & Co. v. Krueger, 105 Cal.App. 35, 286 P. 1060. See also Hanchett v. Finch, 47 Cal. 192, where it is said (quoting from the syllabus):

> "When the action is brought in a county other than that in which the defendant resides, he has a *prima facie* right to have the venue changed to the county of his residence, but this right is subject to the power of the Court to retain the cause for trial in the county in which it was brought, if the convenience of witnesses and ends of justice require it"; that "where there is a conflict in the affidavits its ruling will not be disturbed, unless it appears that this discretion has been abused."

[2, 3] The question then is whether the trial court abused its discretion in denying plaintiff's motion to retain the action in Kern County. Plaintiff concedes this rule of law, but argues such discretion must be based on reason and must be supported by some adequate showing appearing on the face of the record, citing such authority as Gaster v. Hinkley, 85 Cal.App. 55, 258 P. 988; and Clavey v. Lord, 87 Cal. 413, 25 P. 493.

The argument is that the uncontradicted evidence shows that inconvenience of plaintiff's witnesses has been established; that parol evidence from witnesses other than the parties will be necessarily required; that although depositions could be taken, such evidence is not always satisfactory compared to the testimony of the witnesses, and that inconvenience to these witnesses would result if they were required to go to Los Angeles. It is further argued that plaintiff's affidavit showed that to his knowledge there are no other witnesses to the transaction involved who live in Los Angeles, and accordingly there is no conflict in the evidence on the issue of convenience to witnesses and the court abused its discretion in denying the motion to retain.

It does appear that the requirements set forth in Peiser v. Mettler, supra, have been met by plaintiff in his showing in reference to names, addresses and testimony to be given by the respective witnesses on the motion to retain.

The remaining question is whether such showing, as to convenience of witnesses, was contradicted by the record before us, sufficiently to allow the trial court to exercise its discretion. It is true that any inconvenience to the parties to the action, as distinguished from other witnesses, is not ordinarily considered on a motion of this nature. Baird v. Smith, 21 Cal.App.2d 221, 224, 68 P.2d 979; Wrin v. Ohlandt, 213 Cal. 158, 1 P.2d 991. In plaintiff's affidavit he states that both he and Hedley discussed the proposed agreement with each of the witnesses named, including an escrow agent in Bakersfield, and gave a résumé of their testimony which he anticipated they would give. This testimony would appear to be material to the issues presented.

Mr. Hedley, in his opposing affidavit, which was fatally defective, states that all of the conversations and negotiations for such written agreement were carried on by and between him and plaintiff outside of the presence of anyone; that they were partly carried on in Kern County, partly in Los Angeles County, and partly by telephone; that none of the persons named in plaintiff's affidavit in support of the motion, other than plaintiff and affiant, were present at any of said conversations or negotiations and affiant did not discuss the proposed agreement with any of them. It is not argued and there is no contention on this appeal that the ends of justice would be better served by transferring the case to Los Angeles County or that defendants would be prejudiced by retaining the trial in Kern County. There was no offer of defendants to stipulate as to the truth of the testimony of the witnesses named by plaintiff. Nelson v. Enos, 47 Cal.App.2d 79, 117 P.2d 429.

Categorically, Hedley did not deny that the parties named would be witnesses or would not testify to the facts related. He did not indicate that there were other witnesses who lived in other counties who would be witnesses for defendants or that any witness would be inconvenienced by retention of the trial of the action in Kern County. The most that could be said of his affidavit was that if these witnesses did testify in reference to any of said purported conversations such testimony would be false. This denial did not bear on the question of inconvenience of the witnesses and created no conflict on that issue. Accordingly, there being no conflict, the trial court erred in refusing to retain the action for trial in Kern County when the uncontradicted evidence showed that in such county the convenience of witnesses would be better served. Pascoe v. Baker, 158 Cal. 232, 110 P. 815; San Jose Hospital v. Etherton, 84 Cal.App. 516, 258 P. 611; Seybert v. County of Imperial, 139 Cal.App.2d 221, 293 P.2d 135; Bartholomae Oil Corp. v. Associated Oil Co., 203 Cal. 176, 263 P. 516; Thompson v. Brandt, 98 Cal. 155, 32 P. 890; First-Trust Joint Stock Land Bank of Chicago v. Meredith, 16 Cal.App.2d 504, 60 P.2d 1023, 62 P.2d 369; Carr v. Stern, 17 Cal.App. 397, 120 P. 35; Gulf Oil Corp. v. Gilbert, 330 U.S. 501, 67 S.Ct. 839, 91 L.Ed. 1055; Livingston Co. v. Blythe, 139 Cal.App.2d 161, 293 P.2d 96.

Order reversed.

MUSSELL and SHEPARD, JJ., concur.

170 Cal.App.2d 303

Catarino M. ESPARZA, Plaintiff and Respondent,

v.

KADAM, INC., a corporation, and Dale H. Habberstad, Defendants and Appellants.

Civ. 23725.

District Court of Appeal, Second District, Division 1, California.

May 11, 1959.

Action by corporation's director-manager against corporation and another for involuntary dissolution of corporation and for penalty allegedly due for failure to pay earnings when due, plus reasonable attorney fees and other relief. Defendants cross-complained for an accounting and for appraisal and sale of director-manager's stock. The Superior Court, Los Angeles County, Bayard Rhone, J., entered decree confirming commissioners' appraisal of fair value of the stock and entered judgment for director-manager against individual defendant for appraised value and granted other relief, and defendants appealed. On motion to dismiss appeal, the District Court of Appeal, White P. J., held that the appeal would be heard on its merits, even though individual defendant had at one time moved to require director-manager to deposit his stock in court, along with individual defendant's deposit of fair cash value therefor.

Motion denied.

Appeal and Error ⚿154(1)

In action by corporation's director-manager against corporation and another for involuntary dissolution of corporation and other relief, wherein defendants cross-complained for an accounting and for appraisal and sale of director-manager's stock, defendants' appeal from decree confirming commissioners' appraisal of fair value of director-manager's stock would be heard on its merits, even though individual defendant had at one time moved to require director-manager to deposit his stock in court, along with individual defendant's deposit of fair cash value therefor. West's Ann.Corp. Code, §§ 4658, 4659; West's Ann.Code Civ.Proc. § 572.

◆

Arthur Shivell, Saugus, for appellants.

Brown & Ayers, Los Angeles, for respondent.

WHITE, Presiding Justice.

On March 7, 1958, plaintiff instituted this action for involuntary dissolution of defendant corporation. The relief prayed for was an order dissolving the corporation and winding up its affairs as provided by law and that a receiver be appointed to take charge of the assets and the business of the corporation pendente lite and for the purposes of winding the same up, subject to the instructions of the court and for the sum of $2,385 with interest, the penalty provided for failure to pay earnings when due, for reasonable attorney fees, court costs and all other proper relief.

On April 16, 1958 a cross-complaint was filed by defendants for accounting against plaintiff who was the director-manager of defendant corporation and for appraisal and sale of stock (Corporations Code, sec. 4658). The relief prayed for in said cross-complaint was that, after an accounting had been had, the cross-complainants have judgment against the cross-defendant for such moneys as may be found to exceed the value of the shares to which he is equitably entitled in the premises; that appraisers be appointed as provided in section 4659, Corporations Code, and that the cross-complainants be granted a decree requiring that the cross-defendant transfer such shares as he may be equitably entitled to, to the cross-complainants upon the crediting to him or payment to him of the amount to which he is shown by such accounting and appraisal to be equitably entitled to receive.

On January 13, 1959, pursuant to the provisions of section 4659, the court entered its decree confirming the award made by the commissioners duly appointed pursuant to the code section just cited, appraising the fair value of the shares of stock owned by plaintiff in defendant corporation in the sum of $7,456.70. The decree further awarded judgment for plaintiff and against defendant Dale H. Habberstad for the aforesaid sum, and against Travelers Indemnity Company for the included sum of $5,000; that the amount of the award, decree and judgment shall be paid and satisfied within thirty days from entry of decree; that on plaintiff receiving such payment or tender thereof, plaintiff shall transfer all of his shares in said corporation to defendant Dale H. Habberstad; that if payment is not made for the shares within the time specified, the defendant Kadam, Inc., shall be wound up and dissolved as provided by said Corporations Code, Section 4659 and any other pertinent law, and the court may make orders and adjudge as to all matters concerning the winding up of the affairs of the corporation and upon completion of the winding up, the court shall make its decree and judgment declaring the corporation to be wound up and dissolved. Notice of entry of the decree was filed on January 15, 1959.

On January 27, 1959, notice and demand by defendant Habberstad upon plaintiff for sale of corporate stock pursuant to the decree (Corporations Code, secs. 4658, 4659) was filed.

On January 29, 1959 there was filed in court by defendants and served upon plaintiff a notice of motion for deposit in court by plaintiff of the specific shares of stock described in the decree, and by defendant Habberstad of the amount set forth in the decree as the fair cash value of such certificates of stock (Code Civ.Proc. sec. 572).

On January 29, 1959 there was also filed a petition for deposit in court and for order retaining fund in *custodiae legis,* pending trial of the action and cross-complaint (Code Civ.Proc. sec. 572). However, this motion was later withdrawn by defendant Habberstad.

Notice of appeal from the aforesaid decree was filed February 9, 1959.

Respondent now moves to dismiss the appeal on the ground that appellant Habberstad elected to purchase the stock of the former for the sum provided for in the decree; that such election is indicated by appellant Habberstad's motion aforesaid to require respondent to deposit his shares of stock in court and appellant to deposit the amount fixed by the court as the value thereof. Respondent urges that by his conduct, appellant Habberstad impliedly acquiesced in and consented to the decree as rendered. That having agreed to accept the fruits of the decree, he thereby waived and renounced his right to appeal therefrom (3 Cal.Jur.2d 596; San Bernardino County v. Riverside County, 135 Cal. 618, 620, 67 P. 1047).

We are satisfied that the facts and circumstances present in the instant proceeding do not bring it within the rule relied upon by respondent for dismissal of the appeal. The record reflects that appellant Habberstad's motion for mutual deposits in court was a conditional one in that disbursement of the money to be deposited by appellant should not be made until final determination of all the issues in the cause, including the accounting prayed for. Respondent consistently opposed such motion, which was finally withdrawn by appellant Habberstad and notice of appeal filed. Appellants set up certain defenses to respondent's complaint both as to the dissolution count and as to the remaining three counts for wages allegedly due respondent which remain undetermined as to the issues framed by the cross-complaint. In fact these issues have been set for pre-trial in the court below. It is also undenied that following the rendition of the aforesaid decree appellant Habberstad petitioned the trial court to permit immediate deposit in court of funds with which to consummate purchase of the shares of stock following the determination of the remaining issues and causes of action between the parties, and alleged that the amount which the respondent might be found to be entitled to receive was undetermined and that appellant is a trustee for plaintiff for such undetermined amount, and further alleged that the plaintiff and cross-defendant, the respondent here, was insolvent and that other than so much of the award as he might be shown to be entitled to receive therefrom, he was without any means whatever to satisfy the demands of the appellants and cross-complainants or any judgment or any order for payment of costs which might be rendered against respondent in this action except from the funds so to be deposited.

It must also be remembered that the corporate defendant is a party to the appeal herein.

The appeal with which we are here confronted challenges the decree entered by the court as being based on an excessive award made by the court-appointed commissioners; that the latter refused to make any findings of fact or conclusions of law, or to state in their award the evidence and matters considered by them in arriving at their said award, and failed and refused to include in their said award a statement of the number and duration of their hearings and the fees and expenses demanded by them; that appellant objected and excepted to confirmation of the award of the commissioners upon such grounds, and that the trial court refused to make any findings of fact or conclusions of law upon which to base its confirmation of the said award and its said decree.

Appellant has deposited with the court below the sum of $7,456.70 as security for the payment of the decree here involved in accordance with its terms and a writ of supersedeas has been issued by this court. We are persuaded that the appeal should be heard on its merits.

The motion to dismiss the appeal herein is denied.

FOURT and LILLIE, JJ., concur.

170 Cal.App.2d 284

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Thomas Joseph MARSH, Defendant and Appellant.

Crim. 1506.

District Court of Appeal, Fourth District, California.

May 8, 1959.

Defendant was convicted of escape from a state prison and from a judgment of the Superior Court of San Bernardino County, Archie D. Mitchell, J., the defendant appeals. The District Court of Appeal, Griffin, P. J., held that the court did not abuse its discretion in refusing to permit the defense to conduct a demonstration of hypnosis in the courtroom, and that the evidence sustained the conviction as against the defense the escape was not voluntary act of defendant, but was caused by hypnotic suggestion given him by fellow inmate.

Judgment affirmed.

1. Criminal Law 🔑472

The effects of hypnosis are not occurrences of such common knowledge and experience that men of ordinary education can form a conclusion concerning them as capably as an expert witness.

2. Criminal Law 🔑469

A person can testify as an expert in his field when, because of his profession, or his special knowledge, skill or experience not common to men in general, he is able to form an opinion where men in general would be left in doubt.

3. Criminal Law 🔑472

A person familiar with the principles of hypnosis, and experienced in its use, was properly permitted to testify about the effects thereof.

4. Criminal Law 🔑1159(2)

Generally, on appeal an appellate court will not weigh the evidence or disturb the finding of the trier of fact if there is substantial evidence in the record to support it.

5. Criminal Law 🔑1159(3)

It is not the province of the appellate court to analyze conflicts in the evidence.

6. Criminal Law 🔑1137(5)

Where defendant called witness appointed by the court as an expert on hypnosis, he was estopped to complain of her qualifications because of invited error.

7. Criminal Law 🔑1119(4)

If prejudicial remarks were made by the prosecutor it was incumbent upon defendant to have them included in the record in order to complain thereof.

8. Criminal Law 🔑650

In prosecution for escape from a state prison where sole defense was that the escape was caused by the hypnotic suggestion given defendant by a fellow inmate, refusing to permit the defense to conduct a demonstration of hypnosis in the courtroom, was not an abuse of discretion.

9. Escape ⚷10

Evidence sustained conviction of escape from a state prison as against claim of the defendant that his escape was not his voluntary act, but was caused by hypnotic suggestion given him by fellow inmate. West's Ann.Pen.Code, § 4530.

◆

Thomas Joseph Marsh, in pro. per., for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Robert M. Sweet, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

Appellant was charged with the crime of escape from a State prison, in violation of section 4530 of the Penal Code. Trial by jury resulted in a conviction.

At the trial it was stipulated that the appellant was committed to the California Institution for Men at Chino on September 13, 1955; that on February 12, 1958, while still a prisoner at Chino, he left without permission, traveled to Los Angeles, and was apprehended the next day. In appellant's written statement made five days after his escape, he recited the substance of the foregoing facts regarding his escape and apprehension and added: "It is a bum beef. I want to go in and cop a plea as soon as possible and get my time in order that I can get back to Quentin and get this over." The prosecution's case was completed by the admission in evidence of official records showing that appellant was serving a sentence upon conviction of first degree robbery when he escaped.

The appellant's sole defense was that his escape was not his voluntary act but was caused by a hypnotic suggestion given him by a fellow inmate, one Jack A. Cox. Cox testified that he had obtained his knowledge of hypnosis from books and had hypnotized hundreds of persons, including appellant; that on February 12, 1958, he again hypnotized the appellant and while he was in the trance suggested to him that he "go back where he * * * was having a good time". Cox explained that this hypnotic suggestion was intended only to cause "age regression" but evidently appellant interpreted it as a suggestion that he leave prison and return to the area in which he lived prior to his confinement. Cox further testified that he became worried when he was unable to locate appellant within the prison and that he left the prison without permission in order to find appellant and return him to prison; that although he had no actual knowledge of appellant's whereabouts, he traveled to Wilmington, California, where appellant had previously resided; that he found appellant on Avalon Boulevard and brought him out of a hypnotic trance; and that appellant and Cox then went into a restaurant and were there having coffee when the police arrested them.

On cross-examination Cox admitted making a statement on February 17, 1955, in which he said:

> "I left the Institution right after the 7:00 p. m. count Wednesday, February 12, 1958. I lived Bar. 1 and went out past the dairy. Then over the fences east then back north to Ontario, where I sold my watch, Windsor yellow-gold wrist watch for $7.50. I then got on a bus and rode to L. A. where I changed to Long Beach. I got a hotel room and stayed there Thursday night.
>
> "The next day I was picked up in Long Beach in a cafe drinking a cup of coffee. I wore my own civilian clothes when I left.
>
> "I want to see a Deputy D. A. make a statement and get my time as soon as possible."

Three other prisoners also testified for the defense that they had seen Cox hypnotize various persons, including the appellant.

Testifying on his own behalf appellant said Cox had hypnotized him on 12 to 15 occasions prior to February 12, 1958; that on that date Cox had again hypnotized him and the next thing he remembered was being brought out of a trance by Cox in Wilmington; that Cox explained what had happened and he and Cox then decided to return to prison; and that while returning they stopped for coffee in Long Beach where the police apprehended them. On cross-examination he admitted changing into civilian clothes from his prison garb while absent and that he had read an article about hypnosis in Readers Digest.

A psychiatrist was appointed by the court as an expert at the request of the defense. This expert, a member of the staff at Patton State Hospital, was familiar with the principles of hypnosis and experienced in its use. She testified that while in a hypnotic state a subject can be ordered to move an arm or do other simple acts, and that the subject may or may not remember what he has done during the trance, depending on the depth of the hypnosis; and that no one can be forced, under hypnosis, to perform an act which is contrary to his basic nature. The doctor further testified that a successful hypnotist must have a rather forceful personality; that not all persons are apt subjects for hypnosis and that the best subjects are suggestable, weak, compliant, peaceful personalities. She testified that from her observation of Mr. Cox's manner while testifying she formed the opinion that Cox did not possess the personality qualities which a successful hypnotist must have and that the appellant did not possess the qualifications of the ideal subject. The doctor also testified that, in her opinion, a suggestion as to age regression such as was said to have been made by Cox to the appellant, would not cause the recipient to escape. A defense request for permission to perform a hypnotic experiment in the courtroom was refused by the court.

In rebuttal the prosecution called a correction officer stationed at Chino, who testified that he talked to the appellant at the City Jail in Long Beach in the presence of Cox, and that appellant stated that he and Cox met at the dairy at Chino and left from there together, and that he had "caught a bus to some little town and went to L. A."

On October 10, 1958, appellant sent a letter to this court requesting that an attorney be appointed to represent him on this appeal. This court then made an independent examination of the record and determined that it would be of no value to either the defendant or the court to have counsel appointed. A letter was received from the appointed counsel who had represented the appellant at his trial, stating that counsel had been unable to determine that meritorious grounds for appeal exist. Appellant was notified that his request for appointed counsel was denied and requested to file an opening brief or to make such other showing as he might desire.

In a communication to this court appellant Marsh represented that the psychiatrist appointed by the court was not an expert on hypnosis, was prejudiced against him, and that the testimony given by the witness was untrue.

[1, 2] The effects of hypnosis are not occurrences of such common knowledge and experience that men of ordinary education can form a conclusion concerning them as capably as an expert witness. It is the settled rule that a person can testify as an expert in his field when, because of his profession, or his special knowledge, skill or experience not common to men in general, he is able to form an opinion where men in general would be left in doubt. Oakes v. Chapman, 158 Cal.App.2d 78, 322 P.2d 241; People v. Cole, 47 Cal.2d 99, 301 P.2d 854, 56 A.L.R.2d 1435.

[3–6] As a person familiar with the principles of hypnosis and experienced in its use, the psychiatrist appointed by the court was correctly permitted to testify about the effects of hypnosis. In reply to appellant's argument that the expert was prejudiced against him and that part of her testimony was false, it must be remembered that it is the general rule that on appeal an appellate court will not weigh the evidence or disturb the finding of the trier of fact if there is substantial evidence in the record to support it. It is not the province of the appellate court to analyze conflicts in the evidence. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557. Furthermore, the appellant called the witness appointed by the court, as an expert on hypnosis. He is estopped to complain of her qualifications, for he invited the error, if any was made. Gjurich v. Fieg, 1913, 164 Cal. 429, 129 P. 464.

[7] Appellant also contends that the district attorney committed prejudicial misconduct during his closing argument. This contention is not supported by any argument or citation of authority nor do the arguments by counsel appear in the transcript prepared at appellant's request. If such prejudicial remarks were made it was incumbent upon appellant to have them included in the record. People v. Mike, 1958, 163 Cal.App.2d 466, 329 P.2d 519.

[8] It does not appear that the court was in error in refusing to permit the defense to conduct a demonstration of hypnosis in the courtroom. The admission of such evidence is a matter for the discretion of the trial court. No abuse of discretion here appears. People v. Sherman, 97 Cal. App.2d 245, 217 P.2d 715.

[9] In the instant case the facts constituting the escape were stipulated. Appellant's sole defense was that this escape was performed involuntarily while he was in a hypnotic trance. Without ruling on its validity as negating a conscious or volitional act, a reading of the entire record makes it clear that appellant was given a full and fair opportunity to present such a defense and the jury was properly instructed on it. That the jury disbelieved appellant's contentions is manifest and there is ample evidence to support the verdict.

The attorney general has filed a statement setting forth the evidence and points reviewed, and has reached a similar conclusion.

Judgment affirmed.

MUSSELL and SHEPARD, JJ., concur.

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170 Cal.App.2d 21

John EVOLA, Plaintiff and Appellant,

v.

WENDT CONSTRUCTION COMPANY, a corporation, United Pacific Insurance Company, a corporation, Builders' Control Service of Northern California, Inc., a corporation, First Doe, Second Doe and Third Doe, Defendants, and Respondents.

Civ. 18116.

District Court of Appeal, First District, Division 1, California.

April 29, 1959.

Hearing Denied June 24, 1959.

Contractor brought action against subdivider, surety on surety bond given by subdivider to county, and others to recover on surety bond. The Superior Court, Contra Costa County, Homer W. Patterson, J., entered judgment adverse to the contractor, and the contractor appealed. The District Court of Appeal, Hanson, J. pro tem., held that the bond referred to in section of the Subdivision Map Act providing that in event agreement for improvement of streets or easements is entered into, governing body may require that agreement shall be secured by a good and sufficient bond or it may accept in lieu thereof a cash deposit authorizes a city or county to require of a subdivider a performance bond and not a bond for protection of suppliers of labor and materials.

Judgment affirmed.

See also 158 Cal.App.2d 658, 323 P.2d 158.

1. Appeal and Error ⚷837(4)

On appeal from judgment sustaining demurrer without leave to amend first amended complaint, District Court of Appeal, in considering the demurrer, was required to ignore facts not mentioned in the amended complaint.

2. Counties ⚷55

Rules relating to construction of statutes apply also to construction of county ordinances, since an ordinance has the same force within the corporate limits of the county as a statute passed by the Legislature has throughout the State. West's Ann.Code Civ.Proc. § 2102.

3. Counties 🔑21½
Municipal Corporations 🔑43

Purpose of the Legislature in enacting section of the Subdivision Map Act providing that in event agreement for improvement of streets or easements is entered into, governing body may require that agreement shall be secured by good and sufficient bond, or it may accept in lieu thereof a cash deposit in amount not in excess of estimated cost of improvement, was to protect counties, cities, and the public, and not to protect suppliers of labor and materials. West's Ann.Bus. & Prof.Code, §§ 11500 et seq., 11611, 11612.

4. Counties 🔑21½
Municipal Corporations 🔑43

One of the main purposes of the Subdivision Map Act is to require subdivider to do original work of placing streets in proper condition before maintenance thereof is taken over by city or county, and to relieve the public to such extent of the burden that would otherwise exist. West's Ann.Bus. & Prof.Code, §§ 11500 et seq., 11611, 11612.

5. Municipal Corporations 🔑43

The Subdivision Map Act specifically and impliedly permits the adoption of some local ordinances, relating to design and improvement, but such permission is not an unlimited permission but is restricted to such local ordinances as come within limitations contained in the Act. West's Ann.Bus. & Prof.Code, §§ 11500 et seq., 11611, 11612.

6. Municipal Corporations 🔑57, 59

A municipal corporation possesses and can exercise only those powers granted in express words, those necessarily or fairly implied in or incident to powers expressly granted, and those essential to declared objects and purposes of the municipal corporation, and not simply convenient.

7. Counties 🔑21½
Municipal Corporations 🔑43

The bond referred to in section of the Subdivision Map Act providing that in event agreement for improvement of streets or easements is entered into, governing body may require that agreement shall be secured by a good and sufficient bond or it may accept in lieu thereof a cash deposit authorizes a city or county to require of a subdivider a performance bond and not a bond for protection of suppliers of labor and materials. West's Ann.Bus. & Prof. Code, §§ 11500 et seq., 11611, 11612.

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Sol S. Judson, Pittsburg, Henry Muller, Oakland, of counsel, for appellant.

Weinstock, Andrson, Maloney & Chase, H. J. Chase, San Francisco, for respondent.

HANSON, Justice pro tem.

The main question here is whether a corporate surety bond given by an owner and subdivider of land to the County of Contra Costa, pursuant to the requirements of an ordinance, protects a contractor so as to enable him to sue thereon for moneys due him for constructing, at the instance of the subdivider, the paving, curb, gutters, and tract drainage in the proposed subdivision.

Before the surety bond was given to the county, the plaintiff and the subdivider entered into a written contract by the terms of which the plaintiff was to be paid $28,439 in installments of $1,000 whenever a dwelling was completed and sold in the subdivision known as Westmoreland Park No. 2 until said sum was paid with interest.

An ordinance (XV) of Contra Costa County dealing with subdivisions provides that if the off-site improvements have not been completed before the final map is submitted to the Board of Supervisors for approval the subdivider must enter into an agreement *to complete the improvements within a specified time* and give a cash or surety bond. "The bond is to guarantee full payment of the cost of all required improvements and to be in lieu of any 'performance' bond otherwise required by law * * *." The subdivider entered into such an agreement with the county and provided a surety bond in the penal sum of $25,000 executed by defendant United as surety. The plaintiff, as the contractor, completed the off-site improvements for the subdivider in the time allotted and they were accepted and approved by the Board of Supervisors. The plaintiff received no payments on account because the subdivider and owner defaulted on a trust deed he had executed and so ownership of the land passed to third parties upon its foreclosure.

Although the bond named the county only as the obligee, nevertheless, the plaintiff contends that the bond is a labor and materials payment bond running in favor of third party labor and material claimants. This contention is predicated upon the language of the ordinance, which in substance is likewise found in the bond, reading as follows: "The bond is to guarantee full payment of the cost of all required improvements and to be in lieu of any 'performance' bond *otherwise required by law*, the bond herein required being of greater surety than the performance bond." (Emphasis added.) It is conceded by the parties hereto that the bond is a statutory bond and not a common-law bond. On the one hand, the defendant surety contends it is a performance bond and, on the other hand, plaintiff contends it is also a bond guaranteeing payment of the installation cost of the subdivision improvements made by plaintiff contractor.

The trial court sustained a demurrer without leave to amend to the first amended complaint. The plaintiff does not contend he should have been given a further opportunity to amend, but merely that the court erred in sustaining the demurrer on the ground no cause of action was stated.

[1] At this point it should be stated that the subdivider, having lost ownership to the land, defaulted and judgment was entered against him. It is also of some interest to note that, in the contract between the contractor and the subdivider, the contractor agreed that he would "waive all lien rights upon the execution of an assignment of funds through Builders' Control Service by Wendt Construction Co., Inc., Subdivider." Such an assignment was made and, in a contract between Builders' Control and the contractor, the latter expressly agreed: "Contractor hereby releases any and all mechanic's lien rights which he has or may hereafter acquire on or against the real property described above; and Contractor does hereby waive and release any and all rights which he might otherwise have to levy attachment upon the real property described above regardless of any claim or claims he has or may have against the legal or equitable owners or owner of said real property described above." However, as no mention was made in the amended complaint of these facts we must ignore them in considering the demurrer.

[2] In order to construe the statutory bond before us it is necessary to refer to the ordinance under which it was given and to the Subdivision Map Act originally enacted in 1937. In that connection it needs to be noted that the rules relating to the construction of statutes apply also to the construction of ordinances, inasmuch as an ordinance "has the same force within the corporate limits as a statute passed by the legislature itself has throughout the state." Ex parte Roach, 1894, 104 Cal. 272, 274, 37 P. 1044, 1045. "All questions of * * * the construction of statutes * * * are to be decided by the Court * * *." Code of Civ.Proc. § 2102.

The Subdivision Map Act provides that when the final map is tendered to the governing body (Bus. & Prof.Code, § 11611) it shall within a time limited "approve the map if it conforms to all the requirements of this chapter and of any local ordinance applicable at the time of approval of the tentative map, or any rulings made thereunder." At such meeting the "governing body shall * * * also accept or reject any or all offers of dedication and shall, as a condition precedent to the acceptance of any streets or easements, require that the subdivider, at his option, either improve or agree to improve the streets or easements in accordance with standards established by such governing body by local ordinance." To safeguard the acts thus required of the city or county involved, as the case may be, the Map Act by section 11612 provides that: "In the event an agreement for the improvement of the streets or easements is entered into, the governing body may require that *the agreement* shall be secured by a good and sufficient bond, or it may accept in lieu thereof a cash deposit, which bond or cash deposit shall be in an amount not in excess of the estimated cost of the improvement." (Emphasis added.)

[3, 4] It will be noted that section 11612 of the Map Act expressly provides that "* * * the governing body may require that *the agreement*" (emphasis added), if one is entered into by it and the subdivider, "shall be secured by a good and sufficient bond, * * * not in excess of the estimated cost of the improvement." No authority is given by the section which would authorize the governing body to enact an ordinance on the subject; none that would permit the county to expand the agreement to protect labor or material claimants. Accordingly, we think the most cursory reading of the sections of the Subdivision Map Act makes it plain that the purpose of the Legislature in enacting section 11612 of the act was to protect counties, cities, and the public; it was not to protect suppliers of labor and materials. Undoubtedly, the Legislature had in mind that, as it is the duty of a city or county which has accepted a dedication of streets, alleys and the like to maintain them, that it should be entitled to demand a bond guaranteeing that the work of improvement would be done by the subdivider, where it had not been completed. As was aptly said in Hoover v. County of Kern, 1953, 118 Cal.App.2d 139, 142, 257 P.2d 492, 494: "One of the main purposes of the Subdivision Map Act seems to be to require the subdivider to do the original work of placing the streets in a proper condition before the maintenance thereof is taken over by a city or county, and to relieve the public to this extent of the burden that would otherwise exist."

[5] As was said in Kelber v. City of Upland, 155 Cal.App.2d 631, 636, 318 P.2d 561, 564, "While the act specifically and impliedly permits the adoption of some local ordinances, *relating to design and improvement*, this is not an unlimited permission but is restricted to such local ordinances as come within the limitations contained in the Act * * *." (Emphasis added.) Nowhere in the act is there the slightest intimation that the governing body could protect by bond third persons such as suppliers of labor and materials on the project.

[6] As was said in the Tax Factors, Inc. v. County of Marin, 1937, 20 Cal.App.2d 79, at page 87, 66 P.2d 666, at page 670: "'"[I]t is a general and undisputed proposition of law that a municipal corporation possesses and can exercise the following powers, and no others: First, those granted in express words; second, those necessarily or fairly implied in or incident to the powers expressly granted; third, those essential to the declared objects and purposes of the corporation—*not simply convenient, but indispensable*."'"

[7] Accordingly, we come to the conclusion that the type of bond which the Subdivision Map Act authorizes a city or county to require under the provisions of section 11612 is a performance bond and none other. This view is buttressed by the fact that in this same section (11612) "*a faithful performance bond* or cash deposit" (emphasis added) may be required by the governing body if the subdivider elects, at his option, not to enter into a contract with the governing body and instead to initiate and to consummate proceedings under an appropriate special assessment act.

Judgment affirmed.

BRAY, P. J., and FRED B. WOOD, J., concur.

Hearing denied; PETERS, J., dissenting.

170 Cal.App.2d 54

Herbert ALEXANDER, Petitioner,

v.

SUPERIOR COURT of the State of California, IN AND FOR THE COUNTY OF LOS ANGELES, Respondent,

Lewis Jones, Real Party in Interest.

Civ. 23788.

District Court of Appeal, Second District, Division 1, California.

April 30, 1959.

Proceeding on petition by cross defendant for writ of prohibition to restrain Superior Court from taking further proceedings under or upon cross complaint which had been filed by defendant in action by alleged mother of illegitimate girl to have defendant declared to be father of girl and ordered to support girl, and whereby defendant, without making girl a party, sought to have cross defendant determined to be father of girl and ordered to support girl. The District Court of Appeal, Nourse, J. pro tem., held that the Superior Court would not have jurisdiction to try issues raised by cross complaint.

Writ of prohibition issued.

1. Bastards 🔑35

Statutes relating to bringing of actions to enforce obligation of father as well as mother to support illegitimate child and to declare existence or nonexistence of relationship of parent and child give superior court jurisdiction of causes of action created by the statutes, but court may only exercise jurisdiction when jurisdiction is invoked by parties authorized by those statutes to maintain the actions. West's Ann. Civ.Code, §§ 196a, 231.

2. Pleading 🔑147

"Cross complaint" constitutes assertion of an alleged distinct and independent cause of action, and when one is properly interposed, there are two simultaneous actions pending in latter of which defendant in original action becomes plaintiff who must by his cross complaint allege facts which give him right to maintain his action.

See publication Words and Phrases, for other judicial constructions and definitions of "Cross Complaint".

3. Bastards 🔑33

In action by alleged mother of illegitimate girl to have defendant declared to be father and ordered to support girl, wherein defendant, without making girl a party, filed cross complaint for determination that cross defendant was father and for order directing cross defendant to support girl, Superior Court would not have jurisdiction to try issues raised by cross complaint. West's Ann.Civ.Code, §§ 196a, 231; West's Ann.Code Civ.Proc. § 442.

4. Prohibition 🔑3(3)

In action by alleged mother of illegitimate girl to have defendant declared to be father and ordered to support girl, wherein defendant, without making girl a party, filed cross complaint for determination that cross defendant was father and for order directing cross defendant to support girl, if judgment were rendered against cross defendant, the judgment could be reviewed on appeal, but that would not constitute speedy or adequate remedy for cross defendant, who sought writ of prohibition. West's Ann.Civ.Code, §§ 196a, 231; West's Ann. Code Civ.Proc. § 442.

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Goodman & Hirschberg, Los Angeles, and Barrie M. Karen, Los Angeles, of counsel, for petitioner.

Harold W. Kennedy, County Counsel and William E. Lamoreaux, Asst. County Counsel, Los Angeles, for respondent.

Leo S. Rich, Los Angeles, for real party in interest.

NOURSE, Justice pro tem.

By his petition filed herein Herbert Alexander seeks a writ of prohibition to restrain the superior court from taking further proceedings under or upon a cross complaint filed against him by the real party in interest Lewis Jones.

There is no dispute as to the facts; they are: One Ruth Jones filed a complaint in the respondent court on her own behalf and on behalf of Yvonne Angela Alexander Jones, a minor, naming the real party in interest Lewis Jones as defendant. In this complaint she alleged that she was the mother of Yvonne and that Jones was her father. She prayed that the court declare that Yvonne was the child of herself and Jones and that Jones be ordered to support Yvonne. She further prayed for attorney's fees and for custody of the minor child. Jones answered this complaint denying that he was the father of the child and for want of information and belief denied that the plaintiff Ruth was the mother of the child. At the time of answering he also filed a cross complaint naming as the sole cross defendant petitioner here. By his cross complaint he alleged that Ruth was the mother of the child and that the cross defendant petitioner here was the father of the child and prayed that the court determine that the cross defendant was the father and that the court make appropriate order compelling the cross defendant to support the minor. To this cross complaint the petitioner filed a general demurrer. Upon its being overruled he filed an answer denying the allegations of the cross complaint as to his paternity.

The trial court will, unless restrained, proceed to the trial of the issues tendered by the cross complaint and the answer.

We have concluded that the trial court would be acting in excess of its jurisdiction in attempting to try said issues. The complaint of Ruth, insofar as it sought on behalf of the minor to have the existence of the relationship between the minor and Jones declared was based upon section 231 of the Civil Code and insofar as it sought a judgment compelling him to support Yvonne it was based on section 196a of the Civil Code.

[1] Section 231 only authorizes an action to be maintained to declare a relationship *between the parties* to the action and an action brought under section 196a may only be maintained on behalf of an illegitimate child by its mother or guardian or guardian ad litem appointed upon the application of or with the consent of its mother. These sections undoubtedly give the superior court jurisdiction of the causes of action created thereby but the court may only exercise that jurisdiction when its jurisdiction is invoked by a party authorized to maintain the action.

[2] A cross complaint constitutes an assertion of an alleged distinct and independent cause of action and when one is properly interposed there are two simultaneous actions pending in the latter of which the defendant in the original action becomes a plaintiff who must by his cross complaint allege facts which give him the right to maintain his action. Case v. Kadota Fig Assn., 35 Cal.2d 596, 603, 220 P.2d 912; Pacific Finance Corp. v. Superior Court, 219 Cal. 179, 182, 25 P.2d 983, 90 A.L.R. 384.

[3] That Jones is not a party who had the right to invoke the jurisdiction of the court under either of these sections is apparent. The child is not a party to the cross-complaint and there is no relationship to be declared between the cross complainant and Alexander nor is Jones a party who, under section 196a, may seek to impose upon Alexander the obligation to support the minor. If the allegations of the original complaint are true then certainly Jones, as the father of the child, has no right to assert that same relationship between the child and some other person. If they are untrue, then Jones is an entire stranger to the relationship.

Respondent real party in interest seeks to support the cross complaint under section 442 of the Code of Civil Procedure, but a mere reading of that section shows that the cross complaint here is not authorized by it. By section 442 a cross complaint is only authorized where the cross complainant seeks affirmative relief relating to or depending upon the contract, transaction, matter, happening or accident upon which the action is brought or affecting the property to which the action relates. Certainly, Jones and Alexander could not both have been parties to the "transaction, happening or accident" upon which the claims of the minor, as asserted in the complaint, are based.

[4] It is, of course, true that if the respondent court should enter a judgment against the petitioner that judgment might be reviewed upon appeal therefrom. This, however, would not, in our opinion, constitute a speedy or adequate remedy. It is plain that the court, if it proceeds, would be exceeding its jurisdiction and that any judgment it rendered against petitioner could not be sustained. By such proceeding the petitioner would be subject to needless expense and under the circumstances shown here the trial court should be prohibited from proceeding. Tide Water Association Oil Co. v. Superior Court, 43 Cal.2d 815, 279 P.2d 35.

Let a peremptory writ of prohibition issue as prayed.

WHITE, P. J., and LILLIE, J., concur.

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170 Cal.App.2d 80

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Harry Stanley BROWN, Defendant and Appellant.

Cr. 1385.

District Court of Appeal, Fourth District, California.

April 30, 1959.

Defendant was convicted of burglary in the second degree and from a judgment of the Superior Court of San Diego County and from an order denying a new trial, John A. Hewicker, J., the defendant appealed. The District Court of Appeal, Griffin, P. J., held that admitting evidence of another similar offense committed by the defendant was not prejudicial error, and that the evidence failed to establish that the trial judge improperly brought the weight of his official position against the defendant.

Judgment and order denying a new trial affirmed.

1. Criminal Law 🔑372(1), 683(1)

Evidence of similar offenses when not too remote to indicate a plan, scheme, or design is admissible, either in chief or rebuttal.

2. Criminal Law 🔑374

Generally, it is a primary question for the trial court to determine whether the facts pertaining to offenses other than that charged show a general scheme or plan, and are sufficiently similar and possess a sufficiently high degree of common features with the act charged to warrant an inference that if the defendant committed the others he committed the one charged, and the question of remoteness usually goes to the weight and not to the admissibility of the evidence.

3. Criminal Law 🔑1144(15)

Presumption obtains that jurors were true to their oaths and followed the various instructions.

4. Criminal Law 🔑372(10)

In prosecution for burglary for taking the contents of a "piggy" bank from the home of prosecutors, evidence that defendant had committed another similar offense in 1950 had sufficient similarity to show a plan, scheme, or design to justify submission of the evidence to the jury.

5. Criminal Law 🔑372(1)

Other offenses are not admissible to show criminal disposition.

6. Criminal Law 🔑1186(4)

In prosecution for burglary by taking the contents of the "piggy" bank of the owner thereof from her home, admitting evidence respecting the commission of another similar offense by the defendant in 1950, which the trial court allowed after the defendant testified by way of rebuttal to the officer in chief as to what defendant had told him about the previous similar offense as bearing on the defendant's intent, was not prejudicial error. West's Ann.Const. art. 6, § 4½.

7. Criminal Law ⟹**1035(3), 1044**

In prosecution for burglary, evidence failed to establish that the trial judge improperly threw the weight of his official position against the defendant and engaged in what defendant felt were acts of advocacy to the prejudice of the defendant, where no objections were made to the remarks of the trial judge and no motion was made to strike them. West's Ann. Const. art. 6, § 4½.

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Thomas Whelan, San Diego, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and Peter T. Kennedy, Deputy Atty. Gen., for respondent.

GRIFFIN, Presiding Justice.

As a result of a jury trial defendant-appellant Harry Stanley Brown was convicted of burglary, second degree. He admitted a prior felony conviction (violation of section 503 of the Vehicle Code). A motion for new trial was denied.

Defendant and one John Griggs had known each other for about ten years. Previously, defendant had lived in the Griggs home for several weeks and knew that a key to the house was kept in the garage. Spencer Griggs and his wife also lived there on January 22, 1958. In their bedroom, on top of the dresser, they kept a piggy bank with about $25 in it. They had other money in the dresser drawer. On the morning of January 23rd Spencer's wife went to work at about 5:30 A.M., John Griggs left about 6:20 A.M., and Spencer about 7 A.M. All doors were locked. When the wife returned home that evening she discovered the piggy bank and its contents were gone, in addition to $40 which had been kept in the dresser drawer. She said as she unlocked the front door she thought the back door flew open. Griggs' landlady, living next door, said she saw defendant go into the garage and then to the front door of the Griggs home and enter it about 10 A.M. on January 23rd. She positively identified defendant in court. The landlord also testified he saw defendant in the vicinity of that home at that same time. Another neighbor said she saw him the same day about the same time, getting out of his car which he parked in her driveway, saw him walk to the Griggs home and stand at the front door, but she did not see him leave.

One witness said defendant made a $25 payment on a loan in her office on January 23rd, after 11 A.M. A police officer found the receipt for this amount in defendant's wallet on January 24th. Defendant told him he had not been working and that a Mr. May had loaned him the money; that he paid the finance company a loan of $25 about 1 P.M. on January 23rd. May testified defendant had worked for him at one time and that he had loaned him money on occasions but had not loaned him any money on January 23rd.

A gas station employee testified defendant came to his station about 11 A.M. on January 23rd, had his car greased, and paid back a $4 debt he owed, bought $3 worth of gasoline, left about three-quarters of an hour later, and that he usually bought gasoline in small amounts such as 50¢ to 75¢ at a time.

Defendant's wife testified on that day defendant took her to her grandmother's home about 9:30 A.M. and about 10 A.M. left and didn't return until 11:15 A.M. Defendant's mother testified she loaned her son about $100 in different amounts in January, and $30 on January 22, but none on January 23rd.

[1, 2] Defendant testified he went to the grandmother's home about 9:30 A.M., went to the gas station to get his car

checked for grease and that his car was there until 11 A.M., and he then returned to his grandmother's home. He denied going to or near the Griggs home that morning. He admitted knowing where the key to their house was kept, but said he did not use it. He denied telling the officer he paid the finance company $25 at 1 P.M. on January 23rd or that he said he had just borrowed money from Mr. May. Defendant admitted his previous conviction of a felony. On cross-examination he was asked if he had ever seen piggy banks in anybody's bedroom. He stated he had not. He did admit he knew one of the Griggs boys kept his money in the house and that all members of the household were working on January 23rd, but he was not sure about one brother. He was then asked if he knew a Mr. and Mrs. Hawthorne and he said he did. He was then asked on cross-examination: "Do you remember back in 1950, when you entered their home and took a piggy bank off the dresser drawer, or off the top of the dresser and took money out of their dresser?" Objection was made and the court said: "Well, he may inquire. It is to show similar offenses. That is the only purpose for which it is admitted, and modus operandi, and so forth. * * * A. I was an accomplice to that, but I wasn't in the house." A motion to strike this line of testimony was denied. The officer was called and he testified to the fact that defendant did tell him that in 1950 he entered the Hawthornes' home; that while in the house he had ransacked the dresser, where he found money, and also had broken open a piggy bank and removed the money. The motion for a mistrial was denied. In explaining away this testimony, counsel for defendant in his argument to the jury said the claimed similar offense was introduced for the limited purpose of showing intent and not to show a course of conduct of continued criminality. The trial judge re-emphasized this statement to the jury and specifically instructed it that such evidence was received for a limited purpose only; that its value, if any, depended on whether or not it tended to show the identity of the person, intent, or that there existed in the mind of the defendant a plan, scheme, system or design, into which fitted the commission of the offense for which he was then on trial. This form of instruction has legal support, and evidence of similar offenses, when not too remote, are admissible either in chief or on rebuttal. People v. Cavanaugh, 44 Cal.2d 252, 282 P.2d 53; People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. Freytas, 157 Cal.App.2d 706, 719, 321 P.2d 782. Defendant concedes this general rule of law but claims the facts shown do not indicate a similar plan, scheme, system or design, and accordingly the evidence was inadmissible for any purpose. Usually, it is a primary question for the court to determine whether facts pertaining to offenses other than that charged show a general pattern, scheme or plan and are sufficiently similar and possess a sufficiently high degree of common features with the act charged to warrant an inference that if defendant committed the others he committed the one charged, and the question of remoteness usually goes to the weight and not to the admissibility of the evidence. People v. Grimes, 113 Cal.App.2d 365, 248 P.2d 130. See also People v. Peete, supra.

[3–6] The trial court apparently believed that such evidence should go to the jury for its enlightenment under the limited instruction that it could be considered only for the purposes indicated. It will be presumed the jurors were true to their oaths and followed the various admonitions and instructions of the court. While a close question is presented, we believe the claimed offense had sufficient similarity to justify the submission of that evidence to the jury. People v. Cavanaugh, 44 Cal.2d 252, 282 P.2d 53; People v. Coefield, 37 Cal.2d 865, 236 P.2d 570; People v. Westek, 31 Cal.2d 469, 190 P.2d 9; People v. Cook, 148 Cal. 334, 83 P. 43; People v. Sykes, 44 Cal.2d 166, 280 P.2d 769; People v. Peete, 28 Cal.2d 306, 169 P.2d 924; People v. Sims, 165 Cal.App.2d 108, 331 P.2d 799, relied upon by defendant, was factually different.

There, the question whether the other offenses proved, in the manner there accomplished, were or were not *similar offenses* was not the issue. The evidence was not admitted on that theory but attempt was made to elicit the commission of other crimes, not similar in form, from defendant, by means of cross-examination and by way of impeachment, and the court there told the jury it was admissible for the purpose of showing criminal *"disposition"*. It is fundamental that other offenses are not admissible for the purpose of showing criminal disposition. People v. Peete, supra. In the instant case the prosecution offered the testimony of the officer in chief as to what he knew and what defendant told him about the previous similar offense. The trial court refused it but allowed it to be produced after defendant testified, by way of rebuttal, as bearing on the question of intent. No prejudicial error resulted. People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243; People v. Brice, 49 Cal.2d 434, 317 P. 2d 961; Sec. 4½, Art. VI, Cal.Constitution.

[7] Finally, it is argued that the trial judge improperly threw the weight of his official position against the defendant and engaged in what defendant felt were acts of advocacy to his prejudice, citing People v. Lancellotti, 147 Cal.App.2d 723, 305 P.2d 926, and People v. Huff, 134 Cal.App.2d 182, 285 P.2d 17. There was some dialogue between counsel for defendant and the trial judge as to whether the incident in 1950 was or was not similar. No objections were made in reference to the remarks of the trial judge, and no motion was made to strike it. The judge stated to the jury that, to him, there was sufficient similarity to allow that evidence to be considered by the jury, even though counsel for defendant argued otherwise. In view of the conclusions reached and the giving of the specific instruction on the subject, we conclude that no prejudicial error resulted.

Judgment and order denying a new trial affirmed.

MUSSELL and SHEPARD, JJ., concur.

170 Cal.App.2d 115

Leonard L. BUCK, also known as L. L. Buck, and Joy Buck, his wife, Plaintiffs and Appellants,

v.

Lyman C. JEWETT, Administrator of the Estate of John H. Jewett, Jr., Defendant and Respondent.

Civ. 9591.

District Court of Appeal, Third District, California.

May 4, 1959.

Action for the purpose of having a deed absolute in form declared to be a mortgage. Judgment for the defendants in the Superior Court, Humboldt County, William G. Watson, J., and the plaintiffs appeal. The District Court of Appeal, Schottky, J., held that the evidence was not sufficiently clear and convincing to establish that a deed was intended as a mortgage.

Judgment affirmed.

1. Mortgages ⟹38(2)

Clear and convincing evidence is required in order to establish that a deed purporting on its face to convey title absolutely is a mortgage.

2. Mortgages ⟹38(1)

Evidence was not sufficiently clear and convincing to establish that a deed purporting on its face to convey title absolutely was intended by the parties as a mortgage.

◆

Hill & Hill, Eureka, for appellants.

Hilger & Thomas, Eureka, for respondents.

SCHOTTKY, Justice.

Leonard L. Buck and his wife, Joy Buck, appeal from an adverse judgment in an action brought by them for the purpose of having a deed absolute in form declared to be a mortgage.

There is little if any conflict in the evidence. The record shows that Leonard

L. Buck had the opportunity to purchase certain real property in Humboldt County for the sum of $1,000. He did not have any money so he approached John H. Jewett, Jr., his wife's second cousin, to borrow the money so he could purchase the property. Buck testified that John H. Jewett, Jr., offered to lend him $400 so he could make a down payment on the property. Buck, Jewett, and Horning, the agent for the seller, then went to a title company where an escrow was opened. Buck agreed with Horning that the balance of the purchase price would be paid within 15 days. At this meeting John H. Jewett, Jr., allegedly told Horning that he was lending Buck the money. Buck was unsuccessful in raising the balance, so he again sought assistance from John H. Jewett, Jr., who then borrowed the balance ($600) from his brother, Lyman Jewett. Lyman Jewett testified that his brother told him he wanted to lend the money to Buck so Buck could make the final payment on the property. After receiving a check they went to the title company where the check was presented. Buck testified he asked the escrow officer to draw a deed to protect John H. Jewett, Jr. A deed was drawn which gave John H. Jewett, Jr., a one-half interest in the property. The escrow officer testified that his instructions were to draw a deed.

John H. Jewett, Jr., died prior to the commencement of this action so he was unable to contradict or affirm the testimony offered by plaintiffs. Buck said that Jewett's purpose in assisting him was to assist Buck in supporting his family. There was no documentary evidence of the debt, no time of payment set or mentioned at any time. There was evidence that when Buck had an opportunity to sell the hunting rights on the property Buck felt it was necessary to talk with John H. Jewett, Jr., before he dealt with the property in any way.

After John H. Jewett, Jr., died, Buck made a demand against the executor of Jewett's estate for a deed to the property. At the time the demand was made Buck deposited the sum of $445 with the attorney for the executor. This demand was rejected and this suit followed.

[1] Appellants' sole contention upon this appeal is that there is no substantial evidence to support the judgment. The applicable law is well stated in Beeler v. American Trust Co., 24 Cal.2d 1, 7, 147 P.2d 583, 587, as follows:

> "'That a deed purporting on its face to convey title absolutely may be shown by parol evidence to be something else —namely, a mortgage—is a striking exception to the general rule, and it has been universally held that the character of the instrument cannot be thus changed except upon clear and convincing evidence.' [Citations.] But whether or not the evidence offered to change the ostensible character of the instrument is clear and convincing is a question for the trial court to decide. [Citations.] In such case, as in others, the determination of that court in favor of either party upon conflicting or contradictory evidence is not open to review on appeal. * * * '[T]he appellate court * * * will not disturb the finding of the trial court to the effect that the deed is a mortgage, where there is substantial evidence warranting a clear and satisfactory conviction to that effect. All questions as to preponderance and conflict of evidence are for the trial court.'"

[2] We are satisfied that the evidence in the instant case presented an issue of fact to the trial court, that issue being whether or not there was clear and convincing evidence that the deed, absolute in form, was intended to be a mortgage. We are satisfied that there was ample evidence from which the court could find, as it did find, "[t]hat the deed was intended to and did operate to convey to John H. Jewett, Jr. * * * a one-half interest in fee simple * * *." As the court stated in its memorandum opinion:

> "* * * More important, the deed was not the whole of the property which would be the normal security

arrangement where the debt being secured, was the value of the entire property. On the contrary, the deed was to a one-half interest in that property.

> "Plaintiff specifically testified that he had bought the entire property, and it is not conceivable to the Court that for security purposes a deed would then be prepared to one-half of that which was acquired."

It was for the trial court to weigh the evidence, and we are unable to agree with appellants that the evidence in the instant case was such that it compelled a finding that the deed was a mortgage.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

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170 Cal.App.2d 48

James Donald CARR, a minor by and through his Guardian ad litem Donnie R. Carr and Donnie R. Carr, Plaintiffs and Appellants,

v.

CITY AND COUNTY OF SAN FRANCISCO, a Municipal Corporation, First Doe and Second Doe, Defendants and Respondents.

Civ. 18101.

District Court of Appeal, First District, Division 2, California.

April 30, 1959.

Action for injuries sustained by child who was injured when he tripped over the foot of an attendant in charge of a merry-go-round in the city's park. Judgment for the city in the Superior Court, City & County of San Francisco, Eustace Cullinan, Jr., J., and the plaintiffs appealed. The District Court of Appeal, Dooling, J., held that no liability could be imposed on the city in view of the fact that it was engaged in a governmental activity.

Judgment affirmed.

1. Municipal Corporations 🔑734

In the operation of a playground for children, a municipality is performing a governmental and not a proprietary function. West's Ann.Gov.Code, § 53051.

2. Municipal Corporations 🔑734

A city in operating a children's merry-go-around in connection with a children's playground in a public park was engaged in a governmental activity with respect to liability for injuries sustained by minor plaintiff who tripped over the foot of the attendant in charge of the merry-go-round. West's Ann.Gov.Code, § 53051.

3. Municipal Corporations 🔑742(6)

Whether under a given state of facts an act of a municipality is performed as part of its governmental function is a question of law for the court and should not be submitted to the jury.

4. Municipal Corporations 🔑742(5)

In action for injuries sustained by child who tripped over the foot of an attendant in charge of a merry-go-round in a public park, evidence did not justify imposing liability on the city on the ground that the city permitted a defective condition of the merry-go-round to exist so as to impose liability under the statute on the ground that there was only one attendant in charge of the merry-go-round where there was no evidence that the presence of only one attendant had any causal connection with the child's injuries. West's Ann.Gov.Code, § 53051.

5. Municipal Corporations 🔑742(5)

In action for injuries sustained by child who tripped over the foot of an attendant in charge of a merry-go-round in a public park excluding evidence that the merry-go-round may have been operated at a profit was not error since the profit or nonprofit phase of the activity was not determinative in determining whether the city was engaged in a proprietary or governmental function.

6. Municipal Corporations ⚷742(5)

In action for injuries sustained by child who tripped over the foot of an attendant in charge of a merry-go-round in a public park, excluding evidence as to the manner in which a private merry-go-round was operated and the number of attendants employed thereat was not error where there was no showing that the privately operated merry-go-round was operated under the conditions at all similar to the city's merry-go-round.

Vernon W. Humber, James J. Reilly, San Francisco, for appellants.

Dion R. Holm, City Atty., City & County of San Francisco, Paul J. Di Noia, Deputy City Atty., San Francisco, for respondent.

DOOLING, Justice.

This appeal from a judgment of nonsuit is presented on an agreed statement.

On September 5, 1954, the minor plaintiff, who was then eight years of age, was injured when he tripped over the foot of the attendant in charge of the merry-go-round in Golden Gate Park. The minor had entered through the entrance gate in the enclosure surrounding the merry-go-round with his mother and two sisters. He started to climb on a horse and then changed his mind and started to run toward his mother and sisters who had gone to another part of the merry-go-round. As the attendant put one foot on the merry-go-round, with the other still on the ground, the minor ran against his leg and fell.

There was one attendant in charge and it was his practice, which he was following on this day, to keep both exit and entrance gates to the enclosure shut while the merry-go-round was in motion. When it stopped he would open the exit gate to permit those who had completed their rides to leave. He would then close the exit gate and open the entrance gate. After this he would board the merry-go-round and aid any children in need of assistance. He would then close the entrance gate, return to the merry-go-round and put it in motion. This accident occurred when the attendant was stepping on to the merry-go-round to get the children prepared for the next ride and while the merry-go-round was not in motion.

The merry-go-round "is the ordinary type children's merry-go-round which has various animals mounted on a circular revolving platform which turns about a central axis housing the operating mechanism." It is located in an area which contains, among other things, swings, slides, an animal corral, a donkey ride and a food concession.

In granting the nonsuit the court held that the operation of the merry-go-round was a governmental function and that the evidence was not sufficient to establish a cause of action under Government Code, section 53051. Appellants argue that the court erred in both conclusions and also in sustaining objections to certain evidence offered by appellants.

[1] Our decisions are clear that in the operation of a playground for children a municipality is performing a governmental, and not a proprietary, function. Kellar v. City of Los Angeles, 179 Cal. 605, 608–609, 178 P. 505; Farrell v. City of Long Beach, 132 Cal.App.2d 818, 283 P.2d 296; Meyer v. City and County of San Francisco, 9 Cal.App.2d 361, 49 P.2d 893; Schmidt v. City of Vallejo, 122 Cal.App. 5, 10 P.2d 107. The Meyer case is not distinguishable from ours, since in that case this court held that in the operation of a miniature train in Fleischacker Playground the City and County of San Francisco was acting in its governmental capacity.

Appellants cite those cases which have held that an activity designed primarily for the amusement and entertainment of the public is proprietary rather than governmental. (Guidi v. State of California, 41 Cal.2d 623, 262 P.2d 3, fireworks and horse arena; Chafor v. City of Long Beach, 174 Cal. 478, 163 P. 670, L.R.A.1917 E, 685, public assembly hall; Plaza v. City of San Mateo, 123 Cal.App.2d 103, 266 P.2d 523, golf course; Rhodes v. City of

Palo Alto, 100 Cal.App.2d 336, 223 P.2d 639, theater.) From these cases appellants argue that a merry-go-round designed for the entertainment and amusement of children is not logically distinguishable. In making this argument appellants do not take into account the difference in governmental relation to, and responsibility toward, children as distinguished from adults. The very word "*play*ground" has a connotation of amusement and recreation, and the determination of our courts that the maintenance of playgrounds for children is a governmental function is itself a recognition of the responsibility of government to set aside areas in which children may be amused and entertained, by indulging their normal proclivity to play away from the dangers and temptations of our city streets. Play is a normal activity of the young and a recognized part of their education and training and in these days of the widespread recognition of the dangers of juvenile delinquency and the concomitant duty of the public to the children of our cities who can question that affording to the children the facilities for play is a proper governmental function?

[2] A merry-go-round differs from other playground equipment only in the fact that it is mechanically propelled and it is generally recognized in those jurisdictions which like ours, consider the maintenance of playgrounds a governmental function, that the furnishing of such equipment and appliances falls within the limits of governmental immunity. (Playground swings: Mayor and City Council of Nashville v. Burns, 131 Tenn. 281, 174 S.W. 1111, L.R.A.1915D, 1108; Clark v. City of Louisville, 273 Ky. 645, 117 S.W.2d 614; Royston v. City of Charlotte, 278 Mich. 255, 270 N.W. 288; Epstein v. City of New Haven, 104 Conn. 283, 132 A. 467; Etter v. City of Eugene, 157 Or. 68, 69 P.2d 1061; Slides: Schmidt v. City of Vallejo, supra, 122 Cal.App. 5, 10 P.2d 107; Grinde v. City of Watertown, 232 Wis. 551, 288 N.W. 196; See-saw: Piasecny v. City of Manchester, 82 N.H. 458, 136 A. 357; Toboggan and sled runs: Cegelski v. City of Green Bay, 231 Wis. 89, 285 N.W. 343; Ball v. City of Madison, 1 Wis.2d 62, 82 N.W.2d 894; Steele v. City of Boston, 128 Mass. 583; Willcox v. Erie County, 252 App.Div. 20, 297 N.Y.S. 287; Pohland v. City of Sheboygan, 251 Wis. 20, 27 N.W.2d 736; Merry-go-round propelled by the children: Stuver v. City of Auburn, 171 Wash. 76, 17 P.2d 614; Smith v. Iowa City, 213 Iowa 391, 239 N.W. 29; Undescribed "appliance": Bernstein v. City of Milwaukee, 158 Wis. 576, 149 N.W. 382, L.R.A.1915C, 435.) We have no hesitation in holding that in operating a children's merry-go-round in connection with a children's playground respondent was engaged in governmental activity.

[3] Appellants' further contention that the question whether this was a governmental or proprietary activity should have been left to the jury is answered by Barrett v. City of San Jose, 161 Cal.App.2d 40, at page 42, 325 P.2d 1026, at page 1027, in which we said: "Whether under a given state of facts an act of a municipality is performed as part of its governmental function is a question of law for the court, and it is error to submit this question to the jury. [Citing cases.]"

[4] The agreed statement does not support appellants' contention that the evidence would support a finding that respondent permitted a dangerous or defective condition of the merry-go-round to exist so as to impose liability under Government Code, section 53051. The dangerous or defective condition to satisfy this section may be found in the general plan of operation. Teilhet v. County of Santa Clara, 149 Cal. App.2d 305, 308 P.2d 356; Bauman v. City and County of San Francisco, 42 Cal.App. 2d 144, 108 P.2d 989. Appellants seek to bring this case within this rule by arguing that in having only one attendant in charge of the merry-go-round the attendant "had to dash frantically in and about the merry-go-round to open the gates, caution the children about running, see that the children were safely seated, collect the tickets, blow a whistle etc. Had another attendant

been assigned * * * he could have walked in and about the merry-go-round with caution and circumspection, having had knowledge of the propensities of children to run about the merry-go-round."

These statements in the brief find no support in the agreed statement. The attendant testified that, while he was sometimes assigned a part-time assistant, on the day in question he felt he needed no help. There is no evidence that the attendant proceeded at any time in a hurried manner and indeed the minor plaintiff testified that "he noticed that the attendant had started to walk toward the merry-go-round and had last noticed him stop about half way or more between the gate and the merry-go-round and talk to someone * * *" The record is barren of any evidence from which a jury could find that the presence of only one attendant had any causal connection with appellant's injury. Cf. Crone v. City of El Cajon, 133 Cal.App. 624, 630, 24 P.2d 846.

[5] Appellants' complaint that they were not permitted to produce evidence to show that the food concession and merry-go-round may have been operated at a profit and that the donkey-ride concession was leased to a private operator when it did not make a profit is answered by Talley v. Northern San Diego County Hospital Dist., 41 Cal.2d 33, 257 P.2d 22. At pages 39–40 of 41 Cal.2d, at page 26 of 257 P.2d the Supreme Court said: "The imposition of a charge for service is not inconsistent with the exercise of a governmental function. [Citing cases.] Neither is the profit or nonprofit phase of the activity engaged in determinative of either a proprietary or governmental function. [Citing cases.] The test is whether the particular activity in which the governmental agency is engaged at the time of the injury is of a public or private nature."

[6] Appellants also complain that they were not permitted to introduce the evidence of a witness who had been the chief attendant at a privately operated merry-go-round at the San Francisco beach "as to the manner in which the Whitney [private] merry-go-round was operated, the number of attendants employed at Whitneys-At-The-Beach and the necessity of having more than one attendant present to supervise the merry-go-round."

There was no showing that the privately operated merry-go-round was operated under conditions at all similar to those surrounding the respondents' merry-go-round. The merry-go-round in issue was surrounded by a substantial enclosure which prevented access to the merry-go-round while it was in motion, for example, while for all that appears the privately operated merry-go-round at the beach may not have been so protected; but basically appellants can show no prejudice from the exclusion of this testimony, in any event, because as above noticed the record fails to show any causal connection between the fact that there was only one attendant and appellant's injuries.

Judgment affirmed.

KAUFMAN, P. J., and DRAPER, J., concur.

170 Cal.App.2d 76

Hal T. HYLTON and Bessie J. Hylton, Plaintiffs and Appellants,

v.

Clyde BADGLEY and Dora E. Badgley, Defendants and Respondents.

Civ. 9590.

District Court of Appeal, Third District, California.

April 30, 1959.

Rehearing Denied May 26, 1959.

Action to recover on note executed by former partner and secured by his one-third interest in real property which had been owned by dissolved partnership. The Superior Court, Tehama County, Curtiss E.

Wetter, J., entered judgment for former partner and plaintiffs, who were also former partners, appealed. The District Court of Appeal, Warner, J. pro tem., held that where action was brought to dissolve partnership and decree was entered for sale of partnership assets to plaintiffs who purchased realty at dissolution sale and decree provided that plaintiffs as former partners should have judgment against defendant former partner in the amount of $47.35, such decree was res judicata and barred action on note.

Affirmed.

Judgment ⚷744

Where defendant had given plaintiff partners note for a one-third interest in partnership realty and such note was secured by a deed of trust on defendant's interest and subsequent thereto action was instituted for dissolution of partnership during which partnership assets were sold to plaintiffs, and decree was entered whereby plaintiffs were given judgment against defendant for $47.35 and court recited that all of its orders and decrees had been duly carried out, decree was res judicata with respect to balance due on note, and if trial court had erred in former action plaintiffs' remedy was by appeal from judgment entered therein and not by a separate action to recover on note.

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Stanley Brooks, San Francisco, for appellants.

Edwin C. Iliff, Long Beach, and Pugh & Webster, Red Bluff, for respondents.

WARNE, Justice pro tem.

Plaintiffs appeal from a judgment in favor of defendants in an action brought to recover an alleged balance due on a promissory note. In their complaint they allege that in 1949 defendants Clyde Badgley and Dora E. Badgley executed and delivered a certain promissory note to plaintiffs, and that a balance in the sum of $1,849.67 was still due on the note. It was further alleged that said note was secured by a deed of trust on the interest of defendants in certain real property in Tehama County, said interest being an undivided one-third interest of the defendant Clyde Badgley as partner in the partnership known as Fire Mountain Lodge, consisting of the defendant Clyde Badgley, the plaintiff Hal T. Hylton, and one Chester E. Badgley, to which said partnership said real property belonged; that the security became valueless by reason of the sale of all the right, title and interest in and to said property to plaintiff Hal T. Hylton pursuant to the decree dissolving said partnership in Action No. 8695 filed in the Superior Court of Tehama County for dissolution of said partnership; and that said decree recited that said Hal T. Hylton would be entitled to full payment of the note.

Defendants, in their answer, allege that the decree provided that the plaintiffs should become entitled to full payment of said promissory note only out of the proceeds of the sale of the partnership assets as ordered by the court; that the note was given as a portion of the purchase price of the real property described in said trust deed; that said real property had been sold to satisfy said obligation; that all the rights of the parties, including the obligation on the promissory note, were determined and adjudicated in the action dissolving the partnership; and that the final decree granting plaintiff Hal T. Hylton judgment against defendant Clyde Badgley for $47.35 is now res adjudicata. As an affirmative defense and by way of counterclaim, defendants ask $3,000 allegedly due them by the decree of the court which defendants claim had never been paid.

By these pleadings the issues were thus joined.

By stipulation the matter was tried by submission of testimony in the form of affidavits and the matters put in evidence in conformity with the terms of the pretrial conference order. The pretrial order does not include a statement of the matters agreed upon by respective counsel but does show that the interlocutory decree in the case of Hylton v. Badgley, Tehama Superior Court No. 8695, was received as plaintiffs' Exhibit No. 1–A; that the final decree of dissolution in said case was received as plaintiffs' Exhibit No. 1–B; and that the contract of sale dated June 27, 1953, was received as plaintiffs' Exhibit No. 2.

The trial court in the instant case found that the promissory note in question was secured by a deed of trust upon the real property upon which the "Fire Mountain Lodge" was situated and was given as part payment by defendants to plaintiffs for a one-third interest in the said lodge; that the defendants became partners in the operation of said lodge; that the partnership was subsequently dissolved pursuant to a decree of the Superior Court of Tehama County in said Action No. 8695; that pursuant to said decree the partnership's assets were sold, and the court decreed that plaintiffs should be entitled to payment in full of the principal and interest due on said promissory note out of the proceeds of the sale; that plaintiffs purchased the Fire Mountain Lodge at the dissolution sale, and as consideration therefor, acknowledged satisfaction of certain claims, including the claim against the defendants to the extent of $11,277.20; that pursuant to the terms of said interlocutory decree of dissolution the court further found that the defendants were entitled to $3,000 for advances made to said partnership; that the defendants never received the said $3,000 due them from the proceeds of the dissolution sale; that no accurate accounting of the proceeds of the dissolution sale were ever made; and that the court in its final decree in Action No. 8695 recited "that all of its said orders and decrees have been carried out duly."

As conclusions of law the trial court, among other things, found that all claims of plaintiffs against defendants, including the claim for any balance due on said promissory note, were fully adjudicated in Action No. 8695, insofar as the present action is concerned.

The interlocutory decree in the former action, after providing for the sale of the partnership assets and good will then ordered that: "The ultimate proceeds of sale shall first be applied to the repayment of individual advances subsequent to the formation of the partnership, namely: to plaintiff, $21,193.91; to C. Earl Badgley, $4,727.25; to Clyde Badgley, $3,000.00 * * However, immediately upon such sale, plaintiff shall be entitled to payment in full of two notes, each in the principle [sic] amount of $12,666.67, one executed by each of said defendants, with such interest thereon as shall be then due and unpaid. For the sums thus due from each of said defendants, plaintiff shall have a lien up to the amount thereof on the share of each defendant as above determined, and shall be paid from the proceeds of said sale accordingly."

And the final decree states: "And pursuant to the said terms of the said Interlocutory Decree, the said court made its Further Interlocutory Decree, * * * appointing Milton Hull as receiver of the said assets of the partnership and directing him to sell the same upon certain terms, and * * * according and pursuant to the terms of all of said orders and decrees, said Milton Hull as such receiver sold to said Hal T. Hylton all of the said partnership assets, both real and personal, by virtue of a written Contract of Sale approved by the said court * * *;

"And the court now finding that all of the terms of all of its said orders and decrees have been carried out duly.

"It Is Therefore Ordered, Adjudged And Decreed that the said partnership of the said partners, known as Fire Mountain Lodge, is hereby finally dissolved; and that plaintiff recover from defendants his court costs in the amount of $47.35; * * *."

Reading the two decrees in the former action together, it seems clear to us that the court's statement "that all of its said orders and decrees have been carried out duly" can only mean that the note in question had been paid in full. This conclusion is fortified by the fact that the court allowed plaintiffs nothing more than their costs amounting to the sum of $47.35. Hence it appears that the subject matter was finally adjudicated in the former action. If the trial court erred in the former action, plaintiffs' remedy was by appeal from the judgment entered therein, not by a separate action to recover on the note.

Since the conclusions we have reached as hereinabove stated dispose of this appeal, we do not deem it necessary to discuss the other points urged.

The judgment is affirmed.

VAN DYKE, P. J., and PEEK, J., concur.

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170 Cal.App.2d 72

PEOPLE of the State of California, Plaintiff and Respondent,

v.

William BANKS, Jr., Defendant and Appellant.

Cr. 6450.

District Court of Appeal, Second District, Division 3, California.

April 30, 1959.

Prosecution for possession of marijuana. The Superior Court of Los Angeles County, Richard C. Fildew, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Shinn, P. J., held that it could not be contended on appeal that contraband was obtained by means of unlawful search and seizure in absence of a proper objection in trial court, and evidence was sufficient to sustain conviction.

Affirmed.

1. Criminal Law ⟹1028

Contention that contraband was obtained by means of unlawful search and seizure could not be made on appeal in absence of a proper objection in the trial court.

2. Poisons ⟹9

Evidence was sufficient to sustain conviction for possession of marijuana.

Bernard S. Jefferson, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Jack E. Goertzen, Dep. Atty. Gen., for respondent.

SHINN, Presiding Justice.

In a court trial, William Banks was convicted of possessing marijuana and was sentenced to state prison. He appeals from the judgment.

Having received information that narcotic suspects were using the premises at 2835 Edgehill Drive as a "shooting gallery", Officer Florrne Kennedy of the Los Angeles Police Department went to the location at 1:30 a. m. on December 17, 1957 in the company of two other officers. Officer Starkey went to the front door, Officer Uno to the north side of the house, and Officer Kennedy to the south side of the house. Starkey rang the front doorbell and knocked on the door. A few seconds later, a French door on the south side of the house opened and Kennedy observed the hand of a male Negro throw out a package which struck him on the shoulder; the man was wearing a short-sleeved shirt with a wide brown stripe. Kennedy retrieved the package, opened it and observed what resembled marijuana cigarettes. About fifteen seconds later, a package wrapped in tinfoil came through the door and landed at Kennedy's feet. This package had been thrown by a colored woman; it contained balloons similar to those used by narcotic addicts. Kennedy shouted to Starkey: "They are getting rid of it. Knock the door down." A female voice stated that the door would be opened and the officers entered the house.

The officers found Banks, a man named Taylor, and Banks' co-defendant Jessie Houston in the living room. Kennedy observed that Banks was wearing a light tan or cream-colored polo type of T-shirt with short sleeves and a wide brown stripe near the bottom just above the elbow. He identified appellant as the man who had thrown the first package through the French door. Taylor was wearing a long-sleeved shirt. Before leaving the house, Kennedy rolled up Taylor's sleeves to check his arms for needle marks. When questioned by the officer, Banks denied knowing anything about the package.

Kennedy placed his initials on the package thrown by appellant, sealed it inside a manila envelope and delivered the envelope to the police property section for an examination of its contents.

It was stipulated that William G. Penprase was a qualified police chemist, and that if called as a witness he would testify that he received a sealed envelope marked in the case of Willie Banks, that he opened it and found it to contain a smaller envelope, that the smaller envelope contained a brown bag containing twenty cigarettes wrapped inside a piece of brown paper, and that he "chose ten at random" and found a leafy material consisting of marijuana.

Kennedy testified on direct examination that the package thrown by appellant was the one whose contents were described in the testimony of the police chemist. On cross-examination, it was brought out that at the preliminary hearing of Mrs. Houston the officer had testified that the cigarettes were not contained in a bag when he recovered them and that he had taken a brown bag from the house to use as a container for the narcotics. The package was received in evidence without objection as People's Exhibit #2.

Jessie Houston testified on behalf of appellant that she threw out of the French door a single package containing both the heroin and the marijuana and that all of the narcotics belonged to her. Banks was in the bathroom when the officers entered and Taylor's shirt sleeves were rolled up. Appellant testified that he was not in possession of marijuana and did not dispose of the package. On cross-examination, he admitted having suffered two prior felony convictions for narcotic offenses.

[1] The first contention to be considered is that the contraband was obtained by means of an unlawful search and seizure. As mentioned earlier, the marijuana was received in evidence without objection. It is sufficient to say of this point that the admissibility of evidence allegedly obtained by means of an illegal search and seizure will not be reviewed on appeal in the absence of a proper objection in the trial court. People v. Kelsey, 140 Cal.App.2d 722, 295 P.2d 462.

The remaining contention to be noticed is that the evidence was insufficient to support the conviction.

[2] Appellant's main points regarding the sufficiency of the evidence are that the court could not have found that he attempted to dispose of a package or that the package he threw was the one received as an exhibit without resorting to speculation and conjecture. The argument is untenable.

With respect to the first point, Banks was identified by Kennedy as the man who threw the first package out the French door. The court gave full credit to the officer's testimony. It is not for us to say that the identification was insufficient. People v. Alonzo, 158 Cal.App.2d 45, 47–48, 322 P.2d 42.

As to the second point, appellant urges that Kennedy's identification of the exhibit was vitiated by the testimony of the chemist that the exhibit contained two envelopes and by his own previous statement that the cigarettes thrown from the house were not inside a bag. But this question was also one for the trier of fact, and not for a reviewing court.

A third point is that the testimony of the police chemist was wholly conjectural because, in the words of the stipulation, Mr. Penprase merely "chose" ten cigarettes and "found" them to contain marijuana and it was not specified that the ten cigarettes were among the twenty in the package or that he subjected them to a scientific examination. The argument is obviously an afterthought. It was not advanced at the trial. Appellant entered into the stipulation without seeking any clarification of the proposed testimony. Any imprecision in the terms of the stipulation could have been remedied either by amendment or by calling Penprase as a witness to describe how he arrived at his conclusion that the cigarettes were contraband.

The judgment is affirmed.

WOOD and VALLÉE, JJ., concur.

Raymond H. JENSEN, Dorothy J. Jensen, Marian Morrow, and Vincent James DiMatteo, by and through his Guardian ad litem John DiMatteo, Plaintiffs and Appellants,

v.

TRADERS & GENERAL INSURANCE COMPANY, a corporation, Defendant and Respondent.*

Civ. 18167.

District Court of Appeal, First District, Division 2, California.

April 23, 1959.

Hearing Granted June 18, 1959.

Insured's action against insurer for reimbursement for cost of defending action arising out of automobile accident. The Superior Court, Alameda County, Cecil Mosbacher, J., rendered judgment for defendant, and an appeal was taken. The District Court of Appeal, Kaufman, P. J., held that, properly construed, cancellation clause of automobile policy did not make mere mailing of cancellation notice, without regard to its receipt by insured, effective; and held that if clause were interpreted as permitting cancellation by mailing of notice alone, it would violate public policy of California.

Judgment reversed.

1. Insurance 🔑146(3)

A "contract of adhesion", for which insurer selected language and with which language insured is "stuck", must be given construction more favorable to insured.

See publication Words and Phrases, for other judicial constructions and definitions of "Contract of Adhesion".

2. Insurance 🔑229(2)

Properly construed, cancellation clause of automobile policy did not make mere mailing of cancellation notice, without regard to its receipt by insured, effective; and if clause were interpreted as permitting cancellation by mailing of notice alone, it would violate public policy of California. West's Ann.Vehicle Code, § 410 et seq.; West's Ann.Insurance Code, § 11620 et seq.

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Nichols, Williams, Morgan & Digardi, Edward Digardi, Sheridan, Hoffman & Mendel, Oakland, for appellants.

Partridge, O'Connell & Partridge, Wallace O'Connell, San Francisco, for respondents.

KAUFMAN, Presiding Justice.

Plaintiffs Raymond Jensen, Dorothy Jensen and Marian Morrow recovered judgment against plaintiff Vincent (Jim) DiMatteo for injuries sustained in an automobile accident and now have joined with DiMatteo in bringing the present action against his insurance carrier, Traders & General Insurance Company. DiMatteo claimed a right to be reimbursed for the cost of defending the first action. Defendant claimed it had cancelled the policy before the accident. At the first trial, a verdict for the plaintiffs was returned, but on appeal, reversed by this Court (Div. I) on the ground that an instruction conditioning cancellation upon return of the premium was prejudicial to Traders & General.

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* Opinion vacated 345 P.2d 1.

Jensen v. Traders & General Ins. Co., 141 Cal.App.2d 162, 296 P.2d 434. At the second trial, the jury returned a verdict in favor of the defendant. Plaintiffs now appeal.

On April 19, 1951, plaintiff "Jim" DiMatteo, a minor, accompanied by his parents, purchased a used car on a conditional sales contract from A. A. Moschetti, doing business under the name of West Coast Motor Sales. The conditional sales contract included an item by way of premium on the policy. Moschetti (who was not an agent of the defendant) placed the insurance with defendant's agent Lotz. Defendant issued its policy of public liability and property damage insurance, naming as insured, plaintiff Jim DiMatteo, and his father plaintiff John DiMatteo. The DiMatteos received their policy by mail and read it to check coverages but did not read the fine print.

There is uncontroverted evidence that the DiMatteos paid all premiums due from May through November. The payments were made to Moschetti. Moschetti had sold the DiMatteo contract to a finance company in April and received the cash proceeds thereof, including the amount sufficient to pay the insurance premium in full. Moschetti did not remit this amount to defendant's agent Lotz until September 14, 1951.*

Defendant offered competent evidence of mailing of cancellation notices (two separate notices, one addressed to Jim DiMatteo, one to his father) on Friday, August 10, 1951. The letters were not returned to the defendant's office. The plaintiffs testified that no cancellation notices were received and that they had no inkling of any cancellation until November, when the accident occurred. They continued making their payments to Moschetti in August, September, October and November. Plaintiff John DiMatteo testified he would not have permitted his son to drive without insurance.

[1, 2] The sole issue on appeal is the propriety of the following instruction given to the jury.

> "When a policy of insurance provides as in this case that the policy may be cancelled by the company by mailing to the insured at the address shown on the policy a written notice stating when, not less than five days thereafter, such cancellation shall become effective and further provides that the mailing of such notice shall be sufficient proof of notice it is not necessary that the notice so mailed shall be received by the insured in order to be effective. If you find that the defendant Traders and General Insurance Company mailed a notice of cancellation to John and Jim DiMatteo they have done everything which the policy and the law requires of them and the policy ceased to remain in effect after the date specified in said notice regardless of whether or not the DiMatteos or either of them ever actually received such notice."

Plaintiffs argue that the cancellation clause does not warrant such an instruction; that the instruction is contrary to California law and public policy; and that the instruction erroneously deprived them of having the fact of receipt of the notices determined by the jury.

> "23. Cancelation. This policy may be canceled by the named insured by surrender thereof or by mailing to the company written notice stating when thereafter such cancelation shall be effective. This policy may be canceled by the company by mailing to the

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* Under Moschetti's arrangements with Lotz, Moschetti periodically received statements covering the balance due. In March and April the accounts were paid in full. In May, Lotz was in the process of changing his bookkeeping system. At the end of May a balance was owing from Moschetti to Lotz; the June statement showed a balance owing from Lotz to Moschetti. On September 14, Moschetti made a payment to Lotz and closed the account. The verdict rendered against Moschetti at the first trial was not appealed.

> named insured at the address shown in this policy written notice stating when not less than five days thereafter such cancelation shall be effective. The mailing of notice as aforesaid shall be sufficient proof of notice and the effective date and hour of cancelation stated in the notice shall become the end of the policy period. Delivery of such written notice either by the named insured or by the company shall be equivalent to mailing."

The question here presented has not been directly ruled upon in this state. In Naify v. Pacific Indemnity Company, 11 Cal.2d 5, at page 10, 76 P.2d 663, at page 666, 115 A.L.R. 476, the court said:

> "At the outset we are met with a question raised by *amici curiae* on behalf of various insurance companies, namely, whether a notice of cancellation, sent to the address of the assured as stated in the policy, and pursuant to a provision in the policy stating that the mailing thereof shall be sufficient notice, is effective despite lack of receipt by the insured. In this simple form, the question may perhaps be answered in the affirmative."

The court held, however, that under the special circumstances of the case (insured had no choice of policy and never received the policy; pro-rata payments were accepted by the seller who did not notify the insured), the doctrine was entirely inapplicable. American Building Maintenance Co. v. Indemnity Ins. Co., 214 Cal. 608, 7 P.2d 305, states that the mailing of notice under a similar policy clause would have been sufficient, but then held that if the notice sent by mail was not received, the cancellation is ineffective, citing Farnum v. Phoenix Ins. Co., 83 Cal. 246, 23 P. 869. However, the American B. M. case involved modification of the policy, while in the Farnum case the policy provided for termination on "giving notice". See also Truck Ins. Exchange v. Industrial Acc. Comm., 36 Cal.2d 646, at page 650, 226 P.2d 583.

An examination of the authorities on this question in other jurisdictions reveals a sharp conflict. See 29 Am.Jur. 285; 123 A.L.R. 1008, and such cases as Donarski v. Lardy, 1958, 251 Minn. 358, 88 N.W.2d 7; Grimes v. State Auto Mut. Ins. Co., 1953, 95 Ohio App. 254, 118 N.E.2d 841; Medford v. Pacific Nat. Fire Ins. Co., 189 Or. 617, 219 P.2d 142, 222 P.2d 407, 16 A.L.R.2d 1181. In part, this conflict may be explained by variations in the provisions of policies and statutes involved.

In Griffin v. General Acc. Fire & Life Assur. Co., 1953, 94 Ohio App. 403, 116 N.E.2d 41, cited by the plaintiffs, the court in construing a similar provision, indicated that "sufficient proof" was not "conclusive proof." In the Griffin case, however, the agent of the insurer had knowledge that the notices had not been delivered as they were returned by the post office and the agent also had notice of where the insured could be found. In Donarski v. Lardy, 1958, 251 Minn. 358, 88 N.W.2d 7, the issue was whether the policy had been cancelled despite an express finding by the lower court that the notice of cancellation had not been received by the insured. The court held in favor of the plaintiff policy-holder, finding an ambiguity in the words "sufficient proof of notice" by referring to the meaning of "sufficient evidence", and held that even if the clause were interpreted as contended for by the insurance company, it would violate the public policy of the state which was to give the insured notice of cancellation so he could obtain other insurance and fulfill his obligation to those he may injure or damage through the use of his automobile.

Other courts have found that the standard policy provision is neither ambiguous nor contrary to public policy. For example, in Midwestern Insurance Co. v. Cathey, Okl. 1953, 262 P.2d 434, at page 436, the court said:

> "There is no ambiguity in the language of the policy as contained in the cancellation provision. Under the very strictest construction of the policy, the

> contrasting language is not of doubtful meaning. Neither can it be said that the provision is unreasonable or unjust. Under the provision, the assured assumed the risk of receiving the notice when properly mailed to him at the address given in the policy. Under a policy containing the provision involved herein, it would place an unreasonable and unfair burden on the company to say that notice of the cancellation must be actually delivered to the assured. To make such a requirement would be placing additional words in the policy far beyond the actual terms of the policy agreed to by the parties."

See also Service Fire Insurance Co. of N. Y. v. Markey, Fla.1955, 83 So.2d 855; Wisconsin Natural Gas Co. v. Employers Mut. Liability Ins. Co., 1953, 263 Wis. 633, 58 N.W.2d 424; Aetna Ins. Co. v. Aviritt, Tex.Civ.App., 199 S.W.2d 662; American Fire & Casualty Co. v. Combs, Ky.1954, 273 S.W.2d 37; Duff v. Secured Fire & Marine Ins. Co., Tex.Civ.App.1949, 227 S.W.2d 257; Putman v. Deinhamer, 1955, 270 Wis. 157, 70 N.W.2d 652; Womack v. Fenton, 1953, 28 N.J.Super. 345, 100 A.2d 690. Following these authorities (and others involving clauses with slightly different language such as Gendron v. Calvert Fire Ins. Co., 47 N.M. 348, 143 P.2d 462, 149 A.L.R. 1310; Trinity Universal Ins. Co. v. Willrich, 13 Wash.2d 263, 124 P.2d 950, 142 A.L.R. 1), a federal district court in this state has concluded that California would adopt a similar rule. Superior Insurance Co. v. Restituto, D.C., 124 F.Supp. 392; Pierce v. General Casualty Co., D.C., 136 F.Supp. 367; see also Traders & General Ins. Co. v. Champ, 9 Cir., 225 F.2d 802, 805, and 9 Cir., 226 F.2d 829. The facts of the Restituto case are somewhat similar to the instant case as is the clause involved. The court said in 124 F.Supp. at page 395:

> "Parties to a contract may contract on such method of giving notice as they desire and unless public policy is contravened, the contract should be enforced as made. The use of the mails has become too well integrated into our economic and business life for such a public policy question to concern us."

The insurance company argues that the contract is clear and that courts may not rewrite the contracts of the parties. It is difficult to imagine that the standard cancellation clause here involved which has given rise to so many different interpretations by courts is clear to laymen, like the plaintiffs. The plaintiffs here, like most laymen on receiving a policy of insurance, looked at the coverages. Their attention was not called to the fine print. In the instant case, the parties did not bargain for the provisions of the contract. Rather, this is a true "contract of adhesion" where the insurance company selected the language and the insured is "stuck" with it. 43 Columbia L.R. 629. It has long been the law that in such situations, the construction more favorable to the insured must be adopted. Hobson v. Mutual Benefit H. & A. Ass'n, 99 Cal.App.2d 330, 221 P.2d 761; Island v. Fireman's Fund Indemnity Co., 30 Cal.2d 541, 184 P.2d 153, 173 A.L.R. 896; Pacific Heating & Ventilating Co. v. Williamsburgh City Fire Ins. Co., 158 Cal. 367, 111 P. 4. In following the rule of construing insurance policies in favor of the policy-holder, the Supreme Court of Minnesota in Donarski v. Lardy, 251 Minn. 358, at page 363, 88 N.W.2d 7, at page 11, said:

> "The mere fact that some degree of proof is required in the cancellation provision in question indicates that the parties contemplated that some notice of the cancellation of the insurance policy should actually be received by the insured. Therefore, construing this provision consistently with the rule of construction laid down in Freyberg v. London & Scottish Assur. Corp. supra [246 Minn. 417, 75 N.W.2d 203] and in the light of the cases defining 'sufficient evidence,' it is our opinion that the provision means that mailing is a proper mode of communicating notice of cancellation to the insured, but that it does not thereafter relieve the insurance

> company of the obligation of establishing that the insured received the notice. It further establishes a rule of evidence entitling a trier of fact to find that an insured does have notice of cancellation when the company introduces evidence of the mailing of notice, but on the other hand it would also entitle the finder of facts to find that the notice was not received where the insured has testified that the notice was not received. In case the latter fact is found, as in the case at bar, it must be held that the policy was not cancelled."

We think the reasoning of the Minnesota court on the rule of evidence is particularly applicable here. As was pointed out on the first appeal of this case, Jensen v. Traders & General Ins. Co., 141 Cal.App.2d 162, at pages 164–165, 296 P.2d 434, there was here a conflict of evidence as to the mailing of the notices. Under the instruction given, the jury could not have found that the notices were not received. We think the plaintiffs were entitled to have the jury determine the fact of receipt as well as the fact of mailing.

There is, however, a further and more compelling reason for our view here. Even if the clause were interpreted as contended for by the insurance company, it would be a violation of the public policy of this state. The insurance company argues that our Legislature has already declared the public policy of the State of California to be in accordance with its view of the clause. We cannot agree. Sections 10363 and 10369.9 of the Insurance Code merely permit certain kinds of cancellation clauses in disability policies. Section 651, which like section 10369.9 was enacted after the events leading to this litigation, specifically applies to automobile liability policies and merely states, "* * * no cancellation by an insurer * * * shall be effective prior to the mailing or delivery to the named insured at the address shown in the policy, of a written notice of the cancellation stating when * * * the cancellation shall become effective." There are other public policy considerations besides the sanctity of contracts urged by the insurance company. We have already mentioned the rule of construing insurance policies in favor of the insured. The other considerations were well stated by the Minnesota court in Donarski v. Lardy, supra, at pages 364 to 365 of 251 Minn., at page 12 of 88 N.W.2d:

> "Clearly the object of the insured when he buys a policy of the kind involved here is to receive protection in order that he might fulfill his obligations to those he has injured or damaged through the use of his automobile. The provision in the policy providing for notice of cancellation is obviously to give the insured an opportunity to procure other insurance. If the policy can be cancelled at any time by merely depositing notice in the mails with no regard to whether or not notice is actually received, then the object of the notice may be completely nullified and there may be no chance of fulfilling the object sought in obtaining the insurance."

Our own financial responsibility law (Vehicle Code, § 410 et seq.), assigned risk plan (Insurance Code, § 11620 et seq.) and other authorities indicate a policy strongly favoring the protection of the public in the field of liability insurance coverage for automobile owners, and support our view that the overriding public policy of this state is like that of Minnesota in this respect. Samson v. State of California, 55 Cal.App.2d 194, 130 P.2d 452; 35 A.L.R. 1011; California State Automobile, etc., Bureau v. Downey, 96 Cal.App.2d 876, 216 P.2d 882, affirmed 341 U.S. 105, 71 S.Ct. 601, 95 L.Ed. 788; Continental Casualty Co. v. Phoenix Construction Co., 46 Cal.2d 423, 296 P.2d 801, 57 A.L.R.2d 914. In Truck Ins. Exchange v. Industrial Acc. Comm., 36 Cal.2d 646, 226 P.2d 583, the doctrine of estoppel was used to reach a just result. That doctrine has no application to facts here presented.

If the public policy of this state were otherwise, as contended by the insurance company, the result in this case, as well as many others, would be inequitable and unjust. For example, automobile insurance could be cancelled while the insured was away on a 10-day vacation; or the company could provide in its policy that cancellation could be accomplished by merely posting its intention on a bulletin board in its home office. We do not think that the right to fully enter into contracts without impairment of such right demands such results.

The instruction complained of was therefore erroneous. The question as to whether the notice was in fact received should have been submitted to the jury with an appropriate instruction. If the notice was in fact received, the cancellation was effective; otherwise not.

Judgment reversed.

DOOLING, J., concurs.

DRAPER, J., concurs in the judgment.

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170 Cal.App.2d 118

Roger C. CHANDLER and Lois K. Chandler, his wife, Plaintiffs and Respondents,

v.

Press SMITH and Daisy S. K. Smith, his wife; and Virgil Walton and Elsie Cassidy Walton, his wife, Defendants,

Virgil Walton and Elsie Cassidy Walton, his wife, Appellants.

Civ. 9617.

District Court of Appeal, Third District, California.

May 4, 1959.

Action was brought to quiet title against grantors under deed containing restrictions, and for declaratory relief. The Superior Court, Sutter County, Arthur Coats, J., entered judgment quieting title, and the grantors appealed. The District Court of Appeal, Warne, J. pro tem., held that where deed, which contained a number of building and use restrictions declared to be covenants running with the land and binding on the grantee, his heirs, executors, and administrators until certain date, did not describe a dominant tenement, and it did not appear that restrictions were inserted for benefit of grantors' adjoining land, and deed expressly provided that title should not be forfeited or impaired for violation of the restrictions, deed created a mere personal burden adhering exclusively to original covenantor, and restrictions were not binding on those who purchased realty when it was sold under second trust deed without knowledge of restrictions contained in deed containing restrictions.

Judgment affirmed.

Covenants 🔑69(1)

Where deed, which contained a number of building and use restrictions declared to be covenants running with the land and binding on the grantee, his heirs, executors, and administrators until certain date, did not describe a dominant tenement, and it did not appear that restrictions were inserted for benefit of grantors' adjoining land, and deed expressly provided that title should not be forfeited or impaired for violation of the restrictions, deed created a mere personal burden adhering exclusively to original covenantor, and restrictions were not binding on those who purchased realty when it was sold under second trust deed without knowledge of restrictions contained in deed containing restrictions.

Weis, Weis & Harpham, Yuba City, for appellants.

Gray & Hewitt, Marysville, for respondents.

WARNE, Justice pro tem.

In the year 1953, the defendants, Walton and Smith, deeded certain real property situated in Sutter County to one Frederick J. Beer. The deed contained a number of building and use restrictions declared to be covenants running with the land and binding upon the grantee, his heirs, executors, and administrators until January 1, 1980. The deed expressly provided that the grantee's title should not be forfeited or impaired by violation of the restrictions, but that the grantors, their successors in interest, and any other residents or householders in the neighborhood should have a right of action for injunction and damages or to enforce compliance with the restrictions. On the face of the deed the grantee declared himself bound by the restrictions. This deed was duly recorded on November 24, 1953. Thereafter, in 1954, Beer and his wife executed a first deed of trust on the south 100 feet of said property to the Bank of America, as beneficiary, and in 1955 they executed a second deed of trust to said south 100 feet of said property with the Sutter Union Lumber Company, as beneficiary. Neither deed of trust referred to the restrictions contained in the deed from the defendants Walton and Smith to Beer. In October, 1956, this south 100 feet of the property was sold under the second deed of trust to the plaintiffs, and the trial court found that they purchased the property without knowledge of the restrictions contained in the deed executed by the defendants Walton and Smith to Beer.

Plaintiffs thereafter brought this action to quiet title and for declaratory relief. The trial court found that the asserted use and building restrictions were not for the benefit of the property conveyed and "that said deed describes no dominant tenement." Judgment was entered quieting plaintiffs' title and this appeal followed.

Defendants contend that although the covenants set forth in the deed are not such as to create equitable servitudes or covenants running with the land at law, the restrictions are established nevertheless by the doctrine of constructive notice, that is to say, that recording of a deficiency instrument would give it validity. All subsequent dealers with the property would have constructive notice of the previous owners attempt to create such restrictions and would be bound thereby.

In Marra v. Aetna Construction Co., 15 Cal.2d 375, 378, 101 P.2d 490, 492, the court said: "Even though a covenant does not run with the land, it may be enforceable in equity against a transferee of the covenantor who takes with knowledge of its terms under circumstances which would make it inequitable to permit him to avoid the restriction. * * * The doctrine of equitable servitudes has been invoked chiefly in cases where uniform building restrictions have been imposed pursuant to a general plan for improving an entire tract or real estate subdivision, but it is by no means true, as the respondents contend, that the doctrine is restricted to such cases. Tulk v. Moxhay, 41 Eng.Rep. 1143, in which the doctrine was first applied, was itself a case involving restrictions imposed upon a single lot. Bryan v. Grosse, supra [155 Cal. 132, 99 P. 499], and Relovich v. Stuart, 211 Cal. 422, 295 P. 819, furnish examples of decisions in this state which have enforced covenants in equity although they benefit or restrict only a single parcel of land. It is true, however, that a *servitude cannot exist in gross, but must be appurtenant to other benefited property.* Berryman v. Hotel Savoy Co., 160 Cal. 559, 117 P. 677, 37 L.R.A.,N.S., 5." (Emphasis added.)

The Berryman case cited in the Marra case, supra, held that when a deed established certain restrictions but failed to designate or identify the dominant tenement, a subsequent purchaser cannot be charged with recorded knowledge that the original grantor had retained other lands to be benefited by the covenant and are entitled to construe the covenant as imposing no servitude on the land but as creating a mere personal burden adhering exclusively to the original covenantor.

Measured by these standards it cannot be said that the restrictions in the deed in question are enforceable against the grantee's successor in interest. The deed does not describe a dominant tenement, nor does it appear that the restrictions contained therein were inserted for the benefit of grantors' adjoining land as was the case in Guaranty Realty Co. v. Recreation Gun Club, 12 Cal.App. 383, 107 P. 625. Neither are the restrictions conditions subsequent as was the case in Cornbleth v. Allen, 80 Cal.App. 459, 251 P. 87. Further, the deed herein expressly provides that title shall not be forfeited or impaired for violation of the restrictions, hence we conclude that the deed created a mere personal burden adhering exclusively to the original covenantor.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

170 Cal.App.2d 36

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
William T. BURGESS, Defendant and Appellant.
Cr. 6255.

District Court of Appeal, Second District, California.
April 29, 1959.

Rehearing Denied May 25, 1959.
Hearing Denied June 24, 1959.

Defendant, a driver's license examiner, was convicted in the Superior Court of Los Angeles County, Albert E. Wheatcroft, J., for accepting bribes, and he appealed. The District Court of Appeal, Herndon, J., held that evidence, on issue as to admissibility of evidence found by investigators in search of premises where defendant was arrested, afforded ample basis for trial court's findings that investigators had been justified in making arrest in their capacity as private persons.

Affirmed.

1. Criminal Law 🔑394.6(4)

In prosecution of driver's license examiner for accepting bribes, evidence, on issue as to admissibility of evidence found by investigators in search of premises where defendant was arrested, afforded ample basis for trial court's findings that investigators had been justified in making arrest in their capacity as private persons. West's Ann.Vehicle Code, § 136; West's Ann.Pen.Code, § 837.

2. Arrest 🔑64

A private citizen may arrest another when circumstances exist which would cause a reasonable person to believe crime had been committed in his presence. West's Ann.Pen.Code, § 837, subd. 1.

3. Arrest 🔑62

Acquittal, or conviction, of defendant has no bearing on legality of arrest. West's Ann.Vehicle Code, § 136; West's Ann.Pen.Code, § 837.

4. Arrest 🔑63(3)

For purposes of determining whether acts done "in his presence" justified officer in making arrest, quoted term is liberally construed; "presence" having reference not merely to physical proximity but to whether crime was apparent to officers' senses, including those of hearing and smell; and public offense may be committed in officer's presence when his auditory perception is effected by an electronic device. West's Ann.Vehicle Code, § 136; West's Ann. Pen.Code, § 837.

See publication Words and Phrases, for other judicial constructions and definitions of "Presence".

5. Criminal Law 🔑1170½(5)

In prosecution of driver's license examiner for accepting bribes, there was some logic in argument that defendant had opened door to cross-examination, with regard to whether he had on other occasions accepted bribes in connection with applications for drivers' licenses, by testifying on direct examination concerning several of same series of transactions; but even assuming correctness of defendant's contention that cross-examination exceeded scope of direct, assumed error would have to be classified as non-prejudicial in view of fact that controversial questions had produced answers merely reiterating defendant's protestations of innocence and in view of inconceivability that any reasonable jury could have entertained slightest doubt of defendant's guilt. West's Ann.Pen.Code, § 68.

6. Witnesses ⟹277(2)

In prosecution of driver's license examiner for accepting bribes, wherein prosecutor was permitted to ask defendant, on cross-examination, whether defendant had, on occasions other than those charged, accepted bribes in connection with applications for drivers' licenses, testimony of persons who had allegedly bribed defendant on other occasions would have been objectionable and, therefore, failure of prosecutor to call available witnesses in rebuttal did not demonstrate that cross-examination with reference to defendant's dealings with such persons had been conducted in bad faith.

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Sidney Broffman, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Jack E. Goertzen, Dep. Atty. Gen., for respondent.

HERNDON, Justice.

Appellant was charged in five counts with accepting bribes (Penal Code, § 68) and in a jury trial was found not guilty on count I and guilty on counts II through V. He appeals from the judgment and from the order denying his motion for a new trial. Since the sufficiency of the evidence to sustain the conviction is not questioned, we may condense our summary of the voluminous record except as it relates to appellant's specific assignments of error.

Appellant was employed as a Driver's License Examiner for the Department of Motor Vehicles at the Hope Street office in downtown Los Angeles. He resided in Alhambra. During 1957 he had dealings at his home with each of the four persons identified in the counts on which he was found guilty. Each of these persons (all foreign born and recent immigrants) testified that he had given appellant the sum of twenty dollars to obtain a driver's license. The driver's license application fee is but $3.00. Appellant failed to give these persons the required examinations to test their knowledge of the traffic laws and their driving ability.

In urging reversal of the judgment, appellant contends (1) that the trial court erred in admitting evidence which he insists was the product of an unlawful arrest, and (2) that the district attorney was guilty of prejudicial misconduct in questioning appellant in such a manner as to suggest to the jury that he had perpetrated other similar offenses in addition to those charged.

During April, 1957, appellant's activities were the subject of an intensive investigation by Mr. Fitzpatrick and Mr. Beckwith, investigators (Vehicle Code, § 136) employed by the Department of Motor Vehicles. The investigation disclosed that the accident-death and injury rate on licenses which appellant had issued was appreciably higher than the normal. During the course of their investigation, Fitzpatrick and Beckwith interrogated approximately twenty people who stated that they had gone to appellant's home, paid him $20 and obtained driver's licenses without passing the required qualifying tests. Moreover, the investigators received oral communications from an officer of the California State Highway Patrol to the effect that a collateral investigation of appellant's activities was being conducted by that department.

The investigators established contact with a Mr. Klementich, who told them that he had been a runner for appellant, had taken a number of people to his home in Alhambra, where appellant had issued licenses to them for the sum of $20 each. For about two weeks prior to April 30, 1957, the investigators had appellant's house in Alhambra under periodic surveillance from about dusk to approximately midnight. During this time they observed a number of vehicles coming to appellant's residence, from which adults, mostly male, would alight and enter appellant's residence, remaining there from 30 to 45 minutes and then departing. The investigators observed Klementich come to the house with different people on four different occasions before they became personally acquainted with him.

Mr. Nicholas Bobrick was employed by the investigators to pose as a recent immigrant to this country and to attempt to obtain a driver's license from appellant. For the purposes of the investigation, Mr. Bobrick used the name Nikola Bradovic, and obtained an immigrant's card in that name. He approached Klementich, who agreed to take him to appellant's house, and did so on the evening of April 25, 1957. During the course of the interview, he represented himself as unable to speak English and communicated to appellant through Klementich. Appellant took the false immigration card and filled out a preliminary application for a driver's license. Appellant then asked whether Bobrick had ever applied for a license under any other name, whether he had ever failed to pass a test for or been refused a license, and whether he had ever been afflicted with certain diseases, or physical disabilities. Appellant gave Bobrick an eye test, using the standard chart which hung in appellant's kitchen. Through Klementich, Bobrick asked if he couldn't have his license that evening. Appellant responded in the negative and indicated that he must return on another night. No test was given Bobrick as to his knowledge of traffic laws nor was he required to demonstrate his driving ability. Prior to the interview the investigators had given Bobrick the sum of $70 in marked bills, the numbers of which had been recorded. From this money Bobrick gave appellant $20, in the form of a ten and two fives, which appellant placed in his pocket. Bobrick was told to return in a few days to receive his license.

Bobrick returned to appellant's residence in the company of Klementich on the evening of April 29, 1957. During both interviews, radio equipment was strapped to Bobrick's body, and by this device the conversations within the house were overheard by the investigators who were sitting with a radio receiver in a car parked a short distance from appellant's residence. After entering the house, Bobrick observed appellant fill out the application forms. At appellant's direction, Bobrick placed his thumb print thereon. Appellant then gave Bobrick a temporary license, whereupon Bobrick said aloud, in English, "Thank you, Mister" which was a prearranged signal to inform the investigators that the deception had been successful and the illegal transaction completed. The investigators left the vehicle and approached appellant's front door, just as Bobrick and Klementich were about to depart. They entered appellant's residence, and informed appellant that he was under arrest. The investigators displayed their identification cards and badges to appellant, and placed appellant under restraint.

During their search of the premises, Fitzpatrick and Beckwith uncovered a number of documents which were thereafter admitted in evidence during the course of the trial. The investigators searched appellant's person, and found the three bills which Bobrick had given appellant on the earlier meeting. At the trial a number of witnesses testified as to the manner in which they had given the sum of $20 to appellant, obtaining a driver's license thereby, and this evidence is more than adequate to sustain the conviction as to counts II to V. The jury, however, found appellant not guilty of count I, which was based on the Bobrick transaction described above. It is appellant's theory that the trial court erred in admitting evidence seized by investigators Fitzpatrick and Beckwith "* * for the reason that the arrest was unlawful * * * the investigators did not have the power to make an arrest as peace officers, and it was not a proper case for a citizen's arrest."

[1–4] Vehicle Code, section 136 provides that investigators and other designated officers of the Department of Motor Vehicles shall have the powers of peace officers for certain specified purposes. However, it is unnecessary for us now to decide the debatable question whether this section authorized Fitzpatrick and Beckwith to make the arrest here in question in their capacity as peace officers. This is so because the evidence above recited afforded ample basis for the trial court's finding that the investigators were justified in making the arrest in their capacity as private persons. Penal Code, § 837; People v. Ball, 162 Cal.App.2d 465, 328 P.2d 276; cf. People v. McCarty, 164 Cal.App.2d 322, 330 P.2d 484.

The authority of a private citizen to make an arrest is spelled out in Penal Code section 837 as follows: "A private person may arrest another: 1. For a public offense committed or attempted in his presence. 2. When the person arrested has committed a felony, although not in his presence. 3. When a felony has been in fact committed, and he has reasonable cause for believing the person arrested to have committed it."

In Coverstone v. Davies, 38 Cal.2d 315, 320, 239 P.2d 876, 879, the Supreme Court construed former section 836, subd. 1 of the Penal Code (identical in terms with present section 837, subd. 1) and expressly declared that an arrest by a peace officer was authorized "* * * when 'circumstances exist that would cause a reasonable person to believe that a crime has been committed in his presence.'" In view of the identical language employed in section 837, subd. 1 of the Penal Code, it would appear that a private citizen may arrest another when circumstances exist which would cause a reasonable person to believe a crime had been committed in his presence. See also People v. Score, 48 Cal.App.2d 495, 120 P.2d 62; Hill v. Levy, 117 Cal.App.2d 667, 256 P.2d 622.

Without question, the evidence above recited is more than adequate to sustain the trial court's implied determination that there was probable cause for the investigators' actions. They had every reason to believe that when their decoy, Bobrick, gave the pre-arranged signal, the driver's license had been given in exchange for the money paid and without the required tests. Indeed, the unusual circumstance here revealed is the jury's action in acquitting appellant on this count. However, the acquittal, or conviction, of appellant has no bearing on the legality of the arrest. As stated in Coverstone v. Davies, supra, 38 Cal.2d 315, 319, 239 P.2d 876, 878: "The fact that [the persons arrested] were exonerated in the criminal proceeding has no bearing upon the legality of the arrest. (Cf. Neves v. Costa, 5 Cal.App. 111, 118, 89 P. 860; Wilson v. Loustalot, 85 Cal.App.2d 316, 325, 193 P.2d 127, to the effect that the finding of guilt in the subsequent criminal proceeding cannot legalize an arrest unlawful when made. The converse would appear to be equally true.) Since it is settled that a peace officer may lawfully make an arrest for a public offense committed or attempted in his presence (Penal Code, § 836), the critical question presented in this case is whether the acts done in the presence of the arresting officer justified the arrests being made without a warrant." The critical question is precisely the same in the instant case and must be answered in the affirmative.

The term "in his presence" is liberally construed. See People v. Lavender, 137 Cal.App. 582, 586–589, 31 P.2d 439, 441. Presence is not mere physical proximity but whether the crime is "* * * apparent to the officers' senses" (People v. Brown, 45 Cal.2d 640, 642, 290 P.2d 528, 529). The "senses" include those of hearing and smell. People v. Bock Leung Chew, 142 Cal.App.2d 400, 402–403, 298 P.2d 118; People v. Chong Wing Louie, 149 Cal.App.2d 167, 169–170, 307 P.2d 929. Moreover, a public offense may be committed in an officer's presence when his auditory perception is effected by an electronic device. People v. Bradley, 152 Cal.App.2d 527, 532, 314 P.2d 108.

[5, 6] Although the argument is somewhat loosely stated, the substance of appellant's second contention is that the trial court erred in permitting the prosecution to ask defendant, on cross-examination,

whether on occasions other than those charged he had accepted bribes in connection with applications for drivers' licenses. See People v. Farnell, 156 Cal.App.2d 393, 400, 319 P.2d 749.

Among the documents seized on the occasion of appellant's arrest was a loose-leaf calendar on which in his handwriting were numerous names and figures indicating that he had used it as an appointment memorandum. Appellant testified in his own behalf and was extensively questioned by his counsel with reference to the notations on the calendar. He testified that he had used it from time to time to record the results of qualifying examinations given to applicants at his home. On his direct examination, he identified several names on the calendar other than those of the persons mentioned in the information. He explained that the numerals below the names indicated the results of eye tests administered to such persons. He also testified from the calendar concerning the results of eye tests which he had administered in connection with the applicants named in the information. He categorically denied receiving from these applicants the sums which they previously had testified they paid appellant. Again on cross-examination appellant unequivocally stated that he had never taken anything in excess of the statutory fee from any applicant.

On cross-examination, and without objection from appellant, the deputy district attorney further questioned appellant with respect to other names that appeared on the calendar, eliciting the fact that he had examined the named persons in his home in connection with their applications for licenses. However, at a later stage in the cross-examination, appellant's counsel interposed the objection that a similar question exceeded the scope of the direct examination. This objection was overruled and the prosecutor continued to question appellant concerning his dealings with a number of other applicants. All of appellant's answers were to the effect that his transactions were regular and proper in every respect.

Thereafter, the district attorney was permitted, over appellant's objection, to ask appellant whether he had accepted the sum of $20 from each of four persons whose names appeared on the calendar but who were not parties to any of the transactions charged in the information. In each instance, appellant categorically denied accepting any sum in excess of the lawful fee.

In the course of an argument in chambers relating to appellant's objection, the district attorney contended (1) that appellant had opened the door to this line of cross-examination by testifying on direct concerning his dealings with various of the persons whose names appeared on the calendar, and (2) that it was proper for the prosecution thus to elicit proof of other similar offenses in order to show a common plan, scheme or design. The district attorney further indicated that the four persons referred to in the questions propounded to appellant were in court, and that he intended to call them in rebuttal to impeach appellant's testimony denying that he had taken $20 from each of them. Later, however, the prosecutor announced that he would rest the people's case without calling these witnesses in rebuttal.

There is some logic in the argument that appellant opened the door to the cross-examination of which he now complains by testifying on direct concerning several of the same series of transactions. However, for the purposes of this appeal we may assume the correctness of appellant's contention that the cross-examination exceeded the scope of the direct and transgressed the limitations set in People v. McCarthy, 88 Cal.App.2d 883, 888–889, 200 P.2d 69, and other decisions therein discussed. As we shall later point out, a holding that there was error in this respect would not justify a reversal.

Appellant further argues that the failure of the prosecutor to call the available witnesses in rebuttal demonstrates that the cross-examination with reference to appellant's dealings with such witnesses was conducted in bad faith. We cannot agree. Assuming that the testimony of these witnesses would have impeached appellant and would have tended to prove him guilty of other similar crimes, such testimony would have been objectionable. It has been held that impeaching testimony of this character introduced in rebuttal after the defense has rested puts a defendant at an undue disadvantage. People v. McCarthy, supra, 88 Cal.App.2d 883, 888, 200 P.2d 69; People v. Rodriguez, 58 Cal.App.2d 415, 418–419, 136 P.2d 626; People v. Schmitz, 7 Cal.App. 330, 360–361, 94 P. 407, 419, 15 L.R.A.,N.S., 717. Therefore, if the prosecutor had called these witnesses, and if they had impeached appellant's self-exonerating testimony, undoubtedly we would have been presented with a much more serious assignment of error than that which now confronts us.

We hold that the assumed error to which we have alluded in connection with appellant's cross-examination must be classified as non-prejudicial. The controversial questions produced answers which only reiterated appellant's protestations of innocence. More importantly, the record shows such a plethora of evidence of irregularity in appellant's procedures that it is inconceivable that any reasonable jury could have entertained the slightest doubt of his guilt. Appellant's own testimony provided an ample basis for inferences that his extraordinary procedures in processing such a large number of applications for drivers' licenses at his home and at all hours of the day and night were not followed for the purposes represented by him.

As stated in People v. Watson, 46 Cal.2d 818, 836, 299 P.2d 243, 254: "* * * a 'miscarriage of justice' should be declared only when the court, 'after an examination of the entire cause, including the evidence,' is of the 'opinion' that it is reasonably probable that a result more favorable to the appealing party would have been reached in the absence of the error." Applying the foregoing test to the record before us, we are of the opinion that it is not reasonably probable that a result more favorable to the appellant would have been reached in the absence of the error of which complaint is here made. If we entertained any doubt on the subject we would be constrained to give appellant the benefit of it. People v. Campbell, 162 Cal.App.2d 82, 329 P.2d 82; People v. Gibson, 165 Cal.App.2d 685, 332 P.2d 113.

The judgment and order denying new trial are affirmed.

FOX, P. J., and ASHBURN, J., concur.

Hearing denied; SCHAUER, J., dissenting.

170 Cal.App.2d 269

Ethel G. STANTON and Mary Stanton, a minor, by John Stanton, her guardian ad litem, Plaintiffs, Cross-Defendants and Respondents,

v.

Dr. J. Norman ANDREWS, and Cathy Burnett, a minor, and Dr. J. Norman Andrews, her guardian ad litem, Defendants, Cross-Complainants and Appellants.

Civ. 23812.

District Court of Appeal, Second District,
Division 1, California.

May 8, 1959.

Rehearing Denied June 2, 1959.

Action for damages sustained in an automobile accident wherein the defendants filed a cross-complaint and a notice of motion for summary judgment. From an order of the Superior Court of Los Angeles County denying the motion for summary judgment, Walter C. Allen, J., the defendants appealed. The District Court of Appeal, Lillie, J., held that the order was not appealable.

Appeal dismissed.

1. Appeal and Error ⚷78(3)

The statute providing that a summary judgment may be entered after a complaint is dismissed or answer stricken and that the judgment so entered is an appealable judgment as in other cases has no application to an order denying a motion for summary judgment but declares only the right of appeal from a final judgment in accordance with the provision that an appeal may be taken from any final judgment entered in an action or special proceeding commenced in a superior court. West's Ann.Code Civ. Proc. §§ 437c, 963.

2. Appeal and Error ⚷93

An order denying defendant's motion for summary judgment was not appealable, though a judgment entered on an order granting the motion would be appealable, since the order denying the motion does not determine any issue but is merely a finding that there is an issue of fact to be tried. West's Ann.Code Civ.Proc. §§ 577, 963, 1003.

John N. Metcalf, Elon G. Galusha, Los Angeles, for appellants and cross-complainants.

Erb, French & Picone, Beverly Hills, for respondents and cross-defendants.

LILLIE, Justice.

Motion to dismiss appeal.

Plaintiffs, respondents herein, filed a complaint for personal injuries and property damage arising out of an automobile accident occurring February 5, 1958. Defendants filed a cross-complaint for damages and thereafter a notice of motion for summary judgment. The motion was heard and denied, and from the order denying the motion, defendants and cross-complainants appeal. Respondents have filed this motion to dismiss the appeal on the ground that no appeal lies from an order denying a motion for summary judgment.

Appellants, in support of their appeal, rely upon Section 437c, Code of Civil Procedure and contend that the trial court abused its discretion in denying the motion because there exists no triable issue.

[1] Although under Section 437c, Code of Civil Procedure, a summary judgment may be entered after a complaint is dismissed or an answer is stricken, and provides that "(a) judgment so entered is an appealable judgment as in other cases," such latter provision has no application to an order denying a motion for summary judgment. It declares only the right of appeal from a final judgment, in accord with the specific provision in Section 963, Code of Civil Procedure, that an appeal may be taken from any final judgment entered in an action or special proceeding commenced in a Superior Court. In Nevada Constructors v. Mariposa Public Utility Dist., 114 Cal.App.2d 816, at page 817, 251 P.2d 53, at page 54, the first California case to decide the issue raised herein, the court stated: "A judgment entered when a motion to strike the answer or dismiss the complaint is granted has all the qualities of a final judgment for thereby the proceeding is brought to an end; and except as it may be affected by appellate review the case is concluded and no further proceedings may be had. But if a motion to strike the answer or dismiss the complaint may be denied, then the case goes forward to trial and ultimate judgment on the merits; such an order of denial possesses none of the attributes of a final judgment, nor is it one of the orders expressly made appealable by Code of Civil Procedure, section 963."

[2] Section 963 relating to appeals from final judgments also provides that appeals may be taken from certain orders therein designated, which do not include an order denying a motion for summary judgment. Distinguishing between judgments defined in Section 577, Code of Civil Procedure, and orders under Section 1003, thereof, the court, in Nevada Constructors v. Mariposa Public Utility Dist., 114 Cal.App.2d 816, at page 818, 251 P.2d 53, at page 54, concluded: "* * * (1) that the trial court determines the motion by an order, which order is never appealable; (2) that if the motion be granted a judgment in favor of

movant follows, which is appealable. Since this appeal is taken from the order denying the motion it must be dismissed."

In Schulze v. Schulze, 121 Cal.App.2d 75, at page 83, 262 P.2d 646, at page 651, the court, faced with a similar issue arising out of the query whether an order denying a motion for a summary judgment is a final judgment, held: "An order denying a motion for summary judgment is not appealable. A judgment entered on an order granting the motion is appealable. Code Civ.Proc., Secs. 437c, 963. An order denying the motion does not determine any issue. Its effect is merely a finding that there is an issue of fact to be tried. It is otherwise, if the motion is granted. A final judgment for the moving party follows. Denial of the motion is not a final judgment; it is not a final decision on the merits."

The motion to dismiss the appeal is granted and the appeal is dismissed.

WHITE, P. J., and FOURT, J., concur.

170 Cal.App.2d 175

Robert PERRY, Plaintiff and Respondent,

v.

Percy CASSIDY and Mildred Cassidy, Defendants,

Mildred Cassidy, Appellant.

Civ. 9579.

District Court of Appeal, Third District, California.

May 5, 1959.

Action on a contract of guaranty. The Superior Court, San Joaquin County, Thomas B. Quinn, J., rendered judgment for plaintiff and a defendant appealed. The District Court of Appeal, Schottky, J., held that document entitled "Continuing Guaranty", signed by husband and wife, and specifically stating that it guaranteed all advances and debts theretofore or thereafter incurred by husband was supported by sufficient consideration from bank in whose favor it was drawn both because bank thereafter extended a loan in reliance on the agreement and because it delayed enforcement of payment on a prior indebtedness of the husband, and such delay was good consideration even though it was not pursuant to agreement to forbear from enforcing payment.

Affirmed.

Guaranty ⇨16(1, 4)

Document entitled "Continuing Guaranty", signed by husband and wife, and specifically stating that it guaranteed all advances and debts theretofore or thereafter incurred by husband was supported by sufficient consideration from bank in whose favor it was drawn both because bank thereafter extended a loan in reliance on the agreement and because it delayed enforcement of payment on a prior indebtedness of the husband, and such delay was good consideration even though it was not pursuant to agreement to forbear from enforcing payment. West's Ann.Civ.Code, § 1606.

◆

John O. Fugazi, Stockton, for appellant.

Edmund J. Dunning, Oakland, for respondent.

SCHOTTKY, Justice.

Mildred Cassidy appeals from a judgment finding her liable on a contract of guaranty.

On January 7, 1957, Percy Cassidy, the husband of appellant Mildred Cassidy, borrowed $15,000 from the Central Valley National Bank. Cassidy executed a note in favor of the bank for the sum due. This note was payable on demand, or if no demand, then on March 7, 1957. The funds received were deposited to a commercial account in the name of Percy Cassidy or Mildred Cassidy. On March 11, 1957, the bank manager told Percy Cassidy that the note would have to be paid or a substantial reduction made on it. Percy Cassidy then suggested that the bank make another loan to Percy on an automobile he owned. The bank manager agreed if Mrs. Cassidy would execute a continuing guaranty in the sum of $15,000. Percy Cassidy secured appellant's signature on the guaranty and returned it to the bank. The loan was made on the automobile in the amount of $1,500 and the proceeds applied on the $15,000 note. Thereafter the auto loan was paid, and the $15,000 note was assigned to plaintiff Perry who brought this action against the Cassidys to recover the balance due on the note. A judgment in Perry's favor was rendered against the Cassidys. Only Mildred Cassidy has appealed.

Appellant's sole contention upon this appeal is that the court erred in finding that the contract of guaranty executed by her was supported by a good and sufficient consideration.

In the instant case by the terms of the "Continuing Guaranty" it is expressly stated that said contract was executed for a valuable consideration and by its terms sets forth that the "* * * Guarantors * * * unconditionally guarantee and promise to pay to Central Valley National Bank [plaintiff's assignor], * * * any and all indebtedness of Percy Cassidy * * *" and by the terms of said contract it is specifically set forth that the indebtedness referred to in the guaranty "* * * includes any and all advances, debts, obligations and liabilities of the Borrowers or any one or more of them, heretofore, now, or hereafter made, incurred or created * *"

Here the bank told Percy Cassidy it would lend him money on his automobile if he would obtain a contract of guaranty from Mrs. Cassidy. When the contract of guaranty was presented to the bank, the loan was made. The bank delayed further action to enforce the payment of Percy Cassidy's note for a period of four months. By making the loan the bank suffered detriment. By its terms the guaranty extended to loans heretofore, now or hereafter made. The loan would be consideration for the contract of guaranty, and the consideration would extend to the prior loan.

A case very closely in point is Bank of America of California v. Granger, 115 Cal. App. 210, 1 P.2d 479, in which the court said:

> "'* * * [T]he undersigned hereby guarantees the payment in United States gold coin to said bank of any and all sums of money which the said bank may have heretofore or may hereafter advance or loan to said corporation. * * *'" [115 Cal.App. at page 213, 1 P.2d at page 480.]
>
> * * * * * *
>
> "* * * The same defendant contends that the guaranties did not cover loans that had been made prior to the execution of the guaranties. By the express language contained in those documents they did. By delaying its hand in enforcing the collection of the prior loan the bank suffered a prejudice which constituted a good consideration for the guaranties. Civ.Code, § 1606. * * * [115 Cal.App. at page 219, 1 P.2d at page 483].
>
> "* * * But a written guaranty imports a consideration and the record does not show there was none. * *" (115 Cal.App. at page 219, 1 P.2d at page 483.)

Appellant argues that there was no agreement to forbear from suing on the old note and therefore no consideration for the contract of guaranty. However, appellant overlooks section 1606 of the Civil Code which reads:

> "An existing legal obligation resting upon the promisor, or a moral obligation originating in some benefit conferred upon the promisor, or prejudice suffered by the promisee, is also a good consideration for a promise, to an extent corresponding with the extent of the obligation, but no further or otherwise."

We are convinced that the finding of the trial court "[t]hat said Continuing Contract of Guaranty, executed by the Defendant Mildred Cassidy was at the date of execution supported by a good and sufficient consideration from the Plaintiff's Assignor, Central Valley National Bank, to the Defendant Mildred Cassidy," is amply supported by the record and the law.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

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170 Cal.App.2d 106

William L. PENZNER and Barbara Penzner, Plaintiffs and Appellants,

v.

Bess FOSTER et al., Defendants,

Van B. Foster, Jr., Executor of the Last Will and of the Estate of Bess Foster Rhiner, Deceased, Defendant and Respondent.

Civ. 5693.

District Court of Appeal, Fourth District, California.

May 1, 1959.

Action by purchasers of property to quiet title against holder of a note and deed of trust. From adverse judgment of the Superior Court, Fresno County, Strother P. Walton, J., the purchasers appealed. The District Court of Appeal, Stone, J. pro tem., held that where note executed December 9, 1929 and due April 30, 1935, provided for interest at rate of eight per cent per annum payable semiannually and it also provided that if interest should not be paid it should become part of principal and thereafter bear like interest, interest charged between date of execution and date of maturity of note, did not exceed twelve per cent per annum on principal amount, and fact that more than twelve per cent was charged after maturity by reason of makers' failure to pay anything on account, did not make transaction usurious.

Judgment affirmed.

1. Mortgages 🔑345

Enforcement of a power of sale contained in a deed of trust is never outlawed by a lapse of time alone.

2. Limitation of Actions 🔑166

A party may not without payment of debt, enjoin a sale by a trustee under a power conferred by a deed of trust, or have his title quieted against purchaser at such a sale, even though statute of limitations has run against indebtedness.

3. Limitation of Actions 🔑166

Statute of limitations cannot be basis for an action quieting title against a deed of trust.

4. Interest 🔑60
Usury 🔑49

Where note provided that interest should be payable semiannually, and that if interest should not be paid it should become part of principal and thereafter bear like interest, note clearly expressed that compound interest was to be charged and compound interest, as such, was not an illegal charge. West's Ann.Civ.Code, § 1916–2.

5. Usury 🔑48

Where note executed December 9, 1929 and due April 30, 1935, provided for interest at rate of eight per cent per annum payable semiannually and it also provided that if interest should not be paid it should become part of principal and thereafter bear like interest, interest charged between date of execution and date of maturity of note, did not exceed twelve per cent per annum on the principal amount, and fact that more than twelve per cent was charged after maturity by reason of makers' failure to pay anything on account, did not make transaction usurious.

6. Usury 🔑42

Test of whether a transaction is usurious is determined by total amount of interest required to be paid under terms of agreement between date of execution and date of maturity and if interest for full period of loan exceeds maximum rate allowed, then obligation is usurious.

7. Usury ⚷48

Makers of a note cannot by their continued refusal to pay amounts due convert a transaction legal in its inception into a usurious one subsequent to maturity.

8. Mortgages ⚷278

In action by purchasers of property subject to encumbrance to quiet title against holder of note and deed of trust, which note had been executed in 1929 and amount of which purchasers had been given an allowance for toward purchase price by seller, purchasers were not entitled to have their title quieted against deed of trust on ground that enforcement of encumbrance would be inequitable to them.

◆

John Amos Fleming and Theodore R. Gabrielson, Los Angeles, for appellants.

Hanna & Morton, Harold C. Morton, and John H. Blake, Los Angeles, for respondent.

STONE, Justice pro tem.

This is an appeal from a judgment in an action brought by appellant to quiet title to a parcel of real property. The trial court decreed that appellants' title is subject to a lien pursuant to a deed of trust owned by respondent and that the balance due on the note secured by the deed of trust was $14,156.44 at the time judgment was entered.

The appellants purchased the parcel of real property which is located in the city of Fresno from the Normandie Corporation. At the time of the conveyance the property was encumbered by a deed of trust that secured a promissory note in favor of respondent. The escrow provided that appellants would take title to the property subject to the encumbrance in consideration of an allowance on the purchase price equal to the balance due on the note. There was some delay in communicating with respondent and the exact amount due could not be determined by the seller. To expedite the sale the parties agreed to an estimate of the balance due and the escrow was closed. The seller had underestimated the amount by some $1,800, so the president of Normandie Corporation paid appellants $1,820.62 in cash. The appellants then filed a quiet title action against the respondent holder of the note and deed of trust seeking to have their title quieted against the deed of trust upon the grounds: First, that the deed of trust was barred by the statute of limitations; Second, that the original transaction was usurious and the maker of the note had paid more than could legally be collected; and Third, that title to the property should be freed from the encumbrance because enforcement would be inequitable to them.

[1, 2] Appellants did not assume the indebtedness; they merely purchased the property subject to the encumbrance which had been properly recorded and of which they had received actual notice by the escrow agreement. Their contention that the statute of limitations vitiated the deed of trust and entitled them to a decree quieting title against the holders of the note and deed of trust is without merit. The enforcement of a power of sale contained in a deed of trust is never outlawed by a lapse of time alone. As was said in Sipe v. McKenna, 88 Cal.App.2d 1001, 1006, 200 P.2d 61, 64:

> "A party may not without payment of the debt, enjoin a sale by a trustee under a power conferred by a deed of trust, or have his title quieted against the purchaser at such a sale, even though the statute of limitations has run against the indebtedness. (Citations.)" See also Welch v. Security-First National Bank of Los Angeles, 61 Cal.App.2d 632, 635, 143 P.2d 770; Summers v. Hallam Cooley Enterprises, 56 Cal.App.2d 112, 113, 132 P.2d 60.

[3] Since the statute of limitations does not bar the exercise of a power of sale contained in a deed of trust, neither can the statute of limitations be the basis for an action quieting title against a deed of trust.

Appellants' second contention is that the transaction between the maker of the note and the payee was usurious. Based upon this premise, appellants argue that when the alleged usurious interest is deleted the payments which have been made on account satisfy the obligation in full. In turn, they contend that this entitles them to a decree quieting title to the property. The note for the principal sum of $4,000 is dated December 9, 1929, payable five years after April 30, 1930. It bears interest at the rate of eight per cent per annum from April 30, 1930, payable semi-annually, and further provides that "Should interest not be so paid it shall become part of the principal and thereafter bear like interest."

[4–6] Civil Code, section 1916–2, provides that compound interest may be charged if an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith. The note in this case clearly meets such requirements and the compound interest, as such, is not an illegal charge. The only question is whether the interest charged or chargeable under the terms of the note as executed exceeded twelve per cent per annum, the limit applicable at that time. Counsel for appellants have cited computations covering the entire period of approximately twenty-eight years which intervened between the execution of the note and the time of trial. During a part of that time the interest exceeded twelve per cent per annum for the reason that no payments were made on account of either principal or interest from December 9, 1929, to December 15, 1947. During that eighteen-year period the unpaid interest, when added to the principal, increased the amount bearing interest to the point where more than twelve per cent per annum was being charged on the original $4,000 principal. That, however, is not the test. Whether a transaction is usurious is determined by the total amount of interest required to be paid under the terms of the agreement between the date of execution and the date of maturity. If the interest for the full period of the loan exceeds the maximum rate allowed, then the obligation is usurious. This rule is expressed in Haines v. Commercial Mortgage Co., 200 Cal. 609, at page 625, 254 P. 956, 255 P. 805, at page 807, 53 A.L.R. 725, as follows:

> "We intended to hold that the maximum rate allowed for loans coming under the act is at the rate of 12 per cent. per annum for the full period of the loan, and that within such limit the parties may freely contract in respect thereto, if done in writing.
>
> "This means that interest may be compounded, if the maximum rate is not exceeded." See also French v. Mortgage Guarantee Co., 16 Cal.2d 26, 30, 104 P.2d 655, 130 A.L.R. 67; Sharp v. Mortgage Security Corp., 215 Cal. 287, 290, 9 P.2d 819; Pacific Finance Corp. v. Crane, 131 Cal.App.2d 399, 406, 280 P.2d 502.

In the instant case the principal was $4,000, the date of execution was December 9, 1929, the due date April 30, 1935. The maximum interest which could have been charged and actually charged was eight per cent, compounded semi-annually between April 30, 1930, and April 30, 1935. The interest so charged did not exceed twelve per cent per annum on the principal amount of $4,000.

[7] The fact that more than twelve per cent was charged after maturity by reason of the makers' failure to pay anything on account does not make the transaction usurious. The makers of the note can not by their continued refusal to pay the amounts due convert a transaction legal in its inception into a usurious one subsequent to maturity. French v. Mortgage Guarantee Co., supra, 16 Cal.2d 26, 30, 104 P.2d 655; Sharp v. Mortgage Security Corp., supra, 215 Cal. 287, 291, 9 P.2d 819; Pacific Finance Corp. v. Crane, supra, 131 Cal.App. 2d 399, 406, 280 P.2d 502.

[8] Appellants' third point is that because a great deal of interest has accrued during the period of nearly thirty years the court should exercise its equity powers and quiet their title against the deed of trust. We do not see that the principles of equity have any application to this case. The

law is clear that the statute of limitations has not barred the deed of trust and that the transaction was not usurious. Therefore, there is no area in which equity can operate to nullify the deed of trust. Nor do the facts of the case justify such an extension of equity jurisdiction upon the theory of hardship. The appellants were paid the amount due under the terms of the note which the deed of trust secures. They received it in the form of a credit on the purchase price, supplemented by a cash payment of $1,820.62 by the seller. The appellants, if permitted to quiet their title against the deed of trust, would be receiving a net gain of the amount the trial court determined to be due on the note without giving any consideration therefor. It seems doubtful, to say the least, that a windfall could be the basis for an action in equity.

Judgment affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

170 Cal.App.2d 159

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Moses Aaron WALKER, Defendant and Appellant.

Crim. 6354.

District Court of Appeal, Second District, Division 1, California.

May 5, 1959.

Rehearing Denied June 2, 1959.

Hearing Denied July 1, 1959.

Defendant was convicted of the sale of heroin. The Superior Court of Los Angeles County, LeRoy Dawson, J., entered judgment, and the defendant appealed. The District Court of Appeal, Lillie, J., held that where information was filed against defendant charging him with possession of heroin, and on day of trial, in open court, defendant and his counsel both expressly waived defendant's right to trial by jury, and District Attorney then moved to amend information, by way of interlineation, to charge sale of heroin in lieu of possession, and defendant made no objection, and trial commenced before court sitting without a jury, without any objection by defendant that original waiver of jury did not apply to charge, on which he was being tried, conviction was void because of lack of express waiver by defendant and his counsel of right to trial by jury of charge of sale of heroin.

Judgment reversed and caused remanded for new trial.

1. Criminal Law 🔑1144(3)

Where District Attorney, when case was called for trial, moved to amend information, by way of interlineation to charge sale of heroin in lieu of possession, representing to trial court that evidence taken at preliminary hearing would support amendment, and defendant's counsel stated that he would not make any objection, and trial court thereupon allowed the amendment, it was necessary in order for District Court of Appeal to determine on appeal whether amendment was supported by proof given at preliminary hearing, that record on appeal contain a transcript of the evidence taken at the preliminary examination, and, in absence of such transcript before District Court of Appeal, District Court of Appeal was required to indulge all presumptions in favor of judgment of conviction, and assume that amendment did not change offense to one not shown in evidence taken at preliminary hearing. West's Ann. Health & Safety Code, § 11500; West's Ann.Pen.Code, § 1009.

2. Criminal Law 🔑1137(1)

Where District Attorney, when case was called for trial, moved to amend information, by way of interlineation, to charge sale of heroin in lieu of possession, representing to trial court that evidence taken at preliminary hearing would support the amendment, and defendant's counsel stated that he and defendant had talked the situation over, and that defendant did not want anything to delay the trial, and that therefore defendant's counsel would not make any objection to the amendment, and trial court then allowed the amendment, defendant's conduct precluded defendant from making objection for the first time on appeal. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 1009.

3. Criminal Law 🔑1032(1), 1044

Where amended pleading is filed by District Attorney in open court pursuant to statute, and defendant, being present, offers no objection, and makes no motion for continuance, and nothing is called to trial court's attention to show that by making such amendment substantial rights or any rights of defendant are prejudiced, defendant may not for first time raise point on appeal. West's Ann.Pen.Code, § 1009.

4. Criminal Law 🔑261(2), 1031(4)

Where an information is amended, regular and orderly procedure requires that defendant be rearraigned and be required to plead thereto before trial, but if defendant makes no demand or objection and is convicted on a trial without having entered a plea, objection that there was no plea is waived and is unavailable to him. West's Ann.Pen.Code, §§ 1008, 1009.

5. Criminal Law 🔑1167(5)

Where District Attorney, when case was called for trial, moved to amend information, by way of interlineation, to charge sale of heroin in lieu of possession, representing to trial court that evidence taken at preliminary hearing would support the amendment, and defendant's counsel stated that he would not make any objection, and trial court then allowed the amendment, and trial commenced without defendant being arraigned on the amended information and without being given opportunity to plead to the amended information, and defendant did not object to the failure to arraign him on the amended information and to give him opportunity to plead thereto, there was no violation of defendant's substantial or constitutional rights or any prejudice to him because his plea was not entered to the amended charge, and he could not complain on appeal. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen. Code, §§ 1008, 1009.

6. Jury 🔑29(6)

Section of the Constitution providing for waiver by an accused of right to trial by jury must be strictly followed. West's Ann. Const. art. 1, § 7.

7. Jury 🔑29(6)

Section of the Constitution dealing with waiver by an accused of right to trial by jury requires an express consent to waiver by defendant personally as well as by his counsel. West's Ann.Const. art. 1, § 7.

8. Jury 🔑29(6)

No valid waiver by defendant of right to trial by jury occurs where defendant merely fails to object to trial of his case without a jury, and such is true even where counsel for both parties stipulate that a jury trial is waived. West's Ann.Const. art. 1, § 7.

9. Jury 🔑29(7)

Where information was filed against defendant charging him with possession of heroin, and on day of trial, in open court, defendant and his counsel both expressly waived defendant's right to trial by jury, and District Attorney then moved to amend information, by way of interlineation, to charge sale of heroin in lieu of possession, and defendant made no objection, and trial commenced before court sitting without a jury, without any objection by defendant that original waiver of jury did not apply to charge, on which he was being tried, conviction was void because of lack of express waiver by defendant and his counsel of right to trial by jury of charge of sale of heroin. West's Ann.Health & Safety Code, § 11500; West's Ann.Pen.Code, § 1009; West's Ann.Const. art. 1, § 7.

◆

Moses Aaron Walker, in pro. per., for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Jack K. Weber, Deputy Atty. Gen., for respondent.

LILLIE, Justice.

An information was filed against the defendant charging him with a violation of Section 11500, Health & Safety Code, in that he had "in his possession a preparation of heroin." He was arraigned and entered thereon a plea of not guilty. On the day of trial, in open court, defendant and his counsel both expressly waived his right to a trial by jury. After a short interval during which the lower court dealt with other matters, the case was called for trial, at which time the district attorney moved to amend the information, by way of interlineation, to charge sale of heroin in lieu of possession, representing to the court that the evidence taken at the preliminary hearing would support the amendment. Defendant's counsel then stated: "Well, I don't like to have an information amended on the eve of trial that way, but the defendant and I have talked the situation over, and he told me he does not want anything to happen that will delay the trial, so I won't make any objection." The court thereupon allowed the amendment and the record reveals it was effected by crossing out the words "have in his possession" and substituting the word "sell," by interlineation. Immediately thereafter, the trial commenced before the court sitting without a jury. Defendant was found guilty of selling heroin as charged in the amended information and sentenced to the state prison. From the judgment of conviction, defendant appeals.

At no time was defendant arraigned on the amended information, given the opportunity to plead thereto or have a jury trial thereon. Defendant did not file a motion for a new trial.

Appellant contends that the trial court erred first, in permitting the amendment and second, in depriving him of his right to a trial by jury on the amended charge.

Since the sufficiency of the evidence to support the verdict is not in issue, there appears to be no reason for a discussion of the evidence except to state that it discloses beyond doubt that defendant sold to a deputy sheriff one-half ounce of heroin for $125. Defendant did not see fit to testify or offer any evidence on his own behalf.

In connection with his first contention, appellant argues that the trial court could not properly allow the district attorney to amend the information to allege a different charge (sale), because the testimony at the preliminary examination reveals the commission of another offense (possession); and that he was tried on a charge not reflected in the evidence taken before the committing magistrate.

Although under ordinary circumstances the question before the reviewing court is whether the trial judge abused his discretion in allowing the amendment (People v. Stoddard, 85 Cal.App.2d 130, 192 P.2d 472), the record before us does not present this issue.

Section 1009, Penal Code, permits amendment at any stage of the proceedings, as long as it does not "charge an offense not shown by the evidence taken at the preliminary examination," even though a different offense is charged. People v. Walker, 82 Cal.App.2d 196, 185 P.2d 842; People v. Cryder, 90 Cal.App.2d 194, 202 P.2d 765. After amendment the proceedings shall then continue "unless the substantial rights of the defendant would be prejudiced thereby" (Section 1009, Penal Code).

[1] For this court to determine whether the amendment was supported by proof given at the preliminary hearing, it is necessary that the record on appeal contain a transcript of the evidence taken at the preliminary examination. No such transcript is before us. In the absence thereof, then this court must indulge all presumptions in favor of the judgment (People v. Seitz, 100 Cal.App. 113, 279 P. 1070), and assume the amendment did not change the offense to one not shown in the evidence taken at the preliminary hearing (People v. Thompson, 3 Cal.App.2d 359, 39 P.2d 425).

[2, 3] In any event, at the time the district attorney sought to amend the information, he stated: "The proof, I am sure, will be conceded as shown in the preliminary hearing to substantiate that amendment."

To this, defense counsel made no challenge and voiced no objection, but permitted the amendment in order to avoid a delay in trial. More compelling is the fact that not only did defendant's counsel refrain from interposing an objection to the People's request to amend, and fail to move for a continuance, but after discussing the situation with the defendant, affirmatively expressed to the trial judge defendant's desire that there be no delay; and because he wanted an immediate trial would make no objection. This conduct is such as to preclude defendant from now, for the first time, raising objection to the lower court's order allowing the amendment (People v. Van Baron, 111 Cal.App. 48, 295 P. 68). It is well settled that where an amended pleading is filed by the district attorney in open court pursuant to statute, and the accused being present offers no objection, makes no motion for continuance, and nothing is called to the trial court's attention to show that by making such amendment the substantial rights or any rights of the defendant are prejudiced, he may not for the first time raise the point on appeal. People v. Jones, 25 Cal.App.2d 517, 77 P.2d 897; People v. Beck, 71 Cal.App.2d 637, 163 P.2d 41; People v. Severino, 122 Cal.App.2d 172, 264 P.2d 656.

[4, 5] Nor do we find merit in appellant's contention that he was deprived of an arraignment and plea on the amended information. Where an information is amended, regular and orderly procedure requires the defendant be rearraigned and required to plead thereto before trial. In early years this was mandatory (People v. Clement, 4 Cal.Unrep. 493, 35 P. 1022; People v. Moody, 69 Cal. 184, 10 P. 392), but the rule has been relaxed that if the defendant makes no demand or objection and is convicted upon a trial without having entered a plea the objection that there was no plea is waived and is unavailable to him. (Fricke, California Criminal Procedure, page 141). Although Section 1009 based upon Section 1008, amended in 1951, provides that "defendant shall be required to plead to such amendment or amended pleading forthwith," we perceive here no violation of defendant's substantial or constitutional rights or any prejudice to him because his plea was not entered to the amended charge, for he secured all the advantages of a plea of not guilty regularly entered. The cause proceeded to trial on his plea to the offense alleged in the original information and defendant at all times received the benefit of a plea of not guilty, since the cause was tried as though such a plea had been interposed to the amended information. Defendant's substantial rights suffered no detriment by reason of the failure to repeat the plea (People v. Hall, 220 Cal. 166, 30 P.2d 23, 996). Under these circumstances, we are inclined to treat the failure to make the formal plea as a mere irregularity which in no manner or degree affected or impinged upon defendant's substantial rights (People v. Bryant, 101 Cal.App. 84, 281 P. 404). In addition, the record is silent concerning any objection before the lower court interposed by defendant to having the trial proceed without the entry of a new plea. He may not now complain on review where the error is not prejudicial (People v. Rice, 29 Cal.App.2d 614, 85 P.2d 215).

However, quite another problem arises out of the failure of the court to allow defendant a trial by jury on the charge contained in the amended information. True, defendant had properly waived his right to a jury trial on the charge of "possession" of heroin and without further discussion thereon he permitted, by his silence, the charge of "sale" to be heard by the court sitting without a jury. However, the offense of "sale" contained in the amended pleading is separate and distinct from that of "possession" alleged in the original information, on which defendant was entitled to a jury trial which he could not waive by mere silence and acquiescence.

Although possession and sale both arise out of Section 11500, Health & Safety Code, under the circumstances at bar it is clear that the offenses of sale and possession of narcotics are separate and distinct crimes (People v. Richardson, 152 Cal.App.2d 310, 313 P.2d 651; People v. Abair, 102 Cal.App.2d 765, 228 P.2d 336). Although possession does not require sale, on the other hand sale, under ordinary circumstances, includes the element of possession, constructive or actual. Furthermore, sale of heroin is a far more serious offense than that of possession, and one who argues that it is not is unrealistic in his approach to law enforcement. It is well known that our trial courts generally treat a peddler of narcotics with much more severity than one who merely has them in his possession. It is not unreasonable to assume because of this that, although an accused might be willing to waive a jury on a charge of possession, he would not care to do so on the grave offense of sale.

[6-8] Conceding, of course, that a trial by jury may be waived by an accused (People v. Donnelly, 95 Cal.App.2d 595, 213 P.2d 502), and that defendant did so in connection with the original information charging possession, it is likewise true that Article 1, Sec. 7, California Constitution, providing for the waiver must be strictly followed (People v. Washington, 95 Cal.App.2d 454, 213 P.2d 70; People v. Pechar, 130 Cal.App.2d 616, 279 P.2d 570). It requires for a valid waiver that the accused personally, and by use of language, expressly waive a jury trial in open court (People v. Terry, 152 Cal.App.2d 75, 312 P.2d 709). Article 1, Sec. 7, California Const., provides in part: "The right of trial by jury shall be secured to all, and remain inviolate; * * * A trial by jury may be waived in all criminal cases, by consent of both parties, expressed in open court by the defendant and his counsel." This provision has been construed to require an express, as distinguished from an implied, consent to the waiver by defendant personally as well as by his counsel (In re Adams, 160 Cal.App.2d 454, 325 P.2d 107; People v. Pechar, 130 Cal.App.2d 616, 279 P.2d 570; People v. Benjamin, 140 Cal.App.2d 703, 295 P.2d 477; People v. Barnum, 147 Cal.App.2d 803, 305 P.2d 986; People v. Terry, 152 Cal.App.2d 75, 312 P.2d 709; People v. McDaniel, 157 Cal.App.2d 492, 321 P.2d 497). Since a waiver cannot be predicated on an implied consent, it is obvious that no valid waiver occurs where defendant merely fails to object to the trial of his case without a jury. This is true even where counsel for both parties stipulate that a jury trial is waived. People v. Garcia, 98 Cal.App. 702, 277 P. 747; People v. Spinato, 100 Cal.App. 600, 280 P. 691. See also People v. Shannon, 110 Cal.App.2d 153, 241 P.2d 1007, wherein judgment against one defendant was reversed because he did not expressly consent even though he sat silently through a court trial without objection.

[9] Respondent argues that since defendant properly waived his right to a trial by jury on the possession charge, the waiver thereafter can be withdrawn only at the discretion of the trial judge and defendant made neither a motion to withdraw the same, nor during the trial raised objection that the original waiver did not apply to the charge on which he was being tried. There is here no question pertaining to a withdrawal of the waiver, since with the People's abandonment of the original information by way of amendment also went the defendant's plea thereto, and waiver of a jury thereon. The amendment establishes a new, separate and distinct offense, far more serious in nature than the one originally alleged, and with this new pleading there arose the right to an arraignment thereon, plea and jury trial. The record before us does not disclose a waiver of that right in accord with the constitutional provision. Having in mind the sanctity of the right to a trial by jury in criminal cases and the evident purpose of the constitutional provision that no defendant should be deprived of that right unless he unequivocally and personally expresses his consent to such a waiver in open court, it is our view that the judgment and commitment are void.

For the foregoing reasons the judgment is reversed and the cause remanded for a new trial.

WHITE, P. J., and FOURT, J., concur.

Delbert HEALD and Clyda Belle Heald, Plaintiffs and Respondents,

v.

M. FRIIS-HANSEN, Andrew Friis-Hansen, Mary Friis-Hansen and Lily Friis-Hansen, Individually and as co-partners doing business under the firm name and style of M. Friis-Hansen & Co., and M. Friis-Hansen & Co., Defendants and Appellants.*

Civ. 6004.

District Court of Appeal, Fourth District, California.

May 6, 1959.

Hearing Granted July 1, 1959.

Action by borrowers to recover treble the amount of interest collected by lenders on alleged usurious transactions, and to impose a trust on property conveyed to lenders by borrowers. The Superior Court, Fresno County, Edward L. Kellas, J., entered judgment for borrowers and lenders appealed. The District Court of Appeal, Mussell, J., held, inter alia, that an interest charge of 10%, on a one year note did not constitute a charge in violation of usury provision of the constitution, and where borrowers paid the note approximately four years after due, compounding of the interest at rate of 10% per year on balance due was permissible since interest charged and collected did not exceed 10% in any one year, and therefore transaction was not usurious even though at time note was finally paid, interest on the principal amounted to more than 10% per year.

Judgment modified, and as modified affirmed.

1. Usury 🔑8

Adoption of constitutional amendment setting maximum interest rates did not repeal all of the provisions of the usury law, and its provisions, except for maximum rates of interest, are still in effect, including penalties set forth in such law. West's Ann.Const. art. 20, § 22; West's Ann.Civ.Code, § 1916–2.

2. Usury 🔑138

Under the usury act, the recovery to which a borrower is entitled is an amount equal to three times the amount by which the sum actually collected exceeded the loan actually made. West's Ann.Civ.Code, § 1916–2.

3. Usury 🔑52, 102(1)

Where a grant deed of a one-half interest in certain oil, gas, and mineral rights was executed and delivered by borrowers to lenders as a condition to the making of a loan, and value of such right together with interest paid on the loan was in excess of 10% per year permitted by the constitution, borrowers were entitled to judgment against lenders for interest collected on such loan. West's Ann. Const. art. 20, § 22.

4. Usury 🔑42, 49

An interest charge of 10%, on a one year note did not constitute a charge in violation of usury provision of the constitution, and where borrowers paid the note approximately four years after due, compounding of the interest at rate of 10% per year on balance due was permissible since interest charged and collected did not exceed 10% in any one year, and therefore transaction was not usurious even though at time note was finally paid, interest on the principal amounted to more than 10% per year. West's Ann.Const. art. 20, § 22.

5. Usury 🔑49

Where a note was made for a period of one year and approximately two months, and interest on such note was charged and received at the rate of 10% for the first year, and at expiration of the year, interest was added to the principal, and interest charged on interest at the rate of 10% before due date of the note, such act amounted to a charge of interest in excess of 10% for the full term of the loan, and rendered the transaction usurious. West's Ann.Const. art. 20, § 22; West's Ann.Civ.Code, § 1916–2.

6. Usury 🔑49

Where a note was payable one year from date, and interest charged and collected by lenders thereon for that year was at the rate of 10% per year, and interest after the first year was charged at the rate of 10% compounded annually, and although the note was for $7,000, lenders charged and collected on the principal sum of $5,000, which was the amount loaned to borrowers, interest charged was not usurious. West's Ann.Const. art. 20, § 22; West's Ann.Civ.Code, § 1916–2.

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* Opinion vacated 345 P.2d 457.

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Stanton M. Levy and L. Nelson Hayhurst, Fresno, for appellants.

Lester N. Gonser, Fresno, for respondents.

MUSSELL, Justice.

This is an appeal by the defendants from a judgment in favor of plaintiffs in an action to recover treble the amount of interest collected by the defendants on alleged usurious transactions and to impose a trust on property conveyed to defendants by plaintiffs.

Promissory Note No. 1.

On November 3, 1955, defendants loaned plaintiffs the sum of $4,819.50 and plaintiffs executed and delivered their promissory note therefor, which provided for interest at the rate of 10 per cent per annum and was secured by a deed of trust. In addition to said note plaintiffs executed and delivered to defendants a grant deed conveying to the defendants an undivided one-half interest in and to certain oil, gas and minerals in and under certain lands situate in Madera county, California. The said deed and deed of trust were recorded by the Security Title Company at Medera, California. On January 21, 1957, plaintiffs paid to defendants Friis-Hansen as interest on the above loan the sum of $568.38, in addition to the payment of the principal. The trial court found on conflicting evidence that the said grant deed was executed and delivered as a condition to the making of said loan and that the deed was executed and delivered as a bonus and additional interest for the making of said loan. The court further found that at the time of the delivery of said grant deed the one-half interest in and to the said oil, gas and minerals was and now is of a value of not less than $10, which said monetary value, coupled with the interest paid by plaintiffs to said defendants in the sum of $568.38 amounted to a charge and collection of interest in excess of 10 per cent per annum, but less than 12 per cent per annum on said loan.

Promissory Note No. 2.

On March 10, 1952, defendants loaned plaintiffs the sum of $15,000, which was evidenced by a promissory note of that date. The note provided for payment of the principal sum on or before one year after date and also provided for payment of interest annually at the rate of 12 per cent, and if not so paid to become a part of the principal and thereafter bear like interest. This note was prepared by the Home Title Company pursuant to written escrow instructions signed by plaintiffs to provide therein for payment of interest at the rate of 12 per cent per annum. The note (exhibit 1c) indicates that the interest rate of 12 per cent was originally typed in the note and that subsequently the 12 per cent figure was changed to 10 per cent in writing. There is no direct testimony in the record showing when or by whom this change was made. The trial court found in this connection that the note provided for the payment of interest on the principal sum at the rate of 12 per cent per annum. The court further found that on February 15, 1957, plaintiffs paid to defendants the sum of $1,000, which was applied toward the payment of interest and that on April 1, 1957, plaintiffs paid to defendants the principal sum of said loan in the sum of $15,000 and the further sum of $8,310.25, which last mentioned sum was charged and received by the defendants as interest on said loan. The court specifically found that the payment of interest in the total sums of $1,000 and $8,310.25, to wit, the sum of $9,310.25, as charged and received by defendants from plaintiffs by reason of the loan of $15,000 exceeded 12 per cent per annum interest upon the said loan for the period of forbearance. Plaintiff Heald testified that $750 was paid on this note by check on March 21, 1952, payable to one Paul Vincent; that said sum represented the commission due Vincent on a real estate deal and that Hansen told him to pay Vincent and he (Hansen) would count it on the bonus of the note. Hansen testified that the $750 was paid as an inducement to buy a ranch; that this money was paid after the note had been executed and was in no way conditional to the making of the note; that subsequently he (Hansen) gave Heald back a check for $300 in connection with a lease on real property. There was no finding by the trial court that the $750 was given as a bonus on the $15,000 loan and it was not taken into account in the computation of interest by Hansen.

Promissory Note No. 3.

On January 9, 1953, plaintiffs obtained a further loan from defendants of the sum of $5,000, evidenced by promissory note executed on that date, payable on or before March 10, 1954, and as originally prepared, provided for interest at the rate of 12 per cent per annum and if not paid to be added to the principal and thereafter to bear like interest. This note also appears to have been altered in changing the rate of interest to 10 per cent. On April 1, 1957, plaintiffs paid to defendants the principal sum of said loan in the amount of $5,000 and also paid the sum of $2,494.-38, which was charged and received by defendants as interest on said loan. The court specifically found that this payment of interest exceeded 10 per cent interest upon the loan of $5,000 for the period of forbearance but did not exceed 12 per cent.

Promissory Note No. 4.

On June 19, 1953, plaintiffs obtained a further loan from defendants in the principal sum of $5,000. This loan was likewise evidenced by a promissory note. However, the note was for the principal sum of $7,000. It was payable on or before one year after date and provided for the payment of interest at the rate of 12 per cent per annum. (This figure was also changed to 10 per cent in writing, written in above the figure 12.) The note provided that should interest not be so paid it would be added to and become a part of the principal and thereafter to bear like interest. On April 1, 1957, plaintiffs paid the principal sum of this note and also paid the sum of $2,180.88, which was charged and received by defendants as interest upon said loan of $5,000. In this connection the court specifically found that the payment of the said sum of $2,180.88 exceeded 10 per cent per annum interest upon said loan for the period of forbearance, but did not exceed 12 per cent.

The record shows that plaintiffs received $5,000 on this loan and the note called for the payment of $7,000 principal. In this connection both plaintiff Heald and defendant M. Friis-Hansen testified that there was interest due to said defendants at that time. Heald testified that about that time he owed about $1,800 interest and that he wanted to bring the interest up to date; that Hansen would not agree to accept the interest and kept the note; that he did not receive credit for the $2,000 on interest or principal on any of his preceding notes. Hansen testified that he had an understanding with Heald that they were going to figure up the interest and that they felt it would amount to approximately $2,000; that it was never "figured out" because they were going to make an oil deal and the "interests were not to be collected by us, they were going to be converted into oil rights he had in Oklahoma".

The trial court concluded that each of the loans were usurious from their inception; that the loan of $15,000 is violative of Deering's General Laws, Act 3757, West's Ann.Civ.Code, §§ 1916–1 to 1916–5, and that interest paid thereon should be trebled; that plaintiffs were entitled to have the one-half interest in the oil, gas and mineral rights reconveyed to them. Judgment was entered in favor of plaintiffs and defendants appeal therefrom, claiming that the notes were not usurious.

California Constitution, Article 20, section 22, provides in part that:

> "The rate of interest upon the loan or forbearance of any money, goods or things in action, or on accounts after demand or judgment rendered in any court of the State, shall be 7 percent per annum but it shall be competent for the parties to any loan or forbearance of any money, goods or things in action to contract in writing for a rate of interest not exceeding 10 percent per annum.
>
> "No person, association, copartnership or corporation shall by charging any fee, bonus, commission, discount or other compensation receive from a borrower more than 10 percent per annum upon any loan or forbearance of any money, goods or things in action."

Civil Code, section 1916-2, provides as follows:

> "No person, company, association or corporation shall directly or indirectly take or receive in money, goods or things in action, or in any other manner whatsoever, any greater sum or any greater value for the loan or forbearance of money, goods or things in action than at the rate of twelve dollars upon one hundred dollars for one year; and in the computation of interest upon any bond note, or other instrument or agreement, interest shall not be compounded, nor shall the interest thereon be construed to bear interest unless an agreement to that effect is clearly expressed in writing and signed by the party to be charged therewith. Any agreement or contract of any nature in conflict with the provisions of this section shall be null and void as to any agreement or stipulation therein contained to pay interest and no action at law to recover interest in any sum shall be maintained and the debt cannot be declared due until the full period of time it was contracted for has elapsed."

[1] The adoption of the constitutional amendment in 1934 did not repeal all of the provisions of the usury law above quoted and its provisions, including the penalties are still in effect where not inconsistent with the constitutional amendment. Brown v. Cardoza, 67 Cal.App.2d 187, 191, 153 P.2d 767. And in French v. Mortgage Guarantee Co., 16 Cal.2d 26, 34, 104 P.2d 655, 130 A.L.R. 67, it is held that no change in the usury law other than a reduction of the maximum rate of interest which a lender may receive for a loan or forbearance of money was thereby effected.

In Haines v. Commercial Mortgage Co., 200 Cal. 609, 615-616, 254 P. 956, 958, 255 P. 805, 53 A.L.R. 725 the court said:

> "If there is anything that is made clear and plain by the act, it is that the maximum rate of twelve per cent per annum on the amount loaned is the full measure of all profit to the lender in connection therewith and this, too, without even the right in such case to compound the interest in any computation thereon. Of course, it is competent for the parties to contract in writing for compound interest where in so doing the said maximum rate of 12 per cent without such compounding would not be exceeded."

In Sharp v. Mortgage Security Corp., 215 Cal. 287, 290-291, 9 P.2d 819, 820, it is said:

> "It is also elementary that the contract must in its inception require a payment of usury or it will not be held a violation of the statute and it may not be judged after some default of the borrower, which default alone authorizes penalties or forfeitures which, if exacted in the beginning, would have been a violation of the statute. (Citations.)"
>
> "The cases above cited are also authority for the proposition that a debtor cannot bring his creditor to the

> penalties of the usury law by his voluntary default in respect to the obligation involved, where no violation of law is present at the inception of the contract."

[2] In Brocke v. Naseath, 134 Cal.App. 2d 23, 25, 285 P.2d 291, 51 A.L.R.2d 1083, it is held that under the Usury Act the recovery to which a borrower-plaintiff is entitled is an amount equal to three times the amount by which the sum actually collected exceeds the loan actually made; that the act disallows the lender any amount over and above the loan made and fees properly charged, and hence when he collects a further sum, he is liable in treble the amount thereof notwithstanding his forbearance beyond the maturity date of the note.

In Weiss v. Brandt, 137 Cal.App.2d 710, 719, 290 P.2d 626, it is held that until a debtor has made payments of interest in excess of that permitted by the usury statute he cannot maintain an action against a creditor under that statute.

In Pacific Finance Corp. v. Crane, 131 Cal.App.2d 399, 406, 280 P.2d 502, it appeared that an error was made in drawing the note involved and that the error was corrected before the trust deed was recorded and before any interest was due or paid. We there held that under Article 20, section 22, of the Constitution a bonus is not illegal unless it results in exacting more than 10 per cent interest from the borrower; that if all payments had been made on the note as corrected, as they became due, the legal limit of 10 per cent interest would not have been exceeded; and that the contract did not on its face call for usurious interest.

[3] From an examination of the loans involved it appears that interest on each of them was calculated, collected and received on the basis of 10 per cent per annum. Notes two, three and four also provided for compound interest at the same rate. Promissory note number one is not made a part of the record herein and we are not able to determine its due date. However, it is agreed by the parties that plaintiffs paid $568.38 interest on this loan on January 21, 1957, calculated at an interest rate of 10 per cent per annum. However, there is substantial evidence to support the finding of the trial court that the grant deed of the one-half interest in said oil, gas and mineral rights was executed and delivered as a condition to the making of said loan and that said rights were of a value of not less than $10. It appears, therefore, that interest was charged in excess of the 10 per cent permitted by the Constitution, Article 20, section 22, and that the trial court was correct in awarding plaintiffs the interest collected on this loan in the sum of $568.38.

[4] Note number two, dated March 10, 1952, for $15,000 was payable one year from date and the interest thereon for that year was charged, calculated and received by defendants at the rate of 10 per cent per annum. This charge was not in violation of the constitutional provision and was permissible. If plaintiffs had paid the note when due, the legal rate of interest thereon would not have been exceeded. When plaintiffs paid the note on April 1, 1957, the interest had been compounded at the rate of 10 per cent each year on the balance due. This was permissible under the statute since interest charged and collected did not exceed 10 per cent in any one year. It is true that at the time the note was finally paid interest on the principal of $15,000 amounted to more than 10 per cent per annum. However, the constitutional provision was not thereby violated. It follows that the court erred in awarding plaintiffs treble the sum of $9,310.25 interest paid on said note.

[5] Note number three, dated January 9, 1953, and payable on or before March 10, 1954, was for a period of one year and approximately two months. The record shows that interest on this note was charged and received at the rate of 10 per cent for the first year in the sum of $500 and on January 9, 1954, this $500 was added to the principal and interest charged thereon at the rate of 10 per cent before

the due date of the note. This amounted to a charge of interest in excess of 10 per cent for the full term of the loan and the transaction was usurious.

As was said in Sharp v. Mortgage Security Corp., supra, 215 Cal. 287, 290, 9 P.2d 819, 820:

> "The case of Easton v. Butterfield Live Stock Co., 48 Idaho 153, 279 P. 716, 718, is an instructive case citing a great many authorities, and the rule is there stated as follows: 'In determining whether usurious interest has been charged or collected under a particular contract, it is not permissible to consider only a portion of the term. The test is: Did the lender under his contract charge or receive a profit on his investment in excess of the maximum rate for the full period of the loan? If he has, there is usury; otherwise not.'"

We conclude that the trial court was correct in awarding plaintiffs the sum of $2,494.38 collected as interest on note number three.

[6] Note number four. This note, dated June 19, 1953, for $7,000 was payable one year from that date and the interest charged and collected by defendants thereon for that year was at the rate of 10 per cent per annum, which was not in violation of the constitutional provision. Interest after the first year was charged at the rate of 10 per cent, compounded annually. While the note was for $7,000, defendants charged and collected on the principal sum of $5,000, which was the amount loaned to the plaintiffs. The award to plaintiffs of the sum of $2,180.80 interest on this note was likewise error.

The trial court gave judgment to plaintiffs for the sum of $33,192.39, plus interest at 7 per cent, and costs. This judgment was based on the sum of interest paid on note number one, three times the interest paid on note number two, and the interest paid on notes three and four. Since we concluded that plaintiffs were entitled to recover the sum of $568.38 on note number one, no interest on note number two, $2,494.35 interest on note number three, and no interest on note number four, or a total of $3,062.73, the judgment is modified by reducing the amount thereof to the sum of $3,062.73. As so modified the judgment is affirmed. Each party to pay his own costs.

GRIFFIN, P. J., and SHEPARD, J., concur.

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170 Cal.App.2d 218

Robert BURHANS, Jr., et al., Plaintiffs and Appellants,

v.

COUNTY OF KERN, a body corporate and politic, Defendant and Respondent.

Civ. 5666.

District Court of Appeal, Fourth District, California.

May 6, 1959.

Hearing Denied July 1, 1959.

Taxpayers brought action against county for refund of ad valorem taxes paid under protest to county on account of assessments on barley. The Superior Court of Kern County, W. L. Bradshaw, J., entered judgment for the county, and the taxpayers appealed. The District Court of Appeal, Shepard, J., held that taxpayers were liable for taxes assessed against them by county on barley, which was stored in public warehouse in county, and which had been mortgaged by the taxpayers to the United States Department of Agriculture, Commodity Stabilization Service, Commodity Credit Corporation, though total cost to taxpayers of redeeming the barley from all of the loan and charges against it was more than the market value.

Judgment affirmed.

1. Taxation ⚿79

Taxpayers were liable for taxes assessed against them on barley, which was stored in public warehouse in county, and which had been mortgaged by the taxpayers to the United States Department of Agriculture, Commodity Stabilization Service, Commodity Credit Corporation, though total cost to taxpayers of redeeming the barley from all of the loan and charges against it was more than the market value. West's Ann.Const. art. 13, § 1.

2. Taxation ⚿480

Where taxpayers did not object to continuances had before county board of supervisors, sitting as a board of equalization, and they made no claim of invalidity of assessment in their claim on file therein, and no such claim of invalidity was made in taxpayers' claim for refund, and full opportunity was given to taxpayers to be heard by board, actions of board in no way detracted from validity of the assessment. West's Ann.Rev. & Tax.Code, §§ 2902, 2905, 5104; West's Ann.Const. art. 13, § 9a.

3. Estoppel ⚿115

Generally, estoppel, when relied on, must be both pleaded and proved as to all its elements.

4. Estoppel ⚿62(2)

Ordinarily, in the collecting of taxes, the government cannot be estopped from collecting taxes because of an erroneous ruling of an administrative official, but taxpayer will be assessed only for amount he would have paid originally, had administrative ruling been correct.

5. Estoppel ⚿62(3)

County was not estopped to collect tax on barley, which taxpayers had mortgaged to the United States Department of Agriculture, Commodity Stabilization Service, Commodity Credit Corporation, merely because county assessor at one time advised taxpayers that barley would not be subject to tax, where there was no showing that taxpayers' actions would have been different had assessor not made such statement.

6. Taxation ⚿79

Alleged fact that taxpayers, who mortgaged barley to the United States Department of Agriculture, Commodity Stabilization Service, Commodity Credit Corporation, elected to treat proceeds from government loan as income and paid income taxes thereon, would not relieve taxpayers from liability to pay ad valorem taxes assessed by county against the barley.

7. Appeal and Error ⚿712

District Court of Appeal on appeal is not permitted to consider matters outside the record.

◆

Baker, Palmer, Wall & Raymond, Oran W. Palmer, Bakersfield, for appellants.

Roy Gargano, County Counsel for Kern County, Rex R. Mull, Deputy County Counsel, Bakersfield, for respondent.

SHEPARD, Justice.

This is an action for refund of taxes paid under protest to defendant county of Kern on account of assessments on barley produced by plaintiffs and pledged to the Commodity Credit Corporation as security for advances made to plaintiffs under the Federal farm program in the year 1954. The trial court rendered judgment for defendant and plaintiffs appeal.

At the trial the cause was submitted on an agreed statement of facts by which it was stipulated that plaintiffs are farmers and taxpayers of Kern County, California; that defendant, for the fiscal year 1955–56, assessed each of the plaintiffs, at a value of $16 per ton, the barley stored in a public warehouse within defendant county, detailed weights of which are set forth in an exhibit attached to plaintiffs' complaint; that prior to the first Monday in March in the year 1955 said barley had been mortgaged by each of the plaintiffs herein to the United States Department of Agriculture, Commodity Stabilization Service, Commodity Credit Corporation, pursuant to a written mortgage contract, a copy of which is attached to the stipulation; that on said first Monday in March, 1955, the market value of said barley was $47.25 per ton and that the total cost to plaintiffs of redeeming said barley from all of the loan and charges against it was $53.99 per ton, or $6.74 per ton more than said market value; that prior to the storage and mortgaging of said barley defendant, through its assessor, represented to plaintiffs that said barley so stored under such Commodity Credit mortgage would not be subject to tax; that after May 16, 1955, defendant caused said barley for the first time to be assessed against plaintiffs and included in the assessment roll which was delivered by the county assessor to the county board of supervisors, sitting as a board of equalization July 5, 1955; that within the time and manner provided by law plaintiffs filed their application with said board of equalization to reduce said assessments; that evidence was duly taken thereon, the matter was continued from time to time and on February 28, 1956, the board made its decision denying said application; that prior to said decision of said board of equalization plaintiffs paid all of the said taxes; and that on April 10, 1956, plaintiffs filed a claim for refund of said taxes, which was on the same day rejected by said board of supervisors.

The document signed by the plaintiffs to the government is entitled "Producer's Note and Loan Agreement". The body of the agreement provides, in part, as follows:

> "2. This note evidences a loan made available under a loan program formulated by Commodity Credit Corporation pursuant to the Agricultural Act of 1949, * * *
>
> "4. The producer hereby sells, assigns, pledges, mortgages, and/or hypothecates to the payee named in the producer's note and to any subsequent holder thereof, as collateral security for the payment of the note, the warehouse receipts or other documents representing the commodity described in the Schedule of Pledged Commodity below (hereinafter referred to as the 'pledged commodity'.")

Plaintiffs present four contentions to this court. The first of these is to the effect that title to said property was on the first Monday in March of 1955 vested in the United States Government and that, therefore, since the United States Government is exempt from taxation the tax levied against plaintiffs was void.

The California Constitution, Article XIII, Section 1, provides that all non-exempt property in this state shall be taxed in proportion to its value; that the word "property" includes all matters and things, real, personal and mixed, capable of private ownership except debts secured by liens on land; that "The Legislature may provide, except in the case of credits secured by mortgage or trust deed, for a deduction from credits of debts due to bona fide residents of this State * * *" Plaintiffs contend that ownership in the barley is divided into three parts, to wit, the warehouseman's lien for storage, the government's security for moneys advanced (which is exempt from taxation), the grower's opportunity to redeem (which terminated April 30, 1955). They cite in support of their proposition a number of cases.

Some quotations from these cases appear to be in order as giving the trend of the court's thought on these matters. In City and County of San Francisco v. Anderson, 103 Cal. 69, 36 P. 1034, all the real and personal property owned by the San Francisco stock and exchange board had been assessed and taxes thereon fully paid. A seat in the stock exchange (attempted to be taxed) is a nontransferable privilege "too impalpable to go into any category of taxable property." In Germania Trust Co. v. San Francisco, 128 Cal. 589, 61 P. 178, 181, involving taxation of solvent credits secured by property exempt from taxation, the court in holding such credits taxable said:

> "However desirable it may be that taxation should be absolutely equal and uniform, such a result, in practice, is generally unattainable, and the present constitution, therefore, does not exact this rigid condition in the levying of taxes."

In Savings & Loan Soc. v. San Francisco, 131 Cal. 356, 63 P. 665, 667, again upholding the taxation of solvent credits secured by nontaxable securities, the court said: "We cannot see any reason for holding that, because the security happens to be some kind of property exempt by law, that the debt secured thereby should also be exempt." In City and County of San Francisco v. La Societe, etc., 131 Cal. 612, 63 P. 1016, involving similar facts, the court said:

> "Section 1 of article 13 of the constitution provides that 'all property,' with certain exceptions therein stated, 'shall be taxed in proportion to its value.' It further provides that the word 'property' as used in said 'article and section' shall include 'moneys, credits, bonds, stocks, dues, franchises and all other matters and things, real, personal, and mixed, capable of private ownership.' The admitted credits or outstanding loans of defendant come clearly within the above constitutional definition of 'taxable property,' and the fact that such loans are secured by pledge of nontaxable personal property in no way affects the question."

Hunt v. Authier, 28 Cal.2d 288, 169 P.2d 913, 918, 171 A.L.R. 1379, involving the survival of a widow's and childrens' cause of action for the wrongful death of the husband and father, merely holds that " 'Generally, the subjects of property comprise all valuable rights or interests protected by law * * *' " and has little or no possible application to the case at bar.

In further support of their contention that interests in personal property should be divisible for tax purposes plaintiffs cite Whiting Finance Co. v. Hopkins, 199 Cal. 428, 249 P. 853, wherein plaintiff sought to recover taxes paid on "solvent credits" in the form of debts secured by conditional sale of contracts of automobiles assigned by dealers to plaintiff. The court therein ruled that the placing of bare legal title in plaintiff for security purposes did not make the "solvent credits" any less taxable. Sherman v. Quinn, 31 Cal.2d 661, 192 P.2d 17, 19, involved the effort of a veteran to secure his tax exemption under a conditional contract of sale of real property in which the legal title was vested in the United States Government. In discussing the position of the parties the court said: " 'In a conditional sale, the title in the seller is for security only, to assure the payment of the purchase price * * * Both in a practical and a legal sense the buyer is the beneficial owner'." In the case of Parr-Richmond Industrial Corp. v. Boyd, 43 Cal. 2d 157, 272 P.2d 16, the court held that the plaintiff's interest in certain government-owned real property was possessory only, and that due to the peculiar wording of the contract on delivery of merchantable title (the government being unable to presently deliver such title) plaintiff should properly have been assessed only on a possessory interest. It must be noted in connection with this case that it pertained to real property and that the assessment of possessory interests in real property, as distinguished from personal property, has long been recognized. Kaiser Co. v. Reid, 30 Cal.2d 610, 184 P.2d 879; Blinn Lbr. Co. v. County of Los Angeles, 216 Cal. 474, 14 P.2d 512, 84 A.L.R. 1304; DeLuz Homes, Inc. v. County of San Diego, 45 Cal.2d 546, 290 P.2d 544. We are of the opinion that these authorities do not materially aid plaintiffs.

In clarification of the rules referred to in the last above cited cases, defendant refers to the rulings in a number of cases. In Weyse v. Crawford, 85 Cal. 196, 24 P. 735, 737, in which it was sought to charge a warehouseman with ownership of merchandise and grain for tax purposes, the court in rejecting the tax liability said:

> "It is true that, ordinarily, possession of personal property is *prima facie* evidence of ownership, but it is only *prima facie* so; * * * Possession by a factor, who does not purchase on his own account, is not evidence of ownership."

In Standard Auto Sales Co. v. Lehman, 43 Cal.App. 763, 186 P. 178, 179, concerning the question of whether or not a vendor under a conditional contract of sale could have a lien for the unpaid purchase price, the court said:

> "* * * the existence of a lien and ownership as to the same property in the same party at the same time is not in accordance with the legal conception of these terms. A person cannot have a lien upon personal property of which he is the owner."

In Timm Aircraft Corp. v. Byram, 34 Cal. 2d 632, 636, 638, 213 P.2d 715, 717, the question of whether or not plaintiff was the owner, for tax purposes, of money advanced by the United States into a bank account with certain controls thereof retained in the United States, was considered. In holding the property to be that of the plaintiff therein for tax purposes the court said:

> "In the absence of an express Congressional grant of immunity, the tax in question may be avoided only if it is imposed on property of the United States or is so measured by such property as to be in substance and effect a tax thereon. * * *
>
> "* * * The imposition of reasonable restrictions upon the use of property, even the retention of legal title to secure performance of an executory contract, does not make the United States the owner of that property for tax purposes."

In General Dynamics Corp. v. County of Los Angeles, 51 Cal.2d 59, 330 P.2d 794, 797, the county attempted to tax certain personal property wholly owned by the United States, but used by plaintiff in performing governmental contracts. The court in rejecting defendant county's attempt to tax the property stated, respecting the language of Article XIII, Section 14 of the California Constitution:

> "Under these provisions the Legislature may provide for the taxation of 'all forms of tangible personal property' and 'any legal or equitable interest therein.' We have concluded, however, that the Legislature has not provided for the taxation of limited interests in tangible personal property. It has not defined personal property as including a right to its possession as it has real property (see, Rev. & Tax.Code, §§ 104, 107), and this omission reflects not merely a lack of detail, but a consistent pattern of taxing tangible personal property as an entity or not at all."

In the recent case of Thompson v. Arnold, Ind.1958, 147 N.E.2d 903 the supreme court of Indiana had before it a problem substantially identical with that in the case at bar. The Commodity Credit Corporation of the United States, Department of Agriculture, made advances to Thompson on his 1955 corn crop. Thompson signed a producer's note, supplemental loan agreement, and commodity chattel mortgage, all of which described the transaction as a loan and a mortgage. Thompson claimed the transaction was in truth a sale because (1) there was no absolute obligation on his part to repay the debt; (2) the note would be satisfied by payment on delivery to the Commodity; (3) risk of loss was in the Commodity Credit Corporation; (4) he had the election to report and pay income taxes on the amount received from Commodity Credit Corporation; (5) the market value of the corn was several thousand dollars less than the amount received on the loan; and last, the corn was placed under seal by the government, which retained a certain measure of possessory control thereover. The court rejected all of these contentions and ruled that the corn in question was taxable property of the appellant. The case is well reasoned, and we agree with the conclusions there reached.

Fresno County v. Commodity Credit Corporation, 9 Cir., 112 F.2d 639 and Commodity Credit Corporation v. County of Oklahoma, D.C., 36 F.Supp. 694 are both cases which treat of the subject of priority of tax liens as between the county and the federal government, and the type of matter under discussion in the case at bar is not discussed. The case of Goodrich v. Bowers, 167 Ohio St. 403, 149 N.E.2d 248, 250 simply held that under Ohio revised code sections 5701.08 and 5709.01 agricultural products in storage subject to control of the United States are "not used in business in this state", within the meaning of said tax statutes. Because of the material difference between the Ohio statute and the California statute the case is not in point.

[1] We are satisfied that the legislature of California has not thus far provided for divisibility of personal property interests in taxation in the manner contended for by plaintiffs. We are further satisfied that the true owners for tax purposes in the case at bar are the plaintiffs, and not the United States Government. Therefore, the barley was not exempt from taxation.

The second contention of plaintiffs is that the board of supervisors sitting as a board of equalization failed to equalize the taxes consistent with the provisions of the constitution and that, therefore, the tax levied was unequalized and void.

[2] It is first to be noted that the record contains no indication that the plaintiffs objected to the continuances had before the board of equalization, they made no such claim of invalidity in their complaint on file herein, and such contention was not made in their claim for a refund. In this connection Section 5104 of the Revenue and Taxation Code provides "no recovery of taxes shall be allowed in any such action upon a ground not asserted in the claim for refund." Furthermore, unsecured personal property taxes are based on rates adopted for the previous year's secured personal property tax rate. Const., Art. XIII, Sec. 9a; Rev. & Tax.Code, Sec. 2905; Abrams v. San Francisco, 48 Cal.App.2d 1, 119 P.2d 197. Under Revenue and Taxation Code Section 2902, the assessment of unsecured property is complete, for the purpose of enforcing collection, when the assessor has made a record in writing of the assessment in such form as the board of supervisors may prescribe. Full opportunity was given to plaintiffs to be heard by the board of equalization and we consider Londoner v. Denver, 210 U.S. 373, 28 S.Ct. 708, 52 L.Ed. 1103 to be not in point for the reason that the basis of the court's ruling in that case was that the taxpayers were not afforded any opportunity to be heard on their objections. Plaintiffs also cite Savings & Loan Soc. v. San Francisco, 146 Cal. 673, 80 P. 1086 and Universal Consol. Oil Co. v. Byram, 25 Cal.2d 353, 153 P.2d 746. The first of these cases rejects the claim of invalidity against an assessment of solvent credits. The second simply holds that at least a majority of the board must act upon the evidence presented at the equalization hearing, and in that case only two of the five members so acted. Thus, the taxpayer was denied due process. Nothing in either of these two cases supports plaintiffs' contention. In addition, we are unable to discern how the delay in the action of the board of equalization caused plaintiffs to be legally harmed. Buswell v. Board of Supervisors, etc., 116 Cal. 351, 354, 48 P. 226. We are satisfied that the actions of the board of equalization in no way detracted from the validity of the assessment.

[3-5] Plaintiffs' third contention is that the county was estopped to collect the tax because the county assessor at one time advised plaintiffs that the barley in question would not be subject to tax. First, we find nothing in plaintiffs' complaint nor in the claim to the board of supervisors which show that plaintiffs' actions would have been different had the assessor not made such a statement. Nor do we find any pleading or proof of legal injury, and the general rule is that estoppel when relied upon must be both pleaded and proved as to all its elements.

> "The existence of an estoppel in pais is a question of fact. When plaintiff's cause of action depends upon such estoppel, it must be pleaded in the complaint with sufficient accuracy to disclose the facts relied upon and the plaintiff must prove all of the elements constituting it." Judelson v. American Metal Bearing Co., 89 Cal.App.2d 256, 266, 200 P.2d 836, 842; Fleishbein v. Western Auto Supply Agency, 19 Cal. App.2d 424, 427(3), 65 P.2d 928.

Furthermore, while it is true that in some cases it is possible for the government to be estopped such is not the general rule, and ordinarily in the collecting of taxes the government cannot be estopped from collecting taxes because of an erroneous ruling of an administrative official. The true rule in this respect would appear to be that the taxpayer will be assessed only for the amount he would have paid originally, had the administrative ruling been correct. United States Fidelity & Guaranty Co. v. State Bd. of Equal., 47 Cal.2d 384, 394, 303 P.2d 1034; Goodwill Industries v. County of Los Angeles, 117 Cal.App.2d 19, 27 [11], 254 P.2d 877. We are unable to discover how there could have been any difference in the amount of tax to be paid in this case had the assessor not made the erroneous statement. We do not find any basis for lawful estoppel.

[6] Plaintiffs' fourth contention is that they elected to treat the proceeds from the government loan as income and paid income taxes thereon, and that they should not, therefore, be required to pay the ad valorem tax. This identical contention was presented in the case of Thompson v. Arnold, supra [147 N.E.2d 909], and rejected. The court therein quotes at length from Stewart v. United States, D.C.1951, 100 F.Supp. 221:

> "'Usually, and in the absence of election by a taxpayer, amounts received as loans from the Commodity Credit Corporation are not income. They represent loans, and a loan does not ordinarily result in the borrower's receipt of income. By the remedial provisions of section 123(a), supra, such amounts may be considered and reported and treated as income for the year of their receipt, but only if the taxpayer so elects. * * *'
>
> "The privilege granted the producer of paying taxes on the money received from such loan is a matter of statutory indulgence, which does not change the express character of the transaction."

In City Investments, Ltd. v. Johnson, 6 Cal.2d 150, 153, 56 P.2d 939, 940, wherein plaintiff sought to recover taxes paid under protest because of claimed double taxation, the court said:

> "The fact that the two contemporaneous tax charges then overlapped, in whole or in part, was not from a taxing standpoint constitutionally objectionable."

In Weber v. County of Santa Barbara, 15 Cal.2d 82, 87 [6], 98 P.2d 492, 494, in which plaintiff sought to recover taxes alleged to have been unlawfully collected by reason of alleged overlapping of ad valorem and income taxes the court said, in referring to the above case, "* * * the cited case is also authority for the settled principle that the simultaneous imposition of an *ad valorem* tax on property and of a tax measured by the income from such property, does no violence to constitutional inhibitions against double taxation."

[7] Furthermore, we are unable to discover anything in the record before us which factually supports plaintiffs' contention that they did so make such a return of income tax. It is not contained in either the complaint nor the stipulated statement of facts, and we are not permitted to consider matters outside the record. Kovacik v. Reed, 49 Cal.2d 166, 170 [4], 315 P.2d 314.

On the record before us we are compelled to hold that the assessment was made in accordance with law, and the judgment of the trial court was correct.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.

170 Cal.App.2d 271

Sam P. COLLA, Frank Volano and Marino Fanucchi, partners under the firm name and style of Kelly Box Company, Plaintiffs and Appellants,

v.

BEAVER LUMBER COMPANY and Robert M. Cain, Defendants and Respondents.

Civ. 9571.

District Court of Appeal, Third District, California.

May 8, 1959.

Action arising out of collision occurring when truck negotiating left turn off four-lane highway at intersection collided with oncoming truck. The Superior Court, Solano County, Harlow V. Greenwood, J., rendered judgment for defendants, and plaintiffs appealed. The Third District Court of Appeal, Schottky, J., held evidence sustained finding that driver of left-turning truck had been guilty of such negligence as would preclude recovery by plaintiffs.

Affirmed.

1. Automobiles ⚿244(43)

In action arising out of collision occurring when truck negotiating left turn off four-lane highway at intersection collided with oncoming truck, evidence sustained finding that driver of left-turning truck had been guilty of such negligence as would preclude recovery by plaintiffs. West's Ann.Vehicle Code, § 551.

2. Appeal and Error ⚿1010(1)

Issues of fact must be determined by trial court, and before appellate tribunal is justified in reversing judgment on ground of insufficiency of evidence it must appear from record that, accepting full force of evidence, together with every inference favorable to prevailing party which may reasonably be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that law precludes such party from recovering judgment.

3. Evidence ⚿5(2)

It is common knowledge that one of the most hazardous of all highway traffic maneuvers is a left turn by a slow moving vehicle in the face of oncoming traffic. West's Ann.Vehicle Code, § 551.

◆

Tobriner, Lazarus, Brundage & Neyhart, San Francisco, for appellants.

Taft, Wright & Hopkins, Vallejo, for respondents.

SCHOTTKY, Justice.

Plaintiffs above-named have appealed from a judgment in favor of defendants in an action in which plaintiff Sam P. Colla sought to recover for injuries sustained when a truck which he was driving collided with a truck which was being driven by defendant Beaver Lumber Company's employee, defendant Robert M. Cain. Frank Volano and Marino Fanucchi, partners under the firm name and style of Kelly Box Company, appeal from the judgment denying them recovery for damages to their truck which Colla was driving. The case was tried by the court sitting without a jury.

The record shows that the accident occurred on the morning of February 15, 1957, at the intersection of Sequoia Boulevard and Highway 29, which is near Vallejo. Highway 29 runs in a general northerly and southerly direction. It is a divided four-lane highway with two lanes in each direction. The opposing lanes are separated by concrete islands. Sequoia Boulevard enters Highway 29 from the east and a smaller road enters the highway from the west. Several hundred feet south of the intersection Highway 29 curves to the left, and some 500 feet south of the intersection the highway passes under U. S. Highway 40. At the time of the accident, the southbound lanes of Highway 29 were barricaded at the intersection, compelling all southbound traffic to make a left turn onto Sequoia Boulevard or a right turn onto the other road.

Colla was driving a truck loaded with empty boxes south on Highway 29. He testified as follows: He intended to make a left turn at the intersection. He slowed down, signaled for a left turn, and either stopped momentarily or almost stopped before making the turn. Before he turned he looked to the right, saw no traffic coming north and then proceeded across the intersection at a speed of two or three miles an hour. When he was crossing the white line separating the northbound lanes of traffic, he heard brakes screeching and saw the defendant's truck about 100 feet away traveling about 60 miles an hour. He then swerved the truck to the left and hit defendant's truck on the left-hand side some 10 or 12 feet from the front bumper.

A Mrs. LeDesma testified that she first recalled seeing the Kelly Box Company's truck coming toward the intersection at about 5 or 10 miles per hour. She saw it stop at the intersection. A few moments later she heard the sound of brakes screeching and she saw defendant's truck and trailer coming around the curve at a high speed. The next thing she knew there was a collision between the lumber truck and the vehicle crossing the intersection.

Cain who was driving the lumber truck and trailer, which incidentally was empty, was driving north on Highway 29. It was a clear day and visibility was good. He was familiar with the area and knew that the southbound traffic lanes were barricaded. He testified that he went through the underpass some 500 feet south of the intersection at a speed of about 35 miles per hour. He further testified that the intersection was visible about 100 feet north of the underpass. When he first saw the vehicle Colla was driving, it was about 250 feet north of the intersection traveling less than 30 miles per hour. He saw the signal for a left turn. He also saw Colla give a stop signal. The approaching vehicle appeared to be slowing down. Cain testified he was sure it would be stopped. He then looked in his rear view mirrors to check traffic to the rear and upon glancing to the front at a spot about 120 feet south of the intersection saw the truck loaded with boxes proceeding to cross the intersection. Cain immediately applied the brakes and swerved to the right in an attempt to avoid the collision. The wheels of the trailer and truck laid down about 150 feet of skid mark. There was about 120 feet of skid mark from the point the brakes were applied to the point of impact.

The trial court found that the plaintiff Colla "was negligent and careless in the operation of said vehicle at the time of said collision, and that said negligence and carelessness of plaintiff, Sam P. Colla, did proximately cause the collision * * *," and found also that defendant Cain was not negligent or careless in the operation of the vehicle owned by defendant Beaver Lumber Company.

Appellants make the following contentions:

1. The driver of the truck and trailer combination was guilty of negligence as a matter of law.

2. There is no evidence in this case from which it could even remotely be inferred that any part of the blame for this accident could be placed on Colla, and defendants completely failed in their burden of proving their affirmative defense of contributory negligence.

[1,2] Appellants make an earnest and vigorous argument in support of these contentions. And if the evidence were susceptible of no other construction than the one placed upon it by appellants, we would agree with them that the judgment should be reversed. However, we are convinced that there is an issue of fact as to whether or not appellant Colla was guilty of contributory negligence and that the finding of the trial court against appellants on that issue is supported by the record. Issues of fact must be determined by the trial court; and an appellate tribunal is bound by the familiar rule that before it can be justified in reversing a judgment upon the ground of the insufficiency of the evidence, it must appear from the record that accepting the full force of the evidence, together with

every inference favorable to the prevailing party which may reasonably be drawn therefrom, and excluding all evidence in conflict therewith, it still appears that the law precludes such party from recovering a judgment.

Section 551 of the Vehicle Code at the time of the collision here involved provided:

> "(a) The driver of a vehicle intending to turn to the left at an intersection shall yield the right of way to any vehicle which has approached or is approaching the intersection from the opposite direction and which is so close as to constitute a hazard at any time during the turning movement.
>
> "(b) Said driver turning left having so yielded and having given a signal when and as required by this code may make such left turn and the drivers of all other vehicles approaching the intersection from said opposite direction shall yield the right of way to the driver making the left turn."

Appellants contend that the evidence is uncontradicted that appellant Colla had given a left turn signal and had otherwise complied with the statutory requirement and had the right of way over respondent's vehicle which was some distance away, and that Colla had a right to rely on the assumption that his right of way would be respected. Appellants rely strongly on Osgood v. City of San Diego, 17 Cal.App.2d 345, and quote the following from page 351, 62 P.2d 195, 198:

> "'*Where a car has actually entered an intersection before the other approaches it, the driver of the first car has the right to assume that he will be given the right of way and be permitted to pass through the intersection without danger of collision.* He has a right to assume that the driver of the other car will obey the law, slow down, and yield the right of way, if slowing down be necessary to prevent a collision. Keyes v. Hawley, 100 Cal.App. 53, 60, 279 P. 674. *Nor is a plaintiff required to yield the right of way to one a considerable distance away whose duty it is to slow down in crossing an intersection.* Whitelaw v. McGilliard, 179 Cal. 349, 176 P. 679.'" (Emphasis added.)

However, in the later case of Hoagland v. Chargin, 134 Cal.App.2d 466, 471, 286 P.2d 931, 934, in which a hearing was denied, the court referred to the Osgood case as follows:

> "* * * Although it is true the language of the Couchman case which is quoted by appellants, was cited with approval in Osgood v. City of San Diego, 17 Cal.App.2d 345, 62 P.2d 195, which was a case involving a left turn, still it is clear from section 551 of the Vehicle Code, that the person first in the intersection, if he is about to make a left turn, does not necessarily have the right of way. He has such right of way only if no car is within the intersection or approaching so close thereto as to constitute an immediate hazard. Whether or not the driver of the Mercury should have realized that the Chrysler was an immediate hazard appears to be in the present case a question of fact for the jury to decide. In the Osgood case, the verdict for plaintiff was reversed, the court stating that the evidence was not conflicting, that defendant had given the proper signal, had entered the intersection first when plaintiff was about 130 feet away traveling at 35 miles per hour. The court did not discuss the effect of the language in the statute which required defendant to yield the right of way to cars which were an immediate hazard. That language was added in 1929, and was applicable to this case which arose in 1935. Apparently the court felt that the only inference that could be drawn was that a car 130 feet away, whose driver admitted seeing the signal, and who slowed down, then speeded up again when plaintiff hesitated, defendant interpreting this as a yielding by plaintiff of the right of way to him.

> was guilty of negligence as a matter of law. This evidence also clearly demonstrated that defendant was at such a distance and driving a sufficiently slow speed that plaintiff could assume defendant was not an immediate hazard."

We do not regard the Osgood case as determinative of the instant case because we do not believe that we would be justified in holding that the issue of whether or not Colla was guilty of negligence was not a question of fact for the court to determine. As stated in Washam v. Peerless Automatic Staple Machine Co., 45 Cal.App.2d 174, at page 177, 113 P.2d 724, 727:

> "* * * But if such other car is not within the intersection, the motorist must complete his left turn only after he has cautiously estimated that the vehicle approaching from the opposite direction is not 'so close (to the intersection) as to constitute an immediate hazard.' If he miscalculates and a collision occurs, upon a trial of the resulting controversy, it is a fact to be determined from the evidence whether a reasonably prudent person in making the same turn would, under such circumstances have reached the same conclusion."

[3] We believe that under the evidence in the instant case the trier of fact could reasonably conclude that Colla was negligent in proceeding to make a left turn in front of the approaching truck. It is common knowledge that one of the most hazardous of all highway traffic maneuvers is a left turn by a slow moving vehicle in the face of oncoming traffic. Gigliotti v. Nunes, 45 Cal.2d 85, 286 P.2d 809. If Cain was 400 feet south of the intersection when Colla was some 200 feet north of the intersection, one may well infer that he rounded the curve before Colla proceeded across the intersection. The question of Colla's negligence would then be one for the trier of the fact to determine. If Colla failed to see the approaching truck, the trier of the fact could well infer that either Colla did not look or that he was oblivious of what he saw. If he did see it, the court could reasonably conclude that Colla had miscalculated in estimating that the truck Cain was driving was not so close to the intersection as to constitute an immediate hazard and that he was guilty of negligence in making the left turn.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem, concur.

170 Cal.App.2d 240

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Albert John BAKER and Richard Futoshi Saiki, Defendants,

Richard Futoshi Saiki, Appellant.

Cr. 6515.

District Court of Appeal, Second District, Division 1, California.

May 7, 1959.

Prosecution for possession of a narcotic. From the judgment of the Superior Court, Los Angeles County, Herbert V. Walker, J., and from an order denying a motion for new trial, the defendant appealed. The District Court of Appeal, Fourt, J., held that where information charged defendant with unlawful possession of a "narcotic, to wit, amidone", the fact that the narcotic was misspelled "amadon" in the reporter's transcript did not amount to a variance or a failure to establish the corpus delicti.

Judgment and order affirmed, and purported appeal from decision and sentence dismissed.

1. Indictment and Information 🔑181
Poisons 🔑9

Where the information charged defendant with possession of narcotic, amidone, and reporter's transcript of trial disclosed that defendant was convicted of possession of amadon the reporter's misspelling of the narcotic did not amount to a variance or to failure to establish the corpus delicti of the crime alleged. West's Ann.Health & Safety Code, § 11001(j).

2. Criminal Law 🔑394.4(11)

Where part of information which led to arrest of defendant, charged with possession of a narcotic, was furnished to arresting officer by a reliable informant and before entering codefendant's hotel room officers listened at the door and heard voices in the room saying "Get the stuff ready", "Here is a gram capped. Tie it up", and "I need to fix", evidence seized by officers after entry into codefendant's hotel room was not obtained by illegal search and seizure, and the evidence was admissible.

3. Criminal Law 🔑1028

In prosecution for possession of a narcotic where arresting officer was never asked to disclose the name, telephone number, address or any information regarding the identity of informant, defendant could not raise the problem of nondisclosure in the appellate court.

◆

Bradford A. Arthur, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., David B. Allen, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a "decision," judgment and sentence, and from a denial of a motion for a new trial.

The appellant and Albert John Baker were charged in an information in Los Angeles county with possession, on April 26, 1958, of a narcotic, namely amidone. The information also set forth that the appellant was, on or about November 6, 1953, convicted of the crime of violation of section 11500, Health and Safety Code. The appellant pleaded not guilty and denied the prior conviction. A jury trial was waived and it was stipulated that the cause be submitted on the testimony taken at the preliminary hearing, each side reserving the right to produce further evidence. Exhibits were received into evidence, and the defendant and one other witness testified in behalf of the defendant. The court found the defendant guilty as charged, and found the prior conviction to be true, and sentenced the defendant to the state prison for the time prescribed by law. The appellant's motion for a new trial was denied. The defendant Baker pleaded guilty.

This appeal will be considered as an appeal from the judgment and from the order denying the motion for a new trial.

A résumé of the facts most favorable to the respondent is as follows:

On April 21, 1958, Edward Sanchez, a police officer for the city of Los Angeles, received information from a reliable informant that the defendant Baker was selling narcotics out of room 8 of a hotel located on North Soto Street. The officer had received information from the informant before, and it had proved to be reliable. The hotel mentioned by the informant was kept under observation on April 22nd and 23rd. At about 8:30 o'clock p. m., on April 26th, the informant told officer Sanchez that the defendant Baker at that time had a large amount of narcotics secreted in a jacket in the closet of his room. Officers Sanchez and Valdez went to the address and again placed it under surveillance. At about 10:00 o'clock p. m., they saw the defendant Baker and the appellant Saiki enter the hotel and proceed to room 8.

The hotel register showed that room 8 had been registered to the defendant Baker for about five weeks. The officers obtained a key to the room from the hotel manager and then went to the door of room 8 and listened for about ten to fifteen minutes. They heard male voices inside of the room saying such things as, "Get the stuff ready," "Here is a gram capped. Tie it up," and "I need to fix." The officers did not recognize the voices.

Officer Sanchez put the key in the lock of the door and attempted to open it, while identifying himself in a loud voice at the same time. The door was held closed by some one on the inside, so the officers thereupon forced it open. Defendant Baker was behind the door. The appellant Saiki was seated at the far end of the room, and as the officers entered Saiki threw a hypodermic needle onto the floor. Officer Sanchez watched the needle from the time it left the appellant's hand to the time it hit the floor. The officer then picked up the needle.

Both defendants were arrested, handcuffed and searched. On top of a table at the far end of the room were two rubber containers, each containing a quantity of whitish powder. One container was tied and the other was open. Also on top of the table, officer Sanchez found about ten rubber balloons of different colors. In a cellophane paper on the floor by the table, he found numerous empty gelatine capsules.

Officer Sanchez had a conversation with the defendants in the room immediately after the arrest. The two arresting officers and the two defendants were present, and the statements made by the defendants were free and voluntary. Defendant Baker was told that the officers had information that he had a large amount of narcotics in his jacket pocket. Baker stated that he did have, but that he had taken it out, and that was the "stuff" that was on the table. When asked why it was on the table instead of in his jacket, Baker stated that, "we" were in the process of capping it up when the officers came in.

Appellant Saiki was asked where he had met the defendant Baker, and he stated that he had met him earlier in the day and "they had come over to the apartment here to cap some of this stuff up." The officer further testified, "I asked the defendant Saiki how much stuff he was using and he said he was using approximately three times a day. I asked him why he threw the hypodermic needle to the floor and he didn't give me any answer."

The items heretofore mentioned were then taken to the police department and William King, a qualified forensic chemist employed by the Los Angeles police department, made a chemical analysis of the white powder contained in the two rubber containers found therein. There were fifteen grams of powder in one container and 4.5 grams in the other. The reporter's transcript shows that the chemist testified that based upon his analysis he formed the opinion that the white powder contained "a narcotic known as amadon."

The appellant contends:

(1) that the evidence was not sufficient to sustain the conviction;

(2) that the trial court erred in the admission of evidence obtained by illegal search and seizure; and

(3) that the prosecutor was guilty of prejudicial misconduct in presenting evidence obtained by illegal search and seizure.

[1] The appellant asserts that the information charged him with the unlawful possession of "a narcotic, to wit, amidone," and that the reporter's transcript discloses that he was convicted of possession of "amadon," and that therefore the respondent has failed to establish the corpus delicti of the crime alleged. Apparently the court reporter spelled the word as it sounded to him and without checking to see if his spelling was correct. We note, however, from the transcript that in most places where the word "amadon" appears, it is referred to as a narcotic, and we are convinced that no miscarriage of justice has resulted from the misspelling of the name of the drug by the court reporter. The pronunciation is similar if not identical, and there can be no valid contention that there is a case of variance in the proof. The corpus delicti was properly established.

The transcript shows definitely that the appellant had possession of a "narcotic known as amadon" and under the circumstances, it was not necessary to then establish that the amidone in this case met the chemical formula of amidone as defined in the Health and Safety Code, section 11001, subdivision (j), which reads as follows:

"(j) Amidone. 'Amidone' shall mean any substance identified chemically as 4,4-diphenyl-6-dimethylamino-heptanone-3, or any salt thereof by whatever trade name designated."

The appellant was charged in a proper information and he knew with what he was charged and made his defense thereto, which in effect was that he was in the hotel room at the time but did not have possession of the narcotic. People v. Ballard, 145 Cal.App.2d 94, 302 P.2d 89.

[2] The next contention of the appellant is that the court erred in the admission of evidence, and he now asserts that it was obtained by an illegal search and seizure.

Part of the information which led to the arrest of the appellant and his co-defendant and to the seizure of the narcotic was furnished to the arresting officer by a reliable informant. This informant's information had proved reliable in the past and had led to seven arrests, including two narcotic arrests and convictions. Another part of the information leading to the arrest came from the officers' personal observation. Before entering the co-defendant's hotel room the officers listened at the door and heard the voices in the room saying, "Get the stuff ready," "Here is a gram capped. Tie it up," and "I need to fix."

[3] In response to questions on cross-examination, the officer testified that he knew the name and the telephone number of the informant, but not his address. The officer was never asked to disclose the name, the telephone number, the address, or any information regarding the identity of the informant. Furthermore, the narcotics seized were received into evidence without any objection by either of the defendants.

In Priestly v. Superior Court, 50 Cal.2d 812, at pages 819–820, 330 P.2d 39, at page 43, it was said:

"* * * A defendant cannot raise the problem of non-disclosure in the appellate courts when he did not seek disclosure at the trial or preliminary hearing or did not move to strike the testimony on a refusal to disclose. (Citing cases.) Upon his failure to do either at that time evidence of information from a reliable informer is thereafter unobjectionable and may be sufficient to sustain a finding that the search was made with reasonable cause. (Citing cases.)"

For all that appears, in this case the officer may have been willing to disclose the informant's name had he been asked to do so. It was appropriately said in Coy v. Superior Court, 51 Cal.2d 471, 334 P.2d 569, at pages 570:

"* * * The prosecution may have had evidence other than the information of the informer to justify the search or it may have been willing to waive the privilege of nondisclosure if its case would otherwise fail, and it was entitled to an opportunity to produce such evidence or waive nondisclosure. It was not called upon to do so, however, while evidence of reasonable cause stood unchallenged in the record. To hold that the magistrate or trial court must strike the evidence on its own motion when the objection to it has not been called to its attention would open the door to needless repetitions of preliminary hearings. It would also permit the defendant to gamble on an acquittal at his trial secure in the knowledge that a conviction would be reversed on appeal and a new trial ordered. No undue burden is placed on the defendant by requiring him to make a motion to strike when the basis for excluding evidence theretofore properly admitted becomes apparent, and there is no basis for departing from the settled rule requiring such a motion (citing cases and authority) in the present situation."

There was, without question, reasonable and probable cause for the arrest and seizure of the narcotics in this case because of the information received from the reliable informant and the statements of the defendants which the officers heard just before they entered the room. See, People v. Richardson, 51 Cal.2d 445, 334 P.2d 573.

The last contention of the appellant is in effect that the district attorney committed prejudicial misconduct because he introduced the evidence heretofore related, which he, the appellant, now asserts was obtained by illegal search and seizure. We deem the contention to be entirely without merit, without further discussion.

The judgment and the order denying motion for a new trial are, and each is affirmed. The purported appeal from the "decision" and the sentence is dismissed.

WHITE, P. J., and LILLIE, J., concur.

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170 Cal.App.2d 228

A. H. L. ANDREAS, Helen R. Andreas and Linnea Andreas, Plaintiffs,

v.

CALIFORNIA MILLING CORPORATION, a corporation, and Donald Ray Huard, Defendants and Respondents, Linnea Andreas, Appellant.

Civ. 23761.

District Court of Appeal, Second District, Division 1, California.

May 7, 1959.

Hearing Denied July 1, 1959.

Petition by the plaintiff for relief from a default and for grant of an extension of time to request the clerk of the Superior Court for preparation of a reporter's transcript. The respondents moved to dismiss the appeal. The District Court of Appeal, Fourt, J., held that where petitioner filed a notice of appeal and then failed to file a request within the time prescribed for the preparation of the record of the trial court proceedings, and the appellate court relieved appellant from default and stated that if she would make a proper request within 10 days she could proceed with the appeal but she made no request for reporter's transcript within that time and subsequently appellant sought to be relieved from her second default, motion to dismiss the appeal would be granted.

Appellant's motion to be relieved from default denied and motion to dismiss appeal granted.

1. Appeal and Error 🔑611

Where petitioner filed a notice of appeal and then failed to file a request within the time prescribed for the preparation of the record of the trial court proceedings, and the appellate court relieved her from that default and stated that if she would make a proper request within 10 days she could proceed with the appeal, but she made no request for reporter's transcript within that time and subsequently appellant sought to be relieved from her second default, motion to dismiss the appeal would be granted notwithstanding that appellant attempted to represent herself. West's Ann. Rules on Appeal, rules 4(a), 5 and subd. (d), 42(a), 53(b).

2. Appeal and Error 🔑611

An appellate court has the power to relieve a party from a default suffered through inadvertence, or excusable neglect, or mistake, but the appellant must show affirmatively that her case falls within a category wherein relief can and ought to be granted.

3. Courts 🔑85(1)

The rules on appeal were designed to expedite the business of the court, and not to encourage procrastination, delay and defaults. West's Ann.Rules on Appeal, rules 4(a), 5 and subd. (d), 42(a), 53(b).

4. Appeal and Error 🔑611

That appellant attempted to represent herself, would not entitle her to any special privileges for failure to file proper record on appeal.

◆

Arnold Rumwell and Dwain L. Clark, Palm Springs, for appellant.

Hagenbaugh, Murphy & Meifert, Los Angeles, for respondents.

FOURT, Justice.

Appellant has petitioned this Court for relief from a default, and further that the court "grant an extension of time to request the Clerk of the Superior Court for preparation of a Reporter's Transcript." Respondents have moved to dismiss the appeal.

The plaintiffs brought an action for the wrongful death of Alexander Andreas, who was killed January 28, 1957, while a passenger in a truck owned and operated by California Motor Express Company, which said truck was involved in a collision with a truck owned by California Milling Corporation and driven by Donald Ray Huard, an employee of the corporation. The petitioner here is the surviving wife of Alexander Andreas.

The petitioner was represented during the trial by the law firm of Dryden, Harrington, Horgan and Swartz. The remaining plaintiffs, the father and mother of the deceased, were represented by the law firm of Hightower, Gregg and Garland. A trial was had before a jury and the verdict was against the plaintiffs and for the defendants. A judgment on the verdict was entered April 25, 1958. A motion for a new trial was made April 29, 1958, and denied June 4, 1958.

Notice of appeal from said judgment was filed June 27, 1958, by Linnea Andreas, "in propria persona," she apparently having theretofore discharged the attorneys who represented her at the trial.

In a letter dated August 19, 1958, to the District Court of Appeal, the petitioner requested that she be relieved of default and be granted an extension of time to request the clerk of the superior court for preparation of a record on appeal. She stated further that she was ignorant of the law and court proceedings, and that she had thought the defendant would be required to make an answer to the notice of appeal before she could request preparation of a record on appeal. The court thereafter, on September 2, 1958, made the following order:

> "Pursuant to application of appellant and good cause appearing, the clerk of the superior court of Los Angeles county is directed to receive and file request for preparation of record herein if tendered within ten days from date hereof.
>
> Dated: Sept. 2, 1958
>
> Shinn, P. J."

A certified copy of the order was filed in the Superior Court on September 10, 1958.

The petitioner did, on September 10, 1958, file with the clerk of the superior court a document dated September 6, 1958, and denominated a "request for a record on appeal" as follows:

> "Appellant respectfully requests a record on appeal, will you kindly prepare a record on appeal advising me, at your convenience the cost of such record.
>
> "Notice of appeal was filed June 27th, 1958, judgment entered April 25, 1958 in book 3485, page 155A.
>
> "Attached to this request is directive from the District Court of Appeal of the State of California, Second Appellate District, Division Three signed 'Shinn, P. J.,' extending time limit for this request to September, 12th, 1958
>
> "Respectfully submitted,
> Linnea Andreas
> in propria persona
> (Linnea Andreas)
> 32132 Rancho Vista Drive
> Palm Springs, California
> "Dated September 6th, 1958"

Pursuant to Rule 5 of the Rules on Appeal, a notice by the Clerk of the Superior Court (Notice to Appellant re fee for

Clerk's Transcript on Appeal), designating the estimated cost for the preparation of the clerk's transcript, was mailed October 15, 1958, to plaintiff at her address. The notice contained a footnote which read as follows:

> "The above estimate includes only the Notice of Intention to Move for New Trial, ruling thereon, Notice of Appeal, Notice to Clerk and Order. Should you desire any other papers or records to be included in the Clerk's Transcript, the same must be designated by the parties (Rule 5d Rules on Appeal), in which case the cost will be more."

Thereafter she was notified by a communication dated and mailed on October 15, 1958 as to what would be contained in the record she had requested and the approximate fee therefor.

In the affidavit of one of the petitioner's present attorneys (substituted in the case March 27, 1959), it is set forth that on October 21, 1958, appellant directed to the clerk a letter which set forth, in part, that she requested "'* * * a copy of complete transcript of trial proceedings including all statements made by "His Honor, the Judge," lawyers and all witnesses'; that on the 26th day of November, 1958, the appropriate Deputy in the office of the County Clerk of Los Angeles County, advised that a Stipulation designating a Reporter's Transcript must be obtained from attorneys representing Defendants and Respondents herein, the County Clerk having previously advised said Linneas Andreas on November 20, 1958, that by reason of the expiration of the ten days previously granted by the District Court of Appeal for the Second Appellate District, it would be necessary to obtain said Stipulation. That said Linneas Andreas, in writing on December 1, 1958, requested counsel for Respondents to agree to such stipulation, and said request was denied in writing by counsel for Respondents on December 17, 1958." There is no such letter in the record before us.

In the affidavit of one of the attorneys for the respondents it is set forth that they received a letter from petitioner on December 4, 1958, which in part set forth:

> "In my efforts to secure a reporters transcript of the testimony, etc., at original trial, I have received advice from the esteemed Harold J. Ostly, County Clerk, that my notice of September 10th, 1958 did not request preparation of reporters transcript but only requested a 'Record on Appeal', and that since time limit had expired I would have to secure a stipulation from defendant permitting at this default date preparation for myself of a reporter's transcript.
>
> "In my ignorance I believed originally that 'Record of Appeal' would include a Reporter's Transcript."

After counsel for the respondents conferred with their clients, such attorneys informed the petitioner that no stipulation could be entered into with reference to the preparation of the reporter's transcript.

The clerk's transcript was filed December 22, 1958. Notice of Completion of the transcript on appeal was filed February 17, 1959.

In a letter dated February 28, 1959, and filed March 11, 1959, in the District Court of Appeal, the petitioner requests that she be relieved of her default and granted an extension of time to request the clerk of the superior court for preparation of a reporter's transcript. She states in the letter, among other things, "Plaintiff was ignorant of the Rules on Appeal, also that the terminology 'Record date on Appeal' and 'Clerk's Transcript on Appeal' did not include Reporter's Transcript, and on October 26th requested of Clerk of the Supreme Court to also include a Reporter's Transcript in his preparation of appeal documents.

> "Clerk of Superior Court advised that he could not prepare a Reporter's Transcript as this was not included in the Appellate Court's directive.

> "Plaintiff then appealed to the Attorneys for the Defendant for a stipulation permitting the preparation of Reporter's Transcript for use in the appeal declaration. Defendant refused to grant stipulation."

It is conceded by the appellant and petitioner, who is now represented by counsel, that she has failed to comply with the Rules on Appeal, and is now in default. She urges that this Court, under Rule 53(b), should relieve her of such default.

It must also be noted that so far as we have been able to determine, no request has ever been made for the pleadings.

The plaintiff's parents did not appeal and the action is final as to them.

In other words, the petitioner filed her notice of appeal and then failed or neglected to file a request within the time prescribed by the rules for preparation of the record of proceedings in the trial court. The District Court of Appeal relieved her of that default in September, 1958, and in effect said that if she would make the proper requests within ten days she could proceed with the appeal. She apparently was fully cognizant of the rules when she made her request for such relief in August, 1958. Under the order of Presiding Justice Shinn, she could have secured the reporter's transcript and the pleadings had she been so minded. It was not up to the Court to tell her what type of record she should request or secure to the end that the cause be reviewed in this Court.

With the knowledge, on September 2, 1958, that she had ten days within which to do what she wanted to do, she made no request for a reporter's transcript. On October 15, 1958, she was told by the county clerk what would be contained in the record that she had requested. In effect, her present attorney now states that on October 26, she, the appellant, asked the clerk to include the reporter's transcript in the record and he informed her that he could not include such a transcript in the record under the circumstances. Nothing was then done until about December 1, 1958, thirty-five days later, when she asked for a stipulation from the defendants so that she could obtain a reporter's transcript. On December 17th, she was told by the defendants that they could not so stipulate. About seventy days later she wrote this Court another letter requesting that she be relieved from her second default.

[1] The respondents have filed a motion to dismiss the appeal, which has attached to it the clerk's certificate containing the statements required by Rule 42(a) of the Rules on Appeal. It is the contention of the respondents that the appellant has failed to comply with Rule 4(a), and as heretofore indicated, appellant admits, as she must, that there was and is a default in such connection.

[2–4] The Court has the power to relieve a party from a default suffered through inadvertence, or excusable neglect, or mistake; however, the appellant must show affirmatively that her case falls within a category wherein relief can and ought to be granted. We do not believe that the appellant in this case has made a sufficient showing under the circumstances. The Rules on Appeal were designed to expedite the business of the court, and not to encourage procrastination, delay and defaults. The appellant attempted to represent herself, but that circumstance should not entitle her to any special privileges. She was cognizant of the difficulties which she might encounter if she did attempt to represent herself. We can find no sound reason why, under the facts of this case, the appellant should receive different treatment than a lawyer representing a client under the same facts and circumstances.

The appellant's motion to be relieved of the default is denied; and the motion to dismiss the appeal is granted.

WHITE, P. J., and LILLIE, J., concur.

170 Cal.App.2d 208

Delores P. WARDLOW, as Administratrix of the Estate of Walter M. Pozzi, Deceased, Plaintiff and Appellant,

v.

Nellie R. POZZI, Defendant and Respondent.

Civ. 9529.

District Court of Appeal, Third District, California.

May 6, 1959.

Hearing Denied July 1, 1959.

Action for declaratory relief. From a judgment sustaining a demurrer without leave to amend in the Superior Court, Sonoma County, Hilliard Constock, J., the plaintiff appeals. The District Court of Appeal, Peek, J., held that a cause of action for declaratory relief was stated.

Judgment reversed.

1. Joint Tenancy 🔑4, 5

A joint tenancy may be terminated by express agreement between the joint tenants, and an agreement between tenants which although it does not expressly terminate the tenancy is inconsistent by its terms with one or more of the four essential unities of a joint tenancy will be adjudged to be a severance thereof.

2. Joint Tenancy 🔑4

Any interference with the right of survivorship by the terms of an agreement will sever a joint tenancy relationship.

3. Evidence 🔑461(1)

Where there was a failure to provide for the contingency of death in a joint tenancy agreement and in view of other express provisions of the agreement an ambiguity was created, it should be resolved by the introduction of extrinsic evidence concerning the true meaning of the parties.

4. Husband and Wife 🔑279(4)

Where spouses took title to property as joint tenants and prior to divorce action parties entered into a property settlement agreement that the spouses should continue to hold the property in joint tenancy and that at the expiration of a lease on the property each should have the option to purchase the other's one-half interest at an appraised valuation or permitting the property to be sold and the proceeds divided and subsequently the husband died before the option was taken up, settlement agreement negated any intent of the surviving spouse to succeed to the other's interest.

5. Declaratory Judgment 🔑347

In action for declaratory relief with respect to a joint tenancy agreement and whether it had been severed by property settlement agreement between the parties, evidence establishing that a present controversy did exist between the parties concerning the effect of the agreement was sufficient to justify declaratory relief. West's Ann.Code Civ.Proc. § 1060.

Palmer & Grundstrom, Novato, for appellant.

Edward T. Koford and Bryce Swartfager, Santa Rosa, for respondent.

PEEK, Justice.

This is an appeal from a judgment sustaining a demurrer to plaintiff's first amended complaint without leave to amend in an action to quiet title and for declaratory relief.

In 1944 the defendant married the decedent, Walter M. Pozzi. In 1950 they took title as joint tenants to certain real property in Sonoma County, and on October 1, 1953, the property was leased to one Wilson for a term of five years. The lease granted Wilson an option to renew, and if lessors did not desire the land for their own use, he had the first refusal to purchase the same for the sum of $30,000.

In 1954 Nellie and Walter separated, and an action for divorce was commenced by her. Prior to the institution of such action, a property settlement agreement was entered into between the parties, which agreement contained the following provisions:

> "It is * * * agreed that said party of the first part [Walter] and the

> party of the second part [Nellie] shall continue to hold as joint tenants the ranch owned by them as such joint tenants, located near Fulton, Sonoma County, California; that said joint tenancy real property is now leased to one Wilson, and that all rents received shall be deposited in First National Bank of San Rafael, at Novato, California, and out of said fund shall be paid all interest, principal and taxes dues [sic] in and about said property. That at the expiration of the Wilson lease (or before) each of said parties shall have the option to purchase the other's one-half interest at an appraised valuation or that the said property shall be sold and the net proceeds divided equally between the said parties * * *."

Walter died on August 24, 1957, before the option provided for in the agreement was taken up and before any other disposition of the joint tenancy property had been made. The plaintiff and appellant, Delores P. Wardlow, is one of Walter's children by a prior marriage and is the duly appointed and acting administratrix of his estate. On October 18, 1957, she commenced the present action against the defendant-respondent to quiet title to said property. By her complaint she alleged (1) her capacity as administratrix, (2) that Walter and Nellie were joint tenants of the subject property, (3) that Walter and Nellie had entered into a property settlement agreement by which the joint tenancy had been terminated, and that each thereupon received an undivided one-half interest in the property. The defendant demurred to the complaint on the grounds among others that insufficient facts were stated upon which to predicate a cause of action; and that the complaint was uncertain inasmuch as the terms of the alleged property settlement were not set forth. This demurrer was sustained with leave to amend.

Thereafter plaintiff filed her first amended complaint in which she set forth the property settlement agreement in full, the fact of the divorce, the approval of said agreement by the court, and added a second cause of action for declaratory relief.

Defendant's demurrer to the first amended complaint on the ground that the facts were insufficient to constitute a cause of action, and more specifically that no facts were alleged which indicated the joint tenancy to have been severed, was sustained without leave to amend. Thereafter this appeal was taken by plaintiff.

Plaintiff's contentions on appeal are first that the property settlement agreement terminated the joint tenancy, and second that the court abused its discretion in sustaining the demurrer to her first amended complaint without leave to amend.

[1, 2] There can be no question but that a joint tenancy may be terminated by express agreement between the joint tenants and an agreement between the tenants which, although it does not expressly terminate the tenancy, is inconsistent by its terms with one or more of the four essential unities of a joint tenancy will also be adjudged to be a severance thereof. 8 Hastings Law Journal 294. Therefore, any interference with the right of survivorship by the terms of the agreement will sever the joint tenancy relationship. McDonald v. Morley, 15 Cal.2d 409, 101 P.2d 690, 129 A.L.R. 810.

It follows that the primary question to be determined on this appeal is whether the property settlement agreement in question contained provisions inconsistent with the rights of survivorship. In this regard the pertinent portion of said agreement provides as follows: "It is * * * agreed * * * that at the expiration of the Wilson lease (or before) each of the parties shall have the option to purchase the other's one-half interest * * * or that the said property shall be sold and the net proceeds divided equally between the said parties."

It is apparent from the quoted portion of the agreement that on or before the expiration of the Wilson lease, each party had the right to purchase the interest of the other at an appraised value, or, as an alternative, the property would be sold and the proceeds divided equally between them. As noted by plaintiff, at the outset their rights as joint tenants were to continue as such, convey to a third party or one to the other, or seek a partition. Thus, prior to the agreement, neither party had an absolute right to purchase from the other, nor did either have the right to insist that the property be sold and the proceeds divided. Hence by the agreement they surrendered some of those rights; that is, each was bound to sell to the other or both to a third party. And certainly the right of either party to insist upon a sale, whether to one or the other or to a third person, was wholly inconsistent with the continuance of the joint tenancy relationship. Likewise such a provision would appear to negate any intent of the survivor to succeed to the other's interest.

[3] Of course it may well be argued that the very fact of the total failure of the parties to expressly provide for the contingency of death, as in the case of McDonald v. Morley, supra, upon which plaintiff strongly relies, presents a question as to whether the element of survivorship was destroyed by the agreement. But it would also appear that by the very same failure to so provide, considered in light of the other express provisions of the agreement, at least an ambiguity was thereby created which should be resolved by the introduction of extrinsic evidence concerning the true meaning of the parties.

[4] Finally, it is hard to see how two persons in domestic difficulties, and desirous of settling their domestic problems as well as those relating to property, would have intentionally entered into an agreement such as the one before us which would have left the bulk of his or her estate to the other.

[5] In light of the existence of such ambiguities and the obvious fact that a present controversy does exist as between the parties concerning the effect of the agreement, there can be no question but that plaintiff has stated a cause of action for declaratory relief under section 1060 of the Code of Civil Procedure, and we must conclude that the court erred in sustaining defendant's demurrer without leave to amend.

As an alternative ground for relief, plaintiff contends that the right to specific enforcement of the agreement survived the death of her intestate. However, in view of our conclusion as regards plaintiff's first contention, it becomes unnecessary to discuss this alternative ground.

The judgment is reversed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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170 Cal.App.2d 265

ESTATE of Elizabeth CROSS, An Incompetent Person.

Catarino SALCIDO, Petitioner and Appellant,

v.

Reverend Oscar B. JENSEN, Guardian and Respondent.

Civ. 23604.

District Court of Appeal, Second District, Division 1, California.

May 8, 1959.

Proceeding in the matter of the estate of an incompetent. From an order of the Superior Court of Los Angeles County, Harold W. Schweitzer, J., denying a motion of the petitioner to vacate an order confirming the sale of real property of the estate of incompetent, the petitioner appeals. The District Court of Appeal, Fourt, J., held that the order was not appealable.

Appeal dismissed.

1. Appeal and Error 🔑792

In a guardianship proceeding even though both parties assume that the order is appealable, the Appellate Court may dismiss the appeal if it is from a non-appealable order.

2. Guardian and Ward ⚿105(1)

Only those orders mentioned in section 1630 are appealable in guardianship proceedings. West's Ann.Prob.Code, § 1630.

3. Mental Health ⚿270

An order denying a motion to vacate an order confirming the sale of real property of the estate of incompetent in a guardianship proceeding was not appealable. West's Ann.Prob.Code, § 1630.

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David C. Marcus, Los Angeles, for appellant.

George W. Burch, Jr., Los Angeles, for respondent.

FOURT, Justice.

This is an appeal from an order denying a motion to vacate an order confirming the sale of certain real property of the estate of the incompetent.

Elizabeth Cross was the owner of lots 13, 14 and the easterly thirty feet of lot 15 of a tract of land particularly described and located in Los Angeles county. On or about February 1, 1957, she was adjudged to be incompetent, and on or about said date the Reverend Oscar B. Jensen was appointed the guardian of her person and estate by decree of court.

On about June 3, 1957, the guardian sold to Dave Gersh lots 13 and 14 of the real property above mentioned. Sometime after June 25, 1957, the guardian ascertained that a portion of a single family residence constructed and being in large part on the easterly thirty feet of lot 15, did in fact encroach upon and overlap onto lot 14, which lot 14, but for said encroachment and overlapping, was an unimproved lot. On March 4, 1958, the guardian filed a petition denominated a "Return of Sale of Real Property and Petition for Confirmation." This petition set forth, among other things, that the property to be sold was the easterly thirty feet of lot 15 heretofore mentioned; that the incompetent was the owner thereof; that it was to the advantage of the estate to sell it as there was insufficient income to support the incompetent; that the guardian had given the proper legal notices and published the same, and that the guardian had, on February 20, 1958, sold at private sale, the real property in question to Dave Gersh for $1,500, payable $150 cash, and the balance to be represented by a promissory note in the sum of $1,350, payable on or before two days before the close of escrow, bearing interest at six percent per annum; that no real estate broker had been obtained and no real estate commission would be paid; further that the property was being sold *as is,* and there were no warranties in connection therewith and that the property, "while improved is an old structure and has been reappraised for the sum of $1,500.00, for the reason that the lot is below the minimum standards of the City of Los Angeles and on which a dwelling may be maintained, and that furthermore the existing dwelling is partly on Lot 15 and lot 14, the latter lot being owned by Dave Gersh.

"In the event that any person other than Dave Gersh is the successful bidder, the said sale is with the distinct understanding and agreement that the said dwelling must be removed in order that it may not continue to be located on Lot 14."

The petition and return of sale was presented and heard on April 9, 1958. Gersh and appellant Catarino Salcido appeared in court. The judge announced, "In the Estate of Elizabeth Cross I have a Return of Sale of real property commonly known as 2608 East Michigan, in the city of Los Angeles. It is fully described in the Return of Sale. Any prospective bidder may examine the Return of Sale for additional information on request."

Mr. Gersh asked some questions of the court about the time within which the balance could be paid. The judge answered the questions and then also said, in effect, "The sale is on condition that the purchaser remove the dwelling"—"that a portion of the improvements on said premises are also—" on lot 14, "—on the adjoining property, and there is a possibility of a lawsuit; and that anyone purchasing these premises must remove that portion of the building which overlaps now on to Lot 14 forthwith, * * *." Then the court stated that anyone wanting any "additional information about the terms and conditions of this sale, or information with respect to the condition of the improvements thereon, * * *" might obtain the same on request at that time.

A Mr. Aaron then said, "$1650 cash," and the court immediately inquired of him whether he knew of the possibility of a lawsuit with respect to the building being removed immediately, and Aaron replied, in effect, that Catarino Salcido, who was the bidder, understood, and that he, Aaron, was claiming a commission.

Another broker indicated by some questions that he was interested in the property and did make a bid. Aaron then said, "$2500 with $150 down, and same terms and conditions as appears in the Return of Sale of Real Estate."

Gersh made inquiries about when the house would be moved off of his property, and the court said, "I don't know whether they want to commit themselves now or not. You have a right of lawsuit, and they have been advised there is a possibility of a lawsuit here unless they move forthwith." The court then stated that he thought the down payment was too small and that he would not approve the last offer. Aaron said, "$2,000 with $500 cash," and stated that the name of the purchaser was Salcido. The court then formally stated the last bid and terms, and confirmed the sale to Salcido. On April 14, 1958, the court executed an order confirming sale of real property in the usual form, and included therein the following language: "Subject to the provision that such portion of the dwelling located on the hereinafter described real property, as projects on, over or across Lot 14 of Block C of J. W. Browning subdivision of Lots 4 and 5 of the Mathews and Fickett Tract, in the City of Los Angeles, as per map recorded in Book 10, Page 50, Miscellaneous Records in the office of the County Recorder of said County, shall be removed by the purchaser herein named from said Lot 14, at his sole cost and expense, * * *."

A deed was thereafter made by the guardian containing the same provisions for the removal of such portion of the dwelling building as projects onto lot 14, in accordance with the Return of Sale and order confirming sale.

On June 13, 1958, Salcido moved the court for an order to set aside the order confirming sale, and to make a new order confirming the sale without the provisions to the effect that the purchaser should remove the building from lot 14. The motion was made upon the grounds that the order was not the true order made by the court. The motion was denied and this appeal is from such order of denial.

The briefs submitted to this Court by the respective parties seem to express the view that the only question in this matter is whether a probate court, in the exercise of its discretionary powers, can impose terms and conditions of sale in an order confirming sale of real property under the circumstances here presented. We, however, are of the belief that under the circumstances of this particular case the order from which the purported appeal is taken is a non-appealable order.

Section 1630, Probate Code, provides as follows:

"An appeal may be taken to the Supreme Court from an order granting or revoking letters of guardianship; settling an account of a guardian; instructing or directing a guardian; or refusing to make any order heretofore mentioned in this section."

[1] The case before us is a guardianship proceeding and even though both parties have apparently assumed that the order in question was appealable, this court may dismiss the appeal if it is from a non-appealable order. See, In re Guardianship of Lyle, 77 Cal.App.2d 159, 161, 174 P.2d 910.

[2] It was said in Re Guardianship of Kawakita, 42 Cal.2d 840, 844, 271 P.2d 13, 15 "* * * it is settled that only those orders mentioned in section 1630 are ap-

pealable in guardianship proceedings. In re Guardianship of Leach, 29 Cal.2d 535, 539, 176 P.2d 369; In re Estate of Kay, 30 Cal. 2d 215, 217, 181 P.2d 1."

[3] Section 1630 of the Probate Code does not mention an appeal from an order denying a motion to vacate an order confirming the sale of real property of the estate of the incompetent. "* * * An order confirming the sale of a ward's property is not appealable (In re Guardianship of Reser, 57 Cal.App.2d 935, 936, 135 P.2d 709; Prob.Code, sec. 1630)," and it would appear therefore that the order in question in this case is non-appealable. See, In re Estate of Kay, supra [30 Cal.2d 217, 181 P.2d 3].

On the present record, the appeal is dismissed.

WHITE, P. J., and LILLIE, J., concur.

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170 Cal.App.2d 189

Arthur CARTER and Jed Harris, Plaintiffs and Respondents,

v.

Lewis MILESTONE, Defendant and Appellant.

Civ. 23225.

District Court of Appeal, Second District, Division 3, California.

May 6, 1959.

Action was brought for declaratory judgment that defendant had no contract rights in connection with screen play and that letter, which related to screen play, and which was signed by the plaintiffs and defendant, was a mere memorandum and not a binding agreement, and defendant cross-complained. The Superior Court of Los Angeles County, Joseph L. Call, J., entered judgment in favor of the plaintiffs, and the defendant appealed. The District Court of Appeal, Shinn, P. J., held that evidence sustained finding that the letter was a mere memorandum and not a binding agreement.

Judgment affirmed.

1. Contracts 🔑25

A writing, which is intended by parties to be a mere memorandum of intent to negotiate a contract, and which does not purport to state essentials of proposed agreement, is unenforceable.

2. Contracts 🔑39

Question whether letter, which related to screen play, and which was signed by parties, should be construed as a complete agreement or only as a memorandum, which left essentials to future negotiations, was to be decided in accordance with ascertained intentions of the parties.

3. Contracts 🔑28(3)

In action for declaratory judgment that defendant had no contract rights in connection with screen play and that letter, which related to screen play, and which was signed by plaintiffs and defendant, was a mere memorandum and not a binding agreement, evidence sustained finding that the letter was a mere memorandum and not a binding agreement.

4. Witnesses 🔑275(6)

In action for declaratory judgment that defendant had no contract rights in connection with screen play and that letter, which related to screen play, and which was signed by plaintiffs and defendant, was a mere memorandum and not a binding agreement, trial court did not err in sustaining objections to questions asked on cross-examination of one of the plaintiffs, whether he had told his literary agent to have inserted in the letter the substance of the first numbered paragraph thereof and whether he told her that he was going to sign the letter, where that plaintiff had signed the letter and was familiar with its contents, and a letter written by his literary agent to attorney stated that he wished to have in the letter the substance of the first paragraph.

Gang, Kopp & Tyre, by Martin Gang, Payson Wolff, Los Angeles, for appellant.

Rosenthal & Norton, by Robert G. Rifkind, Beverly Hills, for respondents.

SHINN, Presiding Justice.

This action was brought by Arthur Carter and Jed Harris against Lewis Milestone, the complaint alleging that a controversy existed between the plaintiffs and defendant whether defendant had any contract rights in connection with the writing and production of a screen play, its release, distribution and exploitation and praying judgment that the defendant had no such rights. Certain incidental relief was sought. Defendant answered claiming an interest in the play as a partner or joint adventurer and cross-complained seeking recovery of $35,000 for services rendered and $1,862.85 for moneys expended in connection with the enterprise.

The principal contention of the plaintiffs was that although they had entered into a written agreement with the defendant with respect to the writing and production of a screen play the agreement was incomplete in material particulars and was, and was understood to be, in effect, no more than an expression of the intention of the parties to enter into a contract in the future which would express their full understanding and agreement. The findings sustained this contention, and it was decreed that defendant had no rights whatever in the screen play or its production. Defendant was awarded on his cross-complaint $500 against plaintiff Carter for sums advanced and $298.80 against Harris and Carter for sums expended and plaintiffs were awarded their costs of suit. Defendant appeals.

The transcript of the oral proceedings comprises some 600 pages of testimony but there is no substantial dispute as to any of the material facts upon which the court concluded that the parties did not understand or intend the writing to constitute a binding agreement.

Carter is a resident of Rhode Island and the author of an unproduced stage play entitled "Operation Mad Ball"; Harris, a resident of New York, is a producer and director of stage plays and motion pictures; Milestone, a resident of California, is a director of motion pictures. Between June 1955 and February 1956, Harris and Carter discussed the production of a motion picture based upon the play. In February 1956, upon the invitation of Harris, Milestone visited him in New York and read the play. These two with Carter had conferences during the ensuing two weeks and discussed forming a company to produce a picture. Upon the request of Harris, a New York attorney, Arnold Krakower, made a draft setting forth the preliminary ideas upon which a contract might thereafter be worked out and he presented to the three men option agreements under which Harris and Milestone would have a right to buy the screen play, but these were rejected; Carter wished to have an interest in the production, which he would not have had under the proposed options. Shortly thereafter the parties signed a letter drafted by Krakower. This is reproduced in the margin.[1]

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[1] March 16, 1956

"Mr. Jed Harris
"Mr. Lewis Milestone
"42 East 73rd Street
"New York, N.Y.

"Reference: Operation Mad Ball by Arthur Carter

"Dear Mr. Harris and Mr. Milestone:

"The signatures of the parties below will indicate that this is the general understanding under which formal contracts will be prepared.

"1. A company, which will undertake to produce the motion picture, is to be set up with Jed Harris, Lewis Milestone and Arthur Carter as equal partners.

"2. Arthur Carter is to receive $35,000 for both rights to his play and to the screenplay now being written. This $35,000 to be deferred. Mr. Harris and Mr. Milestone are to receive $50,000 each also to be deferred. The contract will, of course, detail the meaning of deferred, etc.

"3. The producing company is to have an option on the screen rights to the play for a period of four months from May 1, 1956, it being understood that a

Carter worked on the screen play and in April 1956 he and Harris came to California where Carter finished writing it.

The court found that before the agreement was signed Krakower told each of them that it was not a binding contract and gave rise to no legal rights, and that the parties each anticipated that a formal lengthy contract was to be negotiated in the future; they did not intend the signed document to be binding but intended it to be nothing more than a statement of intention upon which they would later try to work out a contract if a screen play was written by Carter in collaboration with Harris.

[1, 2] It is, of course, elementary that a writing which is intended by the parties to be a mere memorandum of intention to negotiate a contract and which does not purport to state the essentials of a proposed agreement is unenforceable. Dillingham v. Dahlgren, 52 Cal.App. 322, 198 P. 832. Whether the writing which is before us should be construed as a complete agreement or only as a memorandum which left essentials to future negotiations was to be decided in accordance with the ascertained intentions of the parties. 17 C.J.S. Contracts § 49, pp. 391–392; 12 Cal. Jur. 246–247; 122 A.L.R. 1232–1237; 165 A.L.R. 759–761.

[3] Whether the parties intended the writing to be presently effective or a mere memorandum of an intention to enter into an agreement to be prepared at a future date was a question of fact. The proof that they did not intend the writing to constitute their complete agreement could consist of evidence of an express agreement to that effect, or the fact could be inferred from manifest incompleteness of the writing itself. In the present case the finding has support in both forms of proof. With respect to the proof of an express agreement we do not have a question of the efficacy of an express agreement of the non-effectiveness of a writing which contains all the essentials of a completed contract in accordance with the intentions of the parties, but, rather, evidence of an understanding of the parties of the non-effectiveness of a writing which the court could and did reasonably conclude was incomplete and left essentials to further negotiation. The testimony in the case related almost exclusively to discussions of the plans of the parties and their understanding of the purpose and effect of the writing which they signed. Our discussion of that evidence will be brief. In his briefs appellant does not question the sufficiency of the evidence to support the finding that the parties did not intend the writing to be a complete or binding agree-

screenplay be completed and that the producing company will have made bona fide financing or distributing contracts which will insure the production of the motion picture by May 1, 1957.

"4. Arthur Carter is to be paid $1,000 on signing of the option agreement which is to cover his expenses for a period of four weeks beginning March 10, 1956, during which time he will be writing the screenplay. This period may be extended one additional week immediately following the four weeks for an additional payment of $250. If he is needed and available, Mr. Carter will contribute additional time and services during the making of the picture and the producers agree to pay his transportation and living expenses during such period or periods.

"5. This contract is to involve the making of one picture only, no remakes, no sequels.

"6. The parties agree that the form of formal contract to be entered into will be the standard form of motion picture production contract and shall contain all of the rights usually contained therein, including, but not being limited to, television and radio rights.

"7. In the event that the picture is not made by this company in the stipulated period of time, then any and all rights to the play and the screenplay must revert to Arthur Carter in order to keep his title free and clear. He will agree however, that in regard to the screenplay alone, he should get the first $35,000 and the next $35,000 should be divided equally between Mr. Harris and Mr. Milestone.

"Very truly yours,
"/s/ Arthur P. Carter
"Understood and Approved:
"/s/ Jed Harris /s/ Lewis Milestone"

ment and that they contemplated further negotiations. He says only: "Plaintiffs' Exhibit 1 [the March 16, 1956 writing] and the oral agreement of the parties constitute a valid contract." The finding as to the understanding and intentions of the parties, if justified by the evidence, is sufficient to support the judgment. Mr. Krakower testified with respect to the preparation of two formal contracts and their rejection by the parties; they had not reached agreement upon essential features; they wished only a memorandum of what they were planning to do; he prepared the letter and explained to them that it gave rise to no legal rights but might serve as an "aid to memoir." Appellant does not make a statement of any of the evidence relative to the finding that the parties did not intend the writing to be binding upon them and understood that a completed agreement would be subject to future negotiation. In the absence of an attack upon that finding, supported by a fair statement of the relevant evidence, with transcript references, we would be warranted in affirming the judgment upon that ground alone. Hickson v. Thielman, 147 Cal.App.2d 11, 304 P.2d 122.

Nevertheless we have read the record and find that in addition to the testimony of Mr. Krakower there was ample evidence in the testimony of Carter, of Harris and of Milestone that the parties had no intention of entering into a full and binding agreement unless and until they succeeded in negotiating with a major studio for the production of the screen play upon terms that were satisfactory to them. The reasons for this will be made clear from a consideration of the writing itself, coupled with the fact that the parties had no intention of making use of their own resources for the production of the screen play.

[4] It is contended by appellant that the finding as to the intentions of the parties would likely have been different had not the court sustained objections to certain questions asked of Carter on cross-examination. He was asked whether he had told his literary agent, Helen Harvey, to have inserted in the letter agreement the substance of the first numbered paragraph thereof and whether he told her he was going to sign the instrument. Objections to these questions were sustained. Carter had signed the agreement and was familiar with its contents. A letter written by Helen Harvey to Harris stated that Carter wished to have in the tentative agreement the substance of paragraph 1. Under these circumstances evidence of any discussion between Carter and his agent with respect to the inclusion of paragraph 1 in the letter agreement was properly excluded as immaterial. Also properly sustained was an objection to the question asked Carter as to the circumstances under which he received some documents from Mr. Krakower's office.

We turn now to the writing of March 16th. The court found that in numerous particulars it failed to state the terms of a completed agreement and that in those particulars there had been no meeting of the minds. This conclusion of the court is manifestly correct. Not only does the conclusion fortify the finding that the parties did not intend the writing they signed to be binding upon them but it constitutes in our opinion a correct conclusion that the incompleteness of the writing is shown upon its face.

The company which the parties were to form was to have four months from May 1, 1956 in which to acquire rights in the play and to produce financing and production contracts. Paragraph 3 reads in part: "* * * it being understood that a screen play be completed and that the producing company will have made bona fide financing or distributing contracts which will insure the production of the motion picture by May 1, 1957." This would call for a mutual agreement of the parties as to what would be bona fide financing or distributing contracts. Such contracts would have to be satisfactory to all the parties. Milestone testified that this provision related to the subject matter of paragraph 6 which reads: "The parties agree that the form of formal contract to be entered into will be the standard form of motion picture production contract and shall contain all of the rights usually contained therein, including, but not being limited to, television and radio rights."

The court found: "There is no such thing as a standard form of motion picture production contract. Such contracts generally run from seventy to ninety pages and each of the terms of such contracts can and do vary." This finding was based upon the testimony of Milestone that there is no standard form of production contract; each one is subject to negotiation; they vary in every important particular, depending upon the expected cost, the supposed value of the production, the actors and numerous other factors, and the percentage of interest in the production which is demanded for use of studio facilities and financing, which may run as high as 50%.

Appellant says in his opening brief: "In the within action, it is clear that the open terms were not only non-essential to the existence of a binding agreement, but also they were of a nature which had to be left to abide the conclusion of a production-release agreement with a major studio. This is the type of agreement that the parties contemplated would require 70 to 80 pages. In such an agreement the terms would be spelled out as to how much cash the major studio or financing agent would advance, and accordingly make funds available to the parties to enable them to schedule the payment of their deferments, for example." This is a frank statement, but contradictory. After stating that the "open terms" were non-essential it proceeds to show that the omitted terms were of the very essence of the agreement which the parties hoped to make. With respect to exercise of the option upon which depended the provisions for sums of $35,000 to be paid Carter and $50,000 each to Harris and Milestone mentioned in paragraph 2 of the writing, which were to be deferred, Milestone testified that exercise of the option would be contingent upon the negotiation of a contract with a major studio which it was hoped would advance the needed financing.

The entire project was dependent upon the negotiation of contracts with a major studio or distributing agency for financing and production of the screen play. There was no agreement, oral or written, nor was there even any discussion of the terms of such hoped for contracts that would be acceptable. If satisfactory contracts were not negotiated there would be no production of the screen play accomplished by the parties and no money to be divided; the project would fail. No such contracts were negotiated and the project did fail.

Under the provisions of paragraph 7 all rights in the screen play reverted to Carter. There is a provision reading: "He will agree, however, that in regard to the screenplay alone, he should get the first $35,000 and the next $35,000 should be divided equally between Mr. Harris and Mr. Milestone." The parties do not discuss the significance of this provision. Milestone testified that it meant that Carter could sell the screen play and if he did the first $70,000 was to be divided one-half to him and one-half to Harris and Milestone. Instead of relying upon this provision Milestone sued for $35,000 as the value of the services rendered to plaintiffs. The court found that he had rendered no services and this finding is not questioned. The provision we have quoted is not one which created any enforceable rights in Milestone. We do not have a contract which is legal in some particulars and illegal in others, nor one which for other reasons is in part valid and in part invalid. No question of severability is involved. We have only a writing which is no contract at all. It created no rights in Milestone as a partner or joint adventurer nor any other rights in the screen play or its production except in a contingency which never arose.

As we have seen, this appeal brings in question, except in minor particulars, only the sufficiency of the evidence to sustain the findings upon the controlling factual issues. The rules of law applicable to those facts are simple and clear. It would serve no good purpose to discuss the authorities relied upon by the appellant with respect to the sufficiency of the agreements construed in those cases since the facts in the cited cases bear no similarity to those of the instant case.

The judgment is affirmed.

PARKER WOOD and VALLÉE, JJ., concur.

170 Cal.App.2d 250

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Carlton KUYKENDALL, Defendant and Appellant.
Cr. 1408.

District Court of Appeal, Fourth District, California.
May 7, 1959.

Defendant was convicted of possession of marijuana. The Superior Court of San Diego County, John A. Hewicker, J., entered judgment, and the defendant appealed. The District Court of Appeal, Mussell, J., held that evidence sustained conviction, and that Superior Court did not coerce jury into returning a verdict of guilty.

Judgment affirmed.

1. Criminal Law 🔑1159(2)

On appeal from judgment of conviction by defendant, who contends that evidence is insufficient to sustain conviction, test is whether there is substantial evidence to support conclusion of trier of fact, and test is not whether guilt is established beyond reasonable doubt, and reviewing court will not attempt to determine weight of the evidence, but will decide only whether, on face of evidence, it can be held that sufficient facts could not have been found by trier of fact to warrant inference of guilt.

2. Criminal Law 🔑1144(13)

On appeal from judgment of conviction by defendant, who contends that evidence is insufficient to sustain conviction, reviewing court is bound to view evidence in light most favorable to the People.

3. Criminal Law 🔑1144(13)

Where defendant contended on appeal from judgment of conviction for possession of marijuana, that evidence was insufficient to sustain conviction, District Court of Appeal was required to assume in favor of jury's verdict the existence of every fact, which the jury could have reasonably deduced from the evidence, and then determine whether facts were sufficient to support the verdict. West's Ann. Health & Safety Code, § 11500.

4. Criminal Law 🔑1141(2), 1159(2)

Where appeal from judgment of conviction for possession of marijuana, was on ground that evidence was not sufficient to sustain jury's verdict, burden was on defendant to demonstrate that there was no evidence of a sufficiently substantial character to support the verdict on any reasonable hypothesis whatever, and it was not enough that established facts and circumstances might be reconciled with defendant's innocence, and before reversal could be had, facts were required to disclose no reasonable basis for any other inference than defendant's innocence. West's Ann.Health & Safety Code, § 11500.

5. Poisons 🔑9

Evidence sustained conviction for possession of marijuana. West's Ann.Health & Safety Code, § 11500.

6. Criminal Law 🔑768(1)

Where trial court, in prosecution for possession of marijuana, fully and fairly instructed jury as to law applicable and specifically told jury that trial court had nothing to do with questions of fact, weight of evidence, or credit to be given to any witness, and instructed that if trial court said or did anything which might have suggested to jury that trial court was inclined in favor of claims or positions of either party, jury should not permit itself to be influenced, and that jury should disregard any expression which seemed to indicate an opinion of trial court in relation to any of such matters, trial court did not coerce jury into returning verdict of guilty. West's Ann.Health & Safety Code, § 11500.

7. Criminal Law ⚿1166½(12)

In prosecution for possession of marijuana, comment by trial court on clothing and appearance of person on roof of apartment building where marijuana was hidden was not reversible error, where comment was in response to inquiry by jury. West's Ann.Health & Safety Code, § 11500.

8. Criminal Law ⚿865(1)

Statement of trial court, when jury was sent back for further deliberation, that if jury did not arrive at a verdict before 6 o'clock, jury would be present during the evening, and bailiff should move paraphernalia upstairs, did not amount to improper pressure on jury to agree.

9. Criminal Law ⚿1035(3)

A claim by defendant of misconduct on part of trial court will ordinarily not be considered on appeal, unless defendant gave trial court an opportunity to correct alleged misconduct.

◆

Carlton Kuykendall in pro per. and Howard R. Mueller, San Diego, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., and Peter T. Kennedy, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant and his codefendant Mary Ellen McGrew were charged with the wilful, unlawful and felonious possession of the narcotic marijuana in violation of section 11500 of the Health and Safety Code. Defendant McGrew pleaded guilty to the crime charged and was sentenced to imprisonment in the state prison. Appellant pleaded not guilty, admitted the four prior felony convictions charged in the information, and after trial by jury he was found guilty of possession of the narcotic as charged. His motion for a new trial was denied and he was sentenced to the state prison. He appeals from the judgment of conviction, contending that the evidence is insufficient to sustain the conviction and that the trial judge committed prejudicial error. On June 12, 1958, Mr. Welch, owner of the Welch Apartments at 166 16th Street in the city of San Diego, in the course of gathering trash from the roof, noticed a brown paper sack in a drain pipe at the southeast corner of the roof. Welch removed the sack from the drain pipe, took it to his apartment and called the police department. The contents of the sack consisted of three bundles, each containing about fifty cigarettes and each wrapped with yellow, red and green rubber bands. Officer Wilson of the San Diego Police Department removed a cigarette from each of the bundles, made identifying marks on some of the cigarettes, dusted the bag and its contents with florescent powder, replaced the sack in the drain pipe and placed the roof under surveillance. At 5:23 p. m. on said date officers Wilson and Mueller observed appellant Kuykendall emerge from a door onto the roof of the apartment house, proceed to the southeast corner of the roof, bend down out of sight, and return to the roof entrance. The officers then went to the front of the apartment house and arrested appellant, Mary Ellen McGrew, a Mr. Smith and a Miss Langley, all of whom were standing by the entrance.

The officers took these four persons into the building and up to the apartment occupied by Miss McGrew. She there emptied the contents of her purse on the table and attempted to conceal a cigarette package in her hand. This package contained five marijuana cigarettes, secured with a red rubber band. One of the officers then went to the roof and removed the sack which they had previously dusted with florescent powder and replaced in the drain pipe. The officer then found the package contained only two packages of cigarettes, bound by rubber bands, instead of three, which were in the package when it was dusted and replaced.

Miss McGrew was searched by a police woman at the police station and she found forty-nine marijuana cigarettes in the left side of Miss McGrew's brassiere. The brassiere and these cigarettes had florescent substance on them and several of the cigarettes had markings thereon made by the officer before he replaced the sack in the drain pipe. Dust of florescent powder was observed on appellant's left hand and two smears on his right hand. Debris removed from the pockets of appellant's vest was submitted to Mr. Orantes, criminalist for the city of San Diego, for examination and was found to contain particles of marijuana.

Miss McGrew testified that she went up on the roof at about 5:00 p. m. and obtained the cigarettes which she had placed there and which were later found on her person. Appellant testified that he arrived at the apartment at about 5:00 p. m. but did not go up on the roof.

[1–5] Appellant's first contention is that the evidence is insufficient to sustain a conviction. The test on appeal is whether there is substantial evidence to support the conclusion of the trier of fact. It is not whether guilt is established beyond a reasonable doubt, and the court on appeal will not attempt to determine the weight of the evidence, but will decide only whether upon the face of the evidence it can be held that sufficient facts could not have been found by the jury to warrant the inference of guilt. People v. Daugherty, 40 Cal.2d 876, 885, 256 P.2d 911. On appeal the reviewing court is bound to view the evidence in the light most favorable to the respondent. People v. Dail, 22 Cal.2d 642, 650, 140 P.2d 828. We must assume in favor of the verdict herein the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778. Where, as here, the appeal is on the ground that the evidence is not sufficient to sustain the findings of the jury, the burden is on the appellant to demonstrate that there is no evidence of a sufficiently substantial character to support the verdict upon any reasonable hypothesis whatever. It is not enough that the established facts and circumstances may be reconciled with the innocence of the accused. Before a reversal may be had, the facts must disclose no reasonable basis for any other inference other than appellant's innocence. People v. Hatton, 114 Cal.App.2d 195, 196, 249 P.2d 901. The evidence viewed in the light of the foregoing rules amply supports the implied finding of the jury that appellant had knowledge of and joint dominion and control of the marijuana sacks found by the officers. People v. Bagley, 133 Cal.App.2d 481, 484, 284 P.2d 36. The sack containing marijuana was replaced on the roof and dusted with florescent powder by the officers, who thereafter watched it. They saw appellant appear on the roof and go directly to the place where the sack was hidden, bend down, and then return to the roof entrance. Miss McGrew was not seen on the roof but had the cigarettes in her possession when arrested, and the jury reasonably deduced that she obtained them from appellant. Traces of florescent powder were found on appellant's hands and marijuana particles were found on his clothes, and the jury could reasonably infer that he was well aware of the nature of marijuana.

[6] Appellant argues that the court erred in giving additional instructions and in making comments to the jury indicating the court's belief of the guilt of the appellant and having the effect of coercing the jury to return a verdict of guilty. This argument is not meritorious. The court fully and fairly instructed the jury as to the law applicable in the case and

specifically told the jury that it had nothing to do with questions of fact, the weight of the evidence, or the credit to be given to any witness, and gave the further instructions that

> "If, during the course of the trial, I have said or done anything which may have suggested to you that I am inclined in favor of the claims or positions of either party, you will not suffer yourselves to be influenced by any such suggestion. I have not expressed, nor intended to express, nor have I intended to intimate any opinion as to which witnesses are, or are not worthy of belief, or what inferences should be drawn from the evidence. If any expression of mine has seemed to indicate an opinion relating to any of these matters, I instruct you to wholly disregard it."

and that

> "The jury are the sole and exclusive judges of the effect and value of evidence addressed to them and of the credibility of the witnesses who have testified in the case."

[7] The record shows that the court commented on the clothing and appearance of the person on the roof of the apartment building but this was in response to an inquiry by the jury. We find no reversible error in this connection. In People v. Ottey, 5 Cal.2d 714, 724, 56 P.2d 193, 198, it is said:

> "It is impossible to state in an opinion just what particular comment should or should not be made in all cases. That question must depend, in a criminal case, upon the nature of the charge, the nature of the evidence, and, to some extent, on the arguments of counsel—in short, upon all of the circumstances of the case. 'It is impossible, however, from the cases to find the dividing line between what is objectionable and what is not, and to lay down a hard and fast rule by which the doubtful cases can be placed on one side or the other of the dividing line. (Reviewing cases.) It is evident from an examination of these cases that each case, in a large measure, stands on its own bottom, except as to the recognition of certain general principles.' (Citations.)"

The record shows that when the jury was sent back for further deliberation the court commented as follows:

> "The Court: You may go out and deliberate. Say Mr. Bailiff, since they are currently going to be down here sometime this evening, I don't know whether they will arrive at a verdict before six o'clock, but if they don't, they are going to be here this evening and I would suggest you move your paraphernalia upstairs, because we have no facilities for calling over there and getting in touch with you, and after the court closes we have to have an outside line. They are provided for upstairs, so I suggest you take them upstairs. Then you can go down and take the exhibits up."

[8, 9] There is nothing in these remarks which suggested to the jury the court's opinion as to what the verdict should be nor was there any improper pressure on the jury to agree. Moreover, the appellant failed to object to the remarks of the trial court and a claim of misconduct on the part of the court will ordinarily not be considered on appeal unless the party who complains has given the trial court an opportunity to correct the error or false impression to the jury. People v. Cheary, 48 Cal.2d 301, 316, 309 P.2d 431.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

170 Cal.App.2d 307

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Ardis Adolph BLALOCK, Defendant and Appellant.

Cr. 6621.

District Court of Appeal, Second District, Division 1, California.

May 11, 1959.

Rehearing Denied June 2, 1959.

Hearing Denied July 8, 1959.

Proceeding on motion for order annulling, vacating and setting aside a judgment of conviction. The Superior Court of Santa Barbara County, Atwell Westwick, J., rendered an order denying relief, and the movant appealed. On motion to dismiss the appeal, the District Court of Appeal, White, P. J., held that question presented on appeal of whether trial court, when it entered an order granting a mistrial and discharging defendant from custody, assertedly because of judicial error, lost jurisdiction again to try defendant upon same charge and whether it had jurisdiction to enter subsequent order vacating order of mistrial was a substantial question of law which could be properly decided only after it was briefed, and appeal presenting question could not properly be dismissed as sham and frivolous.

Motion denied.

1. Criminal Law ⟹998

Where a judgment is void on the face of the record, it may be attacked either by appeal from the judgment or by motion to vacate the judgment.

2. Criminal Law ⟹998

Both an appeal from the judgment and a motion to vacate the judgment are not available in the same case, but an accused, contending that the judgment is void on the face of the record, may avail himself of either remedy.

3. Criminal Law ⟹1131(4)

Question presented on appeal of whether trial court, when it entered an order granting a mistrial and discharging defendant from custody, assertedly because of judicial error, lost jurisdiction again to try defendant upon same charge and whether it had jurisdiction to enter subsequent order vacating order of mistrial was a substantial question of law which could be properly decided only after it was briefed, and appeal presenting question could not properly be dismissed as sham and frivolous. West's Ann.Pen.Code, § 1141.

◆

Jack A. Otero, Santa Barbara, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., for respondent.

WHITE, Presiding Justice.

Respondent moves to dismiss this appeal on the ground that there is no merit therein; that it is sham and frivolous, and presents no appellate objective.

The record reflects that by an amended information, filed by the District Attorney of the County of Santa Barbara, defendant was accused of the crime of burglary. Five prior convictions of felonies were also alleged, all for the crime of burglary in the state of Texas. Two trials before juries resulted in mistrials while in a third trial the jury was unable to agree upon a verdict. A fourth trial before another jury resulted in a verdict finding defendant guilty of burglary as charged in the amended information, and which was found to be burglary of the second degree. All prior convictions charged against him were admitted by defendant to be true. Accordingly, judgment was pronounced July 1, 1957, sentencing defendant to state prison for the term prescribed by law. No appeal was taken from such judgment.

Thereafter, and on December 20, 1957, defendant filed in the Superior Court a motion to annul, vacate and set aside the aforesaid judgment.

The main contention advanced in support of this motion was based upon the fact that in one of the trials preceding the one resulting in conviction of defendant, the record reveals that defendant's motion for a mistrial was granted. "The Jury was then discharged and the *defendant discharged from custody*". (Emphasis added.) This order was made on March 12, 1957. On March 14, 1957, with defendant and his counsel present, the court made the following order: "Good cause appearing therefore the Court upon its own motion orders that the order heretofore made discharging the defendant from custody, be, and the same is hereby vacated and set aside."

It is appellant's contention that when the trial court discharged appellant from custody it had no jurisdiction to again try him upon the same charge, and, that the trial court was without power to set aside its order discharging appellant since the order made was in the exercise of its judgment.

Characterizing the instant appeal as being in the nature of an appeal from the denial of a petition for writ of error coram nobis, the attorney general relies upon the many cases which have established the rule in this state that the writ does not lie to correct errors of law, nor was it intended to authorize any court to review or reverse its opinions. That where the remedy of appeal or a motion for a new trial existed, as in the instant case, the writ of error coram nobis is not available. People v. Martinez, 88 Cal.App.2d 767, 774, 199 P.2d 375; People v. Tuthill, 32 Cal.2d 819, 822, 198 P.2d 505; People v. James, 99 Cal.App.2d 476, 482, 222 P.2d 117. Likewise, asserts respondent, coram nobis is not the proper vehicle for vindication of constitutional rights (People v. Adamson, 34 Cal.2d 320, 327, 210 P.2d 13; People v. Ayala, 138 Cal.App.2d 243, 246, 291 P.2d 517). Respondent finally contends "* * that on application for relief in the nature of a petition for writ of error coram nobis which states no ground within the limited scope of that writ, presents nothing to the court below and presents only an appeal to this court having no proper appellate objective, and, though a defendant may appeal from an order made after judgment *affecting his substantial rights* (Penal Code, Section 1237, subd. (3), an order denying relief to which he was not entitled does not constitute an order affecting his substantial rights."

[1, 2] Appellant, however, earnestly urges that this appeal is from an order denying a motion to annul, vacate, and set aside a judgment and is not in the nature of a petition for writ of error coram nobis. Appellant urges, and we are in accord with his contention, that where a judgment is void on the face of the record it may be attacked either by appeal from the judgment or by a motion to vacate the judgment. People v. Flohr, 30 Cal.App.2d 576, 579, 86 P.2d 862. While both remedies are not available in the same case, an accused may avail himself of either one or the other. In the case at bar the record discloses that on March 12, 1957, the trial court after declaring a mistrial made its order discharging the jury *and the appellant*. The latter now contends that since he was discharged, the court was without jurisdiction to again try him for the same offense.

[3] Penal Code, section 1141, provides: "*In all cases where a jury is discharged* or prevented from giving a verdict by reason of an accident or other cause, *except where the defendant is discharged* during the progress of the trial, or after the cause is submitted to them, the cause may be again tried." (Emphasis added.)

In the case of People v. Superior Court, 214 Cal. 513, 6 P.2d 955, wherein the trial court sustained defendant's motion for a directed verdict and dismissed the indictment, discharged the defendant and exonerated his bail, the Supreme Court stated at page 515 of 214 Cal., at page 955 of 6 P.2d, "The contention here is: If the indictment does not charge an offense, the court committed no error; if it does charge an offense, nevertheless the defendant is immune from further prosecution. The people, of course, must and do contend that the indictment is sufficient. But the court did not of its own motion, nor did the district attorney request that the defendant be held to await a new and sufficient indictment. *This situation makes the further prosecution of defendant on this charge unwarranted and illegal.* Pen.Code, §§ 1117 and 1141." (Emphasis added.)

It is true, as urged by respondent, that on March 14, 1957, the trial court did vacate and set aside its order of March 12, 1957, discharging appellant. However, appellant urges that the order of March 12th could not be set aside except under appropriate statutory procedure since it was made as the result of judicial error (McMahan v. Baringer, 49 Cal.App.2d 431, 432, 122 P.2d 63).

We are convinced that the instant appeal cannot be classified as frivolous and sham but presents substantial questions of law which should be briefed and determined upon the merits.

The motion to dismiss the appeal is denied.

FOURT and LILLIE, JJ., concur.

170 Cal.App.2d 246

Douglas CARLSON, by and through his guardian ad litem, Hilda Goclowski, and Hilda Goclowski, individually, Plaintiffs and Appellants,

v.

Donald C. GLANVILLE, individually and doing business as Glanville Plumbing Company, Defendant and Respondent.

Civ. 5672.

District Court of Appeal, Fourth District, California.

May 7, 1959.

Action for injuries sustained by a minor plaintiff as result of an explosion of a dynamite cap. Judgment for the defendant in the Superior Court of Kern County, Gordon L. Howden, J., and the plaintiff appeals. The District Court of Appeal, Griffin, P. J., held that alleged error in giving instructions on contributory negligence of the plaintiff was invited and could not be complained of on appeal.

Judgment affirmed.

1. Appeal and Error 🔑882(6)

A party who has tendered an issue by his complaint cannot object to his opponent offering evidence on that issue.

2. Appeal and Error 🔑882(12)

In action for injuries sustained by minor from explosion of a dynamite cap where plaintiff pleaded acts of negligence by the defendant and the answer set up defense of contributory negligence and plaintiffs submitted instructions on negligence and contributory negligence and the court gave similar instructions by the defendant, if there was error in giving instructions on contributory negligence, such error was invited by the plaintiff and he could not complain thereof on appeal. West's Ann.Health & Safety Code, §§ 12150.5, 12221.

Vizzard, Baker & Sullivan and Di Giorgio & Davis, Bakersfield, for appellants.

Mack, Bianco, King & Eyherabide, Bakersfield, for respondent.

GRIFFIN, Presiding Justice.

Plaintiff-appellant Douglas Carlson, aged 12, through his guardian ad litem Hilda Goclowski, and Hilda Goclowski individually, brought this action for damages against defendant-respondent Donald C. Glanville, individually and as Glanville Plumbing Company, for loss of the minor's left eye as a result of an explosion of an electrical dynamite cap.

Plaintiffs' complaint alleged that defendant did "carelessly, negligently and unlawfully keep * * * in a truck * * * a number of dynamite caps"; that defendant knew this and that said caps were attractive to children; and that as a result of the explosion of one of these caps the minor lost his eyesight. Defendant answered, denied generally these allegations, and set up, among the affirmative defenses, assumption of risk and contributory negligence.

Facts

A résumé of the facts shows defendant was a sewer contractor, and lived at 3231 Belle Terrace, Bakersfield. In the area back of his home he maintained certain fenced and unfenced property for the storage of equipment. Parked in this rather tall-fenced area was an old disabled truck formerly used by him. It had been inoperative since 1949. He had a sewer job in Porterville in 1951, and used dynamite and caps on that work. He returned a few unused caps from the job and testified he securely locked them in a box with two padlocks, in which he had tools stored, and placed it in the yard. He said he had no occasion to use them thereafter; that in November, 1954, he first noticed the hasps had been broken off of the box and the old tools and dynamite caps were missing; that he made a thorough search of the premises and in the various trucks and found none of the missing articles; that this included the particular old truck here involved where, in 1955, certain caps were found by some neighbor boys who had climbed over the fence, played on the old truck, and took the eight or nine caps they discovered on the seat of the truck or on the lid of the glove compartment, which were contained in a box marked "Explosive * * * Dynamite Caps". These three boys took the caps and hid them in a nearby slough. Later they divided them up. One testified that some time thereafter plaintiff Douglas Carlson, who was not with them when they first took the caps, came to his home and he dug them up from where he had buried them and discharged one cap by means of a wire connected to a dry-cell battery; and that Douglas then asked him for one so he gave it to him. Douglas testified he took the cap, hid it in his home in the loud speaker and in different other places because he did not want his mother to see it; that she did see it on one occasion and whipped him for having it, made him take it back to the other boy, and warned him that it was "very, very dangerous" and might blow up; that about March 10, 1956, after again obtaining it from the boy, he attached it to a wire and dry-cell and it exploded and put out his eye. The exploded cap was received in evidence. There was some evidence that it was a bit longer and shinier than the ones found in the old truck. The three boys testified they had been on the old truck before this occasion and they never saw these or any other caps there, and that defendant had run them off of his property on previous occasions and told them not to trespass upon it.

A verdict in favor of defendant resulted. Previous to submitting the case to the jury a motion to strike the affirmative defenses, i. e., assumption of risk and contributory negligence, from the answer, on the ground that absolute or strict liability existed, was conditionally denied, i. e., the judge then stated if he later entertained a different veiw he would cover it by instructions or on a motion for a directed verdict. The record does not show any subsequent motion by plaintiffs for a directed verdict or that any instruction on the subject of absolute liability was offered. It does show plaintiffs offered instructions on the subject of negligence and of contributory negligence. Instead of giving them, the court gave defendant's instruction on these subjects and refused plaintiffs' proffered instructions on the ground they were covered.

The principal argument on this appeal is that the court should not have given any instructions on negligence or contributory negligence because the evidence conclusively showed that under sections 12150.5 and 12221 of the Health and Safety Code, defendant was absolutely or strictly liable; that defendant's activity, as shown, was ultrahazardous, and accordingly the defense of contributory negligence was abrogated, citing such authority as 38 Am.Jur. p. 857, sec. 180; 171 A.L.R. 898; and cases cited in Caspar v. Lewin, 82 Kan. 604, 109 P. 657, 49 L.R.A.,N.S., 526; Maryland Casualty Co. v. Gulf Refining Co., La.App., 95 So.2d 734, 735; Morrison v. Lee, 22 N.D. 251, 133 N.W. 548, 38 L.R.A.,N.S., 412; Green v. General Petroleum Corp., 205 Cal.

328, 270 P. 952, 60 A.L.R. 475; and Luthringer v. Moore, 31 Cal.2d 489, 190 P.2d 1. Plaintiffs concede they have found no California cases directly in point.

[1, 2] Defendant contends otherwise, and argues that the burden was on plaintiffs to show defendant violated section 12150.5, supra, which provides:

> "Every person having any blasting caps (electric or nonelectric) in his possession or control, shall keep the same securely deposited in a locked receptacle, except when taken therefrom for actual use, transportation or sale";

that before any liability would attach under this section, they must plead it and further show a violation of section 12221, supra, i. e., that defendant *wilfully* or *negligently* violated that section and that the injuries resulted from this violation; and that accordingly, contributory negligence of plaintiffs would become involved as well as the question of proximate cause. It does appear that there is merit to defendant's argument but we deem it unnecessary to decide the question since it affirmatively appears that plaintiffs did plead acts of negligence on the part of defendant in their complaint and the answer did set up a defense of contributory negligence, and plaintiffs submitted proffered instructions on the question of negligence and contributory negligence. The court gave similar instructions offered by defendant. Under the authorities, if there was error in giving the instructions such error was invited. A party who has tendered an issue by his complaint cannot object to his opponent offering evidence on that issue. DeMirjian v. Ideal Heating Corp., 83 Cal. App.2d 400, 188 P.2d 834. See also Yolo Water & Power Co. v. Hudson, 182 Cal. 48, 51, 186 P. 772, 774, where it was definitely said: "A party cannot complain of an instruction given at his own request, or of an error in an instruction given at the instance of his adversary, when he requests a substantially similar one. 14 R.C.L. 815, and cases cited." To the same effect is Jentick v. Pacific Gas & Electric Co., 18 Cal.2d 117, 122, 114 P.2d 343; People v. Harlan, 133 Cal. 16, 65 P. 9; Hazelett v. Miller, 115 Cal.App.2d 801, 252 P.2d 997; Jansen v. Southern Pacific Co., 112 Cal.App. 2d 833, 845, 247 P.2d 581; and 4 Cal.Jur.2d 423, sec. 557.

Judgment affirmed.

MUSSELL and SHEPARD, JJ., concur.

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167 Cal.App.2d 69

ALVAK ENTERPRISES, a Corporation, et al., Plaintiffs, Cross-Defendants and Respondents,

v.

Philip C. PHILLIPS et al., Defendants, Cross-Complainants and Appellants.

Civ. 5911.

District Court of Appeal, Fourth District, California.

Feb. 2, 1959.

Proceeding was brought for stay of dissolution of corporation and for purchase of stock of persons seeking dissolution. The Superior Court, Riverside County, Hilton H. McCabe, J., entered an order staying dissolution and directing sale of stock, and the one seeking dissolution appealed. The District Court of Appeal, Coughlin, J. pro tem., 334 P.2d 148, affirmed the order. A petition for rehearing was filed. The District Court of Appeal held that on appeal from an order based on conflicting affidavits, it will be presumed that the trial court found as true the facts most favorable to the prevailing party.

Petition for rehearing denied.

1. Appeal and Error 🔑931(1)

On appeal from order based on conflicting affidavits, it will be presumed by reviewing court that trial court found as true the facts most favorable to prevailing party.

2. Appeal and Error ⚿1008(1)

Reviewing court will not disturb implied findings of fact made by trial court in support of an order, any more than reviewing court will interfere with express findings on which a final judgment is predicated.

3. Appeal and Error ⚿931(3), 994(3), 1011(1)

When evidence is conflicting, it will be presumed by reviewing court that trial court found every fact necessary to support its order that evidence will justify, and so far as the trial court has passed on the weight of the evidence or credibility of witnesses, its implied findings are conclusive.

4. Appeal and Error ⚿931(1)

When an issue is tried by affidavits, and evidence presented thereby is conflicting, those facts in support of order based thereon will be accepted by reviewing court as true, whether they are supplied by affidavits of losing party or prevailing party, or affidavits of both.

5. Trial ⚿382

The trier of fact may believe and accept a portion of the testimony of a witness, and disbelieve the remainder, even though the witness is a party.

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Thompson & Colegate, Riverside, F. Gillar Boyd, Jr., Palm Springs, Joseph Henry Wolf, Los Angeles, for appellants.

Shaw & Barnett, William W. Shaw, Riverside, for respondents.

PER CURIAM.

[1–3] In their petition for a rehearing, appellants contend that the facts stated in our opinion are incorrect because "on appeal from an order granting or denying a motion, which is decided on the basis of affidavits and where there are affidavits filed by both sides which strongly contradict each other, then it will be presumed that the trial court believed the facts to be as stated in the affidavits of the prevailing parties", citing Cameron v. Cameron, 110 Cal.App.2d 258, 261, 242 P.2d 408; Deyl v. Deyl, 88 Cal.App.2d 536, 199 P.2d 424; and Brock v. Fouchy, 76 Cal.App.2d 363, 172 P.2d 945. This is not a true statement of the rule. On appeal from an order based on conflicting affidavits it will be presumed that the trial court found as true the facts most favorable to the prevailing party. Huskey v. Berini, 135 Cal.App.2d 613, 619, 288 P.2d 43; Maselli v. E. H. Appleby & Co., Inc., 117 Cal.App.2d 634, 638, 256 P.2d 618. "'An appellate court will not disturb the implied findings of fact made by the trial court in support of an order, any more than it will interfere with the express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of evidence or the credibility of witnesses, its implied findings are conclusive. This rule is equally applicable whether the evidence is oral or documentary. In the consideration of an order made on affidavits involving the decision of a question of fact, the appellate court is bound by the same rule as where oral testimony is presented for review.'" Griffith Co. v. San Diego College For Women, 45 Cal.2d 501, 507, 289 P.2d 476, 479, 47 A.L.R.2d 1349; Bailey v. County of Los Angeles, 46 Cal.2d 132, 137, 293 P.2d 449; Murray v. Superior Court, 44 Cal.2d 611, 619, 284 P.2d 1; Byrnes v. Johnson, 138 Cal.App.2d 443, 446, 292 P.2d 1; Russell v. Landau, 127 Cal.App.2d 682, 690, 695, 274 P.2d 681; In re Jost, 117 Cal.App.2d 379, 388, 256 P.2d 71.

[4, 5] As a consequence, when an issue is tried by affidavits and the evidence presented thereby is conflicting, on appeal from an order based thereon, those facts in support of that order will be accepted as true whether they are supplied by affidavits of the losing party or the prevailing party, or both. "The trier of fact may believe and accept a portion of the testimony of a witness, and disbelieve the remainder" (People v. Whitehurst, 112 Cal.App.2d 140, 144, 245 P.2d 509, 511), even though the witness is a party. Goes v. Perry, 18 Cal.2d 373, 378, 115 P.2d 441; Industrial Indem-

nity Co. v. Industrial Accident Comm., 115 Cal.App.2d 684, 692, 252 P.2d 649.

Some of the facts related in our opinion are based on affidavits presented by appellants in connection with prior motions resulting in orders favorable to them. Respondent made these affidavits a part of his motion to stay proceedings. A rule which would require a court to reject the testimony presented by affidavits upon which it based a former order, in arriving at a later decision based on the same affidavits, would be unreasonable and illogical.

The petition for a rehearing is denied.

MUSSELL, Acting P. J., SHEPARD, J., and STONE, Justice pro tem., concur.

170 Cal.App.2d 310

MASQUE THEATER CORP., a California corporation doing business as Vagabond Theater, Plaintiff and Appellant,

v.

CITY OF LOS ANGELES, William Parker, individually and as Chief of Police of the City of Los Angeles, Roger Arnebergh, individually and as City Attorney of the City of Los Angeles, et al., Defendants,

City of Los Angeles, a municipal corporation, William Parker, as Chief of Police of the City of Los Angeles and Roger Arnebergh, as City Attorney of the City of Los Angeles, Respondents.

Civ. 23277.

District Court of Appeal, Second District, Division 3, California.

May 11, 1959.

Action by operator of theater against city and others for adjudication of rights to exhibit a motion picture and for injunctive relief. From adverse judgment of the Superior Court, Los Angeles County, Leon T. David, J., the operator appealed. The District Court of Appeal, Shinn, P. J., held that complaint filed by operator of motion picture theater, alleging that a motion picture which it had contracted to exhibit was not obscene and that no part or portion of it depicted any obscene acts but containing no allegation that picture was not indecent, immoral, or impure or that it did not depict any immoral, indecent, lewd or lascivious acts, was insufficient to state a cause of action for injunction restraining city and others from arresting and prosecuting employees of operator and confiscating film for violation of city ordinance or for a declaration of rights, but plaintiff should have been afforded an opportunity to amend complaint to cure its defects if possible.

Judgment reversed and operator permitted to amend its complaint.

1. Injunction 🔑121

Complaint filed by operator of motion picture theater, alleging that a motion picture which it had contracted to exhibit was not obscene and that no part or portion of it depicted any obscene acts but containing no allegation that picture was not indecent, immoral, or impure or that it did not depict any immoral, indecent, lewd or lascivious acts, was insufficient to state a cause of action for injunction restraining city and others from arresting and prosecuting employees of operator and confiscating film for violation of city ordinance or for a declaration of rights, but plaintiff should have been afforded an opportunity to amend complaint to cure its defects if possible.

2. Pleading 🔑225(1)

Trial court may not sustain a demurrer without leave to amend and enter judgment adverse to plaintiff unless it appears clearly that complaint cannot be amended to state a cause of action for relief.

3. Constitutional Law 🔑45

While courts have undoubted power to declare a statute invalid when it appears to them in course of judicial action to be in conflict with the constitution, yet they can only do so when question arises as a pure question of law, unmixed with matters of fact the existence of which must be determined upon a trial, and as the result of, it may be, conflicting evidence.

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Brock, Fleishman & Rykoff, Hollywood, for appellant.

Roger Arnebergh, City Atty., Philip E. Grey, Asst. City Atty., Wm. E. Doran, Deputy City Atty., Los Angeles, for respondents.

SHINN, Presiding Justice.

[1] Masque Theater Corporation brings this action against the City of Los Angeles and certain of its officers for an adjudication of its right to exhibit a motion picture which it has contracted to exhibit and which the defendants allegedly claim would be in violation of certain provisions of Ordinance 77000 of the city, namely, Sections 41.02 and 41.13 of the Los Angeles Municipal Code. Section 41.02(a) provides: "No person, either as owner, manager, producer, director, actor, or agent or who acts in any other capacity, shall give, direct, present, or participate in any obscene, indecent, immoral or impure drama, play, exhibition, show or entertainment, or any obscene, indecent, immoral, impure scene, tableau, incident, part or portion of any drama, play, exhibition, show or enteraínment."

Section 41.13(a) provides: "No person shall show, exhibit, display, rent, sell, loan, or give to any person, any motion picture or the projection of any picture, which pictures illustrate or depict any obscene, immoral, indecent, lewd, or lascivious act or acts."

It is alleged that the defendants threaten to and unless restrained will cause the arrest and prosecution of the employes of plaintiff and will confiscate the film if it is exhibited by plaintiff. The prayer of the complaint is for injunctive relief and a declaratory judgment. It is alleged that the plaintiff has been operating a motion picture theater for seven years and has built up a valuable goodwill; that it has a contract to exhibit the picture and if prohibited from doing so it will suffer great financial loss. The complaint is in two causes of action, the first alleging facts pertinent to its demand for injunctive relief, the second for a declaration of rights.

Defendants filed a demurrer, both general and special and a motion to strike certain portions of the complaint. The motion to strike was granted, the demurrer was sustained upon special grounds and also upon the general ground without leave to amend. Judgment for defendants was entered and plaintiff appeals.

By its complaint plaintiff attacked the constitutionality of the ordinance upon the ground that it invaded the right of free speech. The trial court filed a comprehensive opinion sustaining the constitutionality of the ordinance. Upon the appeal it is sought to have this court decide the same question.

The complaint was manifestly insufficient. Both grounds of demurrer were well taken. It alleges that the motion picture was not obscene and that no part or portion of it depicted any obscene act or acts, but it is not alleged that the picture was not indecent, immoral or impure and that it did not depict any immoral, indecent, lewd or lascivious act or acts. After argument on the demurrer the matter was submitted and in ruling upon it the court held that the single allegation that the picture was not obscene was insufficient to show that it was not immoral, indecent, lewd or lascivious; that these were terms understood in law and the use of them in the statute did not render it uncertain. Plaintiff insists that it could have amended the complaint so as to cure its defects but that it was given no opportunity to amend.

[2] It is elementary that a trial court may not sustain a demurrer without leave to amend and enter judgment adverse to the plaintiff unless it appears clearly that the complaint could not be amended to state a cause of action for relief. Oppenheimer v. Tamblyn, 162 Cal.App.2d 293, 327 P.2d 574.

It was alleged that the film could not conveniently be attached to the complaint but that the court was respectfully requested to consider the film as a part of the complaint and at its earliest convenience view the film, arrangements for which would be made possible by plaintiff at the convenience of the court. The court declined the invitation. It is not contended by appellant that the court should have viewed the picture before ruling upon the sufficiency of the complaint. If it has the merit that is claimed for it the complaint could have been amended by appropriate allegations.

It is clearly our duty to reverse the judgment with instructions to permit plaintiff to amend its complaint. If it is so amended as to state a cause of action for relief the case will proceed to trial on the issue whether exhibiting the picture would be in violation of the ordinance. Only in the event that issue should be determined against the plaintiff would the court be required to decide the constitutional question.

We would be departing from sound precedent were we to pass upon that question prematurely. "The impressive lesson of history confirms the wisdom of the repeated enunciation, the variously expressed admonition, of self-imposed inhibition against passing on the validity of an Act of Congress 'unless absolutely necessary to a decision of the case.' Burton v. United States, 196 U.S. 283, 295, 25 S.Ct. 243, 245, 49 L. Ed. 482, [485]. * * * Refusal to anticipate constitutional questions is peculiarly appropriate in the circumstances of this case * * * only an adjudication on the merits can provide the concrete factual setting that sharpens the deliberative process especially demanded for constitutional decision." United States v. International Union, 352 U.S. 567, 577, 578, 590, 77 S.Ct. 529, 540, 1 L.Ed.2d 563.

[3] The courts of California have always recognized and respected this rule. "While the courts have undoubted power to declare a statute invalid, when it appears to them in the course of judicial action to be in conflict with the constitution, yet they can only do so when the question arises as a pure question of law, unmixed with matters of fact the existence of which must be determined upon a trial, and as the result of, it may be, conflicting evidence." Stevenson v. Colgan, 91 Cal. 649, 652, 27 P. 1089, 1090, 14 L.R.A. 459. The rule is stated with citation of supporting authorities in Palermo v. Stockton Theatres, Inc., 32 Cal.2d 53, 65, 195 P.2d 1.

The judgment is reversed; plaintiff should be permitted to amend its complaint.

PARKER WOOD and VALLÉE, JJ., concur.

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170 Cal.App.2d 256

Muriel M. BROWN, Plaintiff and Appellant,
v.
Ralph I. GUY, doing business as Rigko Offices, and The Rig Company, Defendants.

Ralph I. Guy, Respondent.
Civ. 23388.

District Court of Appeal, Second District,
Division 1, California.
May 8, 1959.

Action for malpractice against chiropractor who gave ozone treatment to plaintiff while she was suffering from obstruction of arterial circulation in her lower limbs. The Superior Court of Los Angeles County, John J. Ford, J., rendered judgment for defendant, and plaintiff appealed. The District Court of Appeal, Lillie, J., held that evidence, on issue as to whether defendant had injected substance into plaintiff's foot, sustained verdict for defendant.

Affirmed.

1. Appeal and Error ⚿930(1)

On appeal from judgment for defendant in malpractice action, reviewing court was required to view evidence in light most favorable to defendant.

2. Appeal and Error ⚿933(1), 1195(1)

On appeal from order granting plaintiff's motion for new trial after verdict for defendant in malpractice action, reviewing court properly viewed evidence in light most favorable to plaintiff; but its observations were not binding on jury evaluating same testimony at second trial, and did not foreclose jury from exercising its own judgment as to weight of evidence, credibility of witnesses and proper inferences and conclusions to be drawn therefrom.

3. Appeal and Error ⚿1003

Before an appellate court can reject as incredible testimony that has been believed by trier of fact, such testimony must be wholly unacceptable to reasonable minds, unbelievable per se, and such that no reasonable person could believe it.

4. Physicians and Surgeons ⚿18(8)

In action for malpractice, against chiropractor who gave ozone treatment to plaintiff while she was suffering from obstruction of arterial circulation in her lower limbs, wherein issue was whether defendant had injected substance into plaintiff's foot, evidence sustained verdict for defendant.

5. Appeal and Error ⚿977(3, 5)

The granting or denial of motion for new trial rests so completely within discretion of trial court that appellate court will not interfere unless a patent abuse of discretion appears.

6. Appeal and Error ⚿933(5)

All intendments are in favor of action of lower court in rejecting new trial motion predicated upon jury misconduct and, therefore, affidavits in behalf of prevailing party are deemed not only to establish facts directly stated therein but all facts reasonably to be inferred from those stated.

7. New Trial ⚿140(3)

In malpractice action, wherein plaintiff moved for new trial on ground that juror had given, on voir dire examination, untruthful answers to questions as to whether she knew defendant, the chiropractic group of which he was a member, or that particular field of healing art, it was not, on record presented, error to deny motion.

8. Trial ⚿228(3)

A party is not entitled to have jury instructed in any particular language as long as court announces substance of law applicable to case.

9. Appeal and Error ⚿1056(1)

In malpractice action against chiropractor, it was not prejudicial error to refuse to permit testimony assertedly showing scheme or plan by defendant to attract customers to his offices by sale of food supplements, which scheme allegedly tended to represent that he was more qualified than average chiropractor and, as applied to plaintiff, could give injections. West's Ann.Code Civ.Proc. § 1868.

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Elmer Patrick Friel, Los Angeles, for appellant.

Carl B. Sturzenacker, Albert Hampton, DeForrest Home, Los Angeles, for respondent.

LILLIE, Justice.

[1, 2] This action, one for malpractice against the defendant, a chiropractor, has been twice tried and is now before this court on its merits a second time. At the first trial, the jury rendered its verdict for defendant, following which plaintiff's motion for a new trial was granted on the ground of the insufficiency of the evidence to support the same. This order was affirmed (Brown v. Guy, 144 Cal.App.2d 659, 301 P.2d 413), the evidence there and then being properly viewed in the light most favorable to plaintiff.

On retrial, the jury again returned a verdict for defendant. A motion for a new trial based on the insufficiency of the evidence and the asserted misconduct of the jury was denied. On appeal it is contended that the judgment lacks evidentiary support; and that the trial court erred in its refusal to give favorable consideration to affidavits of jurors in support of a new trial, in refusing a requested instruction based on the "law of the case" and in the rejection of certain evidence claimed to be admissible.

Except for the testimony of four additional witnesses, the evidence at the retrial was substantially the same as that given at the former trial, in fact, a great portion of such evidence consisted of oral testimony at the first trial which by stipulation was read into evidence from the reporter's transcript. The record of the proceedings below has reached this court in the form of a settled statement plus the transcripts on the former appeal which are incorporated by reference. We had occasion to comment on the type of record thus presented when defendant unsuccessfully moved to dismiss the appeal for noncompliance with the applicable rules (Brown v. Guy, 167 Cal.App.2d 211, 334 P.2d 67).

Although there is an implied suggestion by plaintiff that a different course should be followed, it is our duty herein to narrate the evidence in the aspect most favorable to defendant. The decision on the prior appeal, as already noted, was concerned solely with the question of whether the trial court abused its discretion in granting a new trial, and the appellate court's recitation of the facts necessarily presented the strongest possible statement of the plaintiff's case. Too, a reading of that opinion (144 Cal.App.2d 659, 301 P.2d 413) discloses that the court did not presume to indicate any view respecting the ultimate determination of the issues of fact presented in this controversy. Its observations, in short, were not binding on the jury evaluating the same testimony at the second trial and "did not foreclose it from exercising its own judgment as to the weight of the evidence, the credibility of the witnesses and the proper inferences and conclusions to be drawn therefrom" (Kalfus v. Fraze, 136 Cal.App.2d 415, 429, 288 P.2d 967, 976); and, of course, the rule is no different in malpractice actions where, as here, conflicting inferences are deducible from the testimony of medical experts (Agnew v. City of Los Angeles, 134 Cal.App.2d 433, 438, 286 P.2d 556).

Plaintiff, then in her fifties, sustained a block or blood clot at the saddle of the aorta on September 13, 1953. This artery, about the size of a garden hose, supplies blood to the vital organs inside the abdomen; at its saddle, or "Y," located near the pelvis, it divides into the right and left iliac arteries which continue down into the limbs and supply them with blood. The resulting obstruction of the arterial circulation produced a blood-starved condition in each leg, considerably more so in the right extremity. In such a case, according to all medical authorities, the onset of gangrene becomes imminent, which complication may arise either spontaneously from the insufficiency of blood supply or may be precipitated by minor trauma or infection. Since there is generally not sufficient circulation to heal even a minor bruise, preventative measures must be taken. As stated by a specialist who treated the plaintiff: "We warn these people, and very severely warn them, that they must under no circumstances injure that extremity or use strong chemicals * * * and never use any heat below (the) waist, particularly above the body temperature * * * any local injury in an extremity in which the circulation is deficient can start gangrene," which would include penetration of the tissues with a needle or some object of that character.

For two years prior to September 13, plaintiff experienced pain, cold and numbness in her legs. The condition turned acute on the evening of September 13 when she became nauseated after dinner and her legs, particularly the right extremity, grew numb and cold. Thereafter, this numb and painful condition of the right leg and foot continued without interruption. Seeking relief therefrom, she was treated from time to time by three osteopaths, a chiropractor and a physiotherapist. A practical nurse was engaged by plaintiff in mid-October. She testified that the plaintiff used a heat pad and a heat lamp on her right foot and also immersed it in hot water. In this latter connection, upon entering a hospital on November 16, 1953, plaintiff's history was taken by two different members of the staff and she mentioned the prior application of "hot packs" and "hot fulgerations" (sic); later she told still another doctor (Dr. Smith) that she had applied heat pads to her foot for two years prior to September of 1953.

On November 3, 1953, still without relief from constant pain, she consulted the defendant, a chiropractor whose practice was limited to that field of the healing arts. She directed attention to her right leg and foot and removed her footwear. After a brief examination, he told her he "couldn't help her one particle" but "would spray the Polyzone on the foot." He had purchased a polyzone machine six months previously and limited its use to skin irritations. This machine passes oxygen over an electrical field, converting the oxygen into ozone which is a gaseous oxidizing agent of questionable therapeutic value (although one of defendant's witnesses, a medical doctor, stated that he found it beneficial for certain conditions and never observed any adverse results). Defendant's machine, which was described and demonstrated to the jury, operates as follows: a rubber hose protrudes from the machine, attached to an ordinary oxygen tank, at the end of which hose a nozzle is permanently attached; various cannulae or tubes, which fit onto the end of the nozzle, can be inserted into the orifices of the body and the polyzone is sprayed into such orifices by pressing a button on the nozzle. As optional equipment, a 30-c.c. syringe, accompanied by a box of 12 hypodermic needles, may be furnished with the machine. By an operation unnecessary here to narrate, the syringe can be filled with the gaseous substance, removed from the machine and the hypodermic needle is then placed on the syringe. The use of this latter or injection technique by a chiropractor would concededly be unlawful; however, the spray technique is within the realm of proper chiropractic treatment and, according to one of plaintiff's experts, "would have no adverse effect whatever."

Plaintiff insists that defendant injected the substance into her foot; defendant insists he did not—that he only sprayed the area in question, and that during his 25 years of practice he had never used a hypodermic needle nor had one in his office. In this latter respect, he was corroborated by an associate who had officed with defendant for some 20 years. Opposing such claims, plaintiff and her witnesses described in detail the condition of the member following defendant's treatment. For example, plaintiff, upon arrival home, claims to have noticed a hole in her foot about the size of a needle, but a qualified medical witness for the defendant testified that a puncture hole is not apparent or visible after a needle of the size in question is withdrawn, owing to the elasticity of the skin.

About two days later, one Porter, another chiropractor, was called to plaintiff's house by plaintiff who injected novocaine around the site of the affected area which had taken the form of an ulcer. On November 16, 1953, plaintiff entered a Glendale hospital and placed herself under the care of an osteopathic physician on its staff. She gave this doctor a history of prior injections and, as previously recounted, the use of heat applications. The abscess was lanced and found thereafter, upon laboratory examination of the tissue, to be sterile, although necrotic. Plaintiff was in the hospital until November 25, when she returned to her home. The pain in the right leg and foot having worsened, in January of 1954 she consulted two medical doctors, and finally in the following month, Dr. Lawrence Smith, a medical doctor specializing in surgery and diseases of the arteries and veins, particularly the extremities. He found that the foot was gangrenous with the possibility of the same condition in the right upper thigh. On April 2, 1954, it became necessary for Dr. Smith to amputate the limb high up in the thigh; he reamputated the stump on May 21, 1954. Plaintiff's life expectancy is now practically nil.

[3, 4] Based in great measure on the testimony of Dr. Smith, who made an outstanding witness for the plaintiff, she urges that there is no real conflict in the evidence and that we should adopt Dr. Smith's evaluation of the entire case as the only rational explanation of the misfortune she experienced. However, the difficulty in embracing this view lies in the fact that Dr. Smith's diagnosis assumed that polyzone was injected, not sprayed; and his testimony did not completely rule out the precipitation of gangrene by trauma, either in the form of the novocaine injection by Porter, the lancing of the abscess at the Glendale hospital, or plaintiff's use of heat applications. It must be borne in mind, too, that there is here no claim of wrongful diagnosis, but, as counsel for both parties concede, the sole question is this: "Did defendant give the injection?"

Plaintiff argues, and at great length, that the testimony of defendant and a certain supporting witness "is inherently improbable and physically impossible." For example, she states that an injection "*must* make a hole"; competent medical testimony says otherwise, at least to the extent that the hole would be visible, as claimed by plaintiff, some time later. Before an appellate court can reject as incredible testimony that has been believed by the trier of fact, such testimony must be "wholly unacceptable to reasonable minds" (Kircher v. Atchison, T. & S. F. Ry. Co., 32 Cal. 2d 176, 183, 195 P.2d 427, 433), "unbelievable *per se*" (Lane v. Safeway Stores, Inc., 33 Cal.App.2d 169, 175, 91 P.2d 160, 163), and such that "no reasonable person could believe the testimony" (Tamble v. Downey, 104 Cal.App.2d 810, 812, 232 P.2d 543, 544). We cannot say that the challenged testimony belongs in any of these categories. Other physical facts are recounted and discussed by plaintiff which would be persuasive if addressed to a forum authorized to weigh the pros and cons thereof. The trial court denied a new trial after considering claims of an identical nature, and we are otherwise of the view that the evidence produced by the defense, particularly the inferences deducible therefrom, was of sufficient substantiality as to preclude any departure from the time-honored rule which has been stated and applied in a host of cases.

[5–7] It is next claimed that a new trial should have been granted because of untruthful answers given by a juror, Mrs. Montgomery, on *voir dire* examination. As required, the stenographic report of such proceedings has been supplied, together with the necessary affidavit that the facts therein set forth were not known before the verdict (Dunford v. General Water Heater Corp., 150 Cal.App.2d 260, 265, 309 P.2d 958). Also made a part of the record are the affidavits of three dissenting jurors which set forth occurrences during the deliberations which assertedly establish the offending juror's bias at the time of impanelment and concealed by her during *voir dire*.

During the proceedings prior to impanelment, Mrs. Montgomery denied knowing the defendant, the chiropractic group of which he was a member, or that particular field of the healing arts except in a general sort of way. In support of the motion for a new trial, affidavits were filed by plaintiff's attorney Mr. Friel, and three jurors, Mrs. Marchand (who voted for the defendant), Mrs. Marino and Mrs. Owens. The Friel affidavit averred that he met with the jury after its verdict had been returned and that Mrs. Montgomery then related an experience she had had with a medical doctor a year or two previously who gave her a "shot" which was in reality a "spray of ozone"; it was further averred that a few days later affiant telephoned Mrs. Montgomery and she told him that she knew a friend who knew the defendant and this friend had been benefitted by food supplements sold by the defendant. Mrs. Marchand stated in her affidavit that during the course of the trial, "at I believe one of the recesses"; Mrs. Montgomery stated she had a friend who had visited the defendant, had received food supplements from him and been benefitted; that during the jury's deliberations Mrs. Montgomery related an experience of hers with ozone therapy. Juror Marino's affidavit recounted statements by Mrs. Montgomery during deliberations to the effect that the latter had received an ozone spray from a medical doctor and that the spray felt like an injection. Juror Owens corroborated the foregoing allegations of Mrs. Marino.

A counteraffidavit was filed by Mrs. Montgomery in which it is alleged that on one occasion during the trial she orally "wondered" if the defendant could be the same doctor from whom a friend of hers had once received some type of food supplement and made such a remark only once; and during *voir dire* and during the trial she did not know whether the defendant was the doctor visited by her friend and was not sure of that fact until the trial had been concluded. There do not appear to be any denials of the several averments respecting her statements to fellow jurors of familiarity with ozone treatments, but she does deny that she recalled such prior experiences during the course of the jury's impanelment. The affidavits of five other jurors tended to negative those of the moving party.

The granting or denial of a motion for a new trial rests so completely within the discretion of the trial court that an appellate court will not interfere unless a patent abuse of discretion appears. There must first be an "affirmative showing of a gross, manifest, or unmistakable abuse of discretion" (Schultz v. Sussman, 7 Cal.App.2d 100, 102, 45 P.2d 409, 410). Because it is necessary to prevent instability of verdict and harassment of jurors, a juror should be permitted to impeach a verdict only in instances "violating the plainest principles of justice" (Kollert v. Cundiff, 50 Cal.2d 768, 773–774, 329 P.2d 897, 900). Whether those principles were here violated was committed to the trial judge in the first instance. Since all intendments are in favor of the action taken by the lower court, the affidavits in behalf of the prevailing party are deemed not only to establish the facts directly stated therein, but all facts reasonably inferred from those stated (DeWit v. Glazier, 149 Cal.App.2d 75, 82, 307 P.2d 1031). In People v. Webb, 143 Cal.App.2d 402, 300 P.2d 130, 142, the court reviewed an order denying a new trial based on a juror's misconduct. The rule here germane was again stated: "The trial court by its ruling denying the motion for a new trial necessarily impliedly found that Bradley did not misrepresent his state of mind on the *voir dire* examination. This finding cannot be reversed in the absence of a showing of a clear abuse of discretion." Too, it does not appear that Mrs. Montgomery's actions constituted proof of intentional (conscious) concealment. In Mast v. Claxton, 107 Cal.App. 59, 290 P. 48, a juror failed to disclose that one of the attorneys had previously represented him. The court pointed out that to justify the granting of a new trial on that ground, "it must be shown that some prejudice resulted to the appellant, or that there was a willfully false and untruthful answer given by the juror, which would lead to the inference that the juror was animated by a dishonest motive in qualifying" (107 Cal. App. at page 67, 290 P. at page 51). In the instant case, the trial court impliedly found that no such dishonest motives existed on the part of the juror concerned, and the record contains substantial support for such finding. Nor is there any affirmative showing of resulting prejudice sufficient to warrant a reversal. True, the jury stood nine to three, and Mrs. Marchand voted with the majority; but there is no averment in her affidavit or those of the other two jurors that Mrs. Montgomery's actions or remarks affected their independent judgment (Woods v. Pacific Greyhound Lines, 91 Cal.App.2d 572, 576, 205 P.2d 738). Furthermore, the trial court was in a far better position than this court to determine whether plaintiff was prejudiced, and her claims in that regard were rejected.

[8] It is further contended the trial court committed reversible error in refusing certain instructions offered by the plaintiff on the principles governing the liability of independent wrongdoers. Those principles were correctly stated in the prior opinion of this court (144 Cal.App.2d 659, 666–667, 301 P.2d 413), and are embodied in a single instruction which was submitted by the plaintiff and read to the jury with certain modifications and deletions. Complaint is now made that two additional instructions on the same general subject, but more applicable to the case from plaintiff's viewpoint, should also have been given. The claim is without merit. A party is not entitled to have the jury instructed in any particular language as long as the court announces the substance of the law applicable to the case (Hooper v. Bronson, 123 Cal.App.2d 243, 255, 266 P.2d 590), "Instructions should not draw the jury's attention to particular facts. It is error to give and proper to refuse an instruction that unduly overemphasizes issues, theories or defenses either by repetition or by singling them out or making them unduly prominent although the instruction may be a legal proposition" (City of Los Angeles v. Frew, 139 Cal.App.2d 859, 872, 294 P.2d 1073, 1082).

[9] The final contention relates to the court's refusal to permit testimony assertedly showing a scheme or plan by defendant to attract customers to his offices by the sale of food supplements, which scheme tended to represent that he was more qualified than the average chiropractor and, as applied to plaintiff, could give injections. Reliance is had on Firlotte v. Jessee, 76 Cal.App.2d 207, 172 P.2d 710, a breach of contract action, wherein reference is made to section 1868 of the Code of Civil Procedure on the avoidance of collateral questions. As the statute declares, the determination whether inquiry into such matters should be permitted is within the discretion of the court and the scheme here in question was certainly collateral to the main issue presented by the pleadings. Under the circumstances, no prejudice is manifest.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

170 Cal.App.2d 234

PEOPLE of the State of California,
Plaintiff and Respondent,
v.
Grant Dean GUNN, Defendant and
Appellant.
Cr. 6382.

District Court of Appeal, Second District,
Division 1, California.
May 7, 1959.

Defendant was convicted in Superior Court of Los Angeles County, LeRoy Dawson, J., of kidnapping his wife who had secured an interlocutory divorce decree, and he appealed. The District Court of Appeal, Fourt, J., held that evidence sustained conviction.

Affirmed.

1. Criminal Law 🔑260(11)

On appeal from conviction for kidnapping of former wife, reviewing court could only ascertain whether evidence was sufficient to support verdict, and reviewing court could not substitute its judgment for that of trial court. West's Ann.Pen.Code, § 207.

2. Kidnapping 🔑5

Evidence sustained conviction of defendant for kidnapping his wife, who had secured an interlocutory decree of divorce, over objection that former wife's testimony was inherently improbable. West's Ann. Pen.Code, § 207.

Gladys Towles Root, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Carl Boronkay, Deputy Atty. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment wherein appellant was convicted of a violation of section 207, Penal Code (kidnapping).

In an information filed in Los Angeles county, the defendant was charged with the crime of kidnapping in that he did, on or about August 9, 1957, unlawfully, forcibly steal and take Louise Gunn in the county of Los Angeles, and carry said person into the county of Riverside. The defendant pleaded not guilty and by stipulation the case was submitted to the trial court upon the transcript of the proceedings had at the preliminary hearing, with each side reserving the right to offer additional evidence. Additional testimony was heard at the trial.

The defendant was found guilty. Sexual psychopathy proceedings were instituted and the defendant was found to be a probable sex psychopath and was committed to a hospital for a ninety-day observation period. The hospital superintendent made a report to the court that defendant was not a sexual psychopath. Motions for a new trial and for probation were denied, and defendant was sentenced to the state prison.

The facts are substantially as follows: At about 8:30 o'clock p. m., August 9, 1957, the complaining witness, Mrs. Margaret Louise Gunn was driving home from her work in her Pontiac automobile, and was in the vicinity of El Segundo Boulevard and Anzac Street when the defendant drove up in an automobile with their two children. Mrs. Gunn had secured an interlocutory decree of divorce from the defendant on July 17, 1957. One of the children called from the defendant's car, "My daddy wants you to stop. He wants to talk to you." The defendant got out of the car he was driving and came over to the car of Mrs. Gunn and stated in effect that he wanted to talk to her about the children. They then agreed that each of them should take one of the children. The defendant put the older child into the Pontiac automobile of Mrs. Gunn, and he, the boy, secured the keys to the Pontiac car and gave them to the defendant, who then unlocked the car and got in. Mrs. Gunn left the car, but was caught by the defendant and put back into the Pontiac automobile, and the defendant then drove away with the two children and Mrs. Gunn in her automobile.

At about 8:30 o'clock p. m., on August 9, 1957, Delbert E. Brossard and Robert E. Miller were driving in the vicinity of El Segundo and Anzac streets when they heard a woman screaming, and later calling for help. They turned a corner and saw a Pontiac automobile drive away from the side of the street at forty-five to fifty-five miles per hour. They followed the automobile for about four or five blocks, but did not observe any disturbance inside of the car. Brossard wrote down the license plate number of the automobile on a slip of paper and turned it in to the police department authorities.

The defendant drove the car to Culver City, and then "out in the sticks" where he took Mrs. Gunn out of the car, to behind a fence, ripped off her clothes and committed an act of sexual intercourse upon her without her consent and against her resistance. He then bound her with his belt and gagged her with his shirt. The defendant then drove the automobile, with Mrs. Gunn and the two children in it, to a location on Culver Boulevard where his Studebaker car was parked on the street. During this time Mrs. Gunn was bound and gagged and her clothing consisted only of a "bra" and undergarments. She saw some people across the street, pushed off the gag and called for help. A man, who was a friend of the defendant, came to the car and was told by the defendant to pay no attention to Mrs. Gunn. The defendant then put the gag back in her mouth, placed her and the children in the Studebaker car and drove to Blythe, California, near the

Arizona border. While enroute to Blythe, the gag and the belt were removed from Mrs. Gunn, but she was not permitted to have her clothing. When they stopped for gasoline the defendant put a blanket over the head of Mrs. Gunn and clapped his hands over her mouth. They all slept in the car that night and arrived in Blythe the next day. From there they drove across the border. Mrs. Gunn did not say anything at the inspection station however, because the defendant had threatened to kill her if she did.

While in Arizona, the defendant and the children went swimming in the river. Mrs. Gunn was still without her clothing. Later the defendant took Mrs. Gunn to a trailer occupied by a woman friend of his and warned Mrs. Gunn not to say anything to the woman. The lady invited them in for coffee, and Mrs. Gunn announced that she did not have enough clothes on, and the woman put a towel around her. They spent two or three hours drinking coffee, and during that time Mrs. Gunn told the woman she was being held against her will.

Later Mrs. Gunn was given back her capri pants in which the zipper had been broken when the defendant had pulled them off of her. They drove into Blythe and Mrs. Gunn made a purchase of some new clothes in the presence of the defendant. The children, during this latter period of time, were left with the woman in the trailer. The defendant and Mrs. Gunn then drove out into the desert and had an act of sexual intercourse. They ate dinner at Blythe, and then drove back to Los Angeles. Mrs. Gunn and the two children were let out of the car at Sepulveda and Culver Boulevard. Mrs. Gunn went immediately to the office of the District Attorney. The next day she went to work and that evening went to an emergency hospital.

For several months prior to the incidents heretofore related, Mrs. Gunn had lived away from the defendant. During that period he had threatened to kill her if she did not come back to him, and she was very much afraid of him. She stated further that from the moment he pulled her into the Pontiac car on August 9, and including the trip to Blythe and across into Arizona, and until she returned to Los Angeles and was released with the children on August 11, that she desired to be away from the defendant, and that she accompanied him against her will. She stated in effect that she was hindered from escaping because she was only clothed in underwear. She also stated that the defendant had twice beaten her while on the trip, first when he committed an act of intercourse with her, and secondly while on the way to Blythe. She was never outside of the presence of the defendant.

The appellant now contends that the evidence was insufficient to support the conviction in that the testimony of Mrs. Gunn was inherently improbable.

[1] In reviewing the evidence in this case it is not appropriate that we attempt to substitute our judgment for that of the trial court. Our only function is to ascertain whether the evidence is sufficient to support the conviction. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778; People v. Tedesco, 1 Cal.2d 211, 219, 34 P.2d 467; People v. Gardner, 147 Cal.App.2d 530, 536–537, 305 P.2d 614; People v. Loehr, 35 Cal.App.2d 1, 4–5, 94 P.2d 390.

This case was heard by an experienced and skilled trial judge, who stated, in effect, at the conclusion of the trial that from the reading of the transcript of the preliminary hearing he was struck, in the first instance, with what appeared to be a fantastic story as related by Mrs. Gunn; but, that upon hearing the defendant and observing him in court, the defendant himself "added weight to the original story of the victim." The judge also stated in effect that much of the victim's story was corroborated by other evidence. The trial judge was satisfied as to the guilt of the defendant, the sufficiency of the evidence, and as to the fairness of the trial; otherwise he would have granted the motion for a new trial.

It is true, as said in People v. Lewis, 18 Cal.App. 359, at page 364, 123 P. 232, at page 234:

> "* * * Cases have occurred, * * * where the appellate court has felt itself constrained, in the interest of justice, to override the conclusions of jury and trial court, but such cases are rare, and occur only where the uncorroborated testimony of the complaining witness is so obviously and so inherently improbable as to leave the court no recourse, without self-stultification, except to reverse the judgment. But this obvious and inherent improbability must, however, very plainly appear before the reviewing court should assume the functions of the trial jury."

The courts of this state have set forth what must be found before it can be said that the evidence is inherently improbable. In People v. Huston, 21 Cal.2d 690, at page 693, 134 P.2d 758, at page 759, the court said:

> "Although an appellate court will not uphold a judgment or verdict based upon evidence inherently improbable, testimony which merely discloses unusual circumstances does not come within that category. (Citing case.) To warrant the rejection of the statements given by a witness who has been believed by a trial court, there must exist either a physical impossibility that they are true, or their falsity must be apparent without resorting to inferences or deductions. (Citing cases.) Conflicts and even testimony which is subject to justifiable suspicion do not justify the reversal of a judgment, for it is the exclusive province of the trial judge or jury to determine the credibility of a witness and the truth or falsity of the facts upon which a determination depends. (Citing case.)" See also, People v. Gardner, supra, 147 Cal.App.2d 530, 536–537, 305 P.2d 614; People v. Carr, 113 Cal.App.2d 783, 786, 248 P.2d 977; People v. Brown, 100 Cal.App.2d 207, 209, 223 P.2d 60.

Also, in People v. Braun, 14 Cal.2d 1, at page 5, 92 P.2d 402, at page 404, it was said: "'A statement, to bear upon its face the brand of improbability, or which may be said to be unbelievable *per se*, must involve, we think, a claim that something has been done that it would not seem possible could be done under the circumstances described, or involve conduct that no one but a person of a seriously calentured mentality would be likely to do.' People v. Haydon, 18 Cal.App. 543, 553, 123 P. 1102, 1108, 1114. * * *"

[2] We have heretofore set forth a résumé of the testimony, and we are of the opinion that the appellant is incorrect in his contention that the testimony is inherently improbable under the law. There is no doubt that the defendant, in forcing Mrs. Gunn back into her automobile and then driving as he did under the circumstances, committed an act of kidnapping. See, People v. Gallagher, 164 Cal.App.2d 414, 330 P.2d 464; People v. Nieto, 14 Cal.App.2d 707, 58 P.2d 945; People v. Arechiga, 72 Cal.App.2d 238, 164 P.2d 503; People v. Brazil, 53 Cal.App.2d 596, 128 P.2d 204; People v. Harris, 67 Cal.App.2d 307, 154 P.2d 442; People v. Valdez, 3 Cal.App.2d 700, 40 P.2d 592; People v. Trawick, 78 Cal.App.2d 604, 178 P.2d 45.

The appellant seems to rely almost entirely upon the language in the case of People v. Carvalho, 112 Cal.App.2d 482, 246 P.2d 950. However, a reading of that case will at once disclose that the factual situation in the instant case, and the facts in the cited case are different in many essential particulars.

We are not concerned with what motivated the conduct of Mrs. Gunn while in Blythe, after the defendant bought her some clothing. The kidnapping at that time had already occurred, and the fact that she adopted the course of conduct which she did, does not necessarily mean that the previous occurrences as she stated them were inherently improbable. Unusual circumstances are not necessarily inherently improbable. People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758; People v. Dragoo, 121 Cal.App.2d 322, 324, 263 P. 2d 90; People v. Becker, 140 Cal.App. 162, 165–166, 35 P.2d 196; People v. Collier, 111 Cal.App. 215, 226, 295 P. 898.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

Harold L. COSPER, Plaintiff and Appellant,
v.
SMITH & WESSON ARMS CO., a corporation, et al., Defendants.

Smith & Wesson, Inc., Respondent.*
Civ. 5677.

District Court of Appeal, Fourth District, California.
May 6, 1959.

Hearing Granted July 1, 1959.

Personal injury action against foreign corporation. The foreign corporation filed motion to quash service. The Superior Court, Kern County, Norman F. Main, J., entered order granting motion, and plaintiff appealed. The District Court of Appeal, Mussell, J., held that where revolver manufacturer was Massachusetts corporation with its offices and manufacturing facilities in Springfield, Massachusetts, and corporation was not qualified to do business in California and had no agents, salesmen or other employees residing in California and had no resident representative authorized to adjust complaints, and manufacturer had no offices in California and no property inventory or assets in California and did not solicit retail business but distributed its products f. o. b. Springfield through regular and dealer channels, and sales promotions were principally conducted by a manufacturer's representative who solicited business, in common with other lines, against an overriding discount or commission, the manufacturer was not "doing business" in California and service upon manufacturer was not effectuated by service on manufacturer's representative.

Order affirmed.

1. Corporations 🔑642(4½)

Where revolver manufacturer was Massachusetts corporation with its offices and manufacturing facilities in Springfield, Massachusetts, and corporation was not qualified to do business in California and had no agents, salesmen or other employees residing in California and had no resident representative authorized to adjust complaints, and manufacturer had no offices in California and no property inventory or assets in California and did not solicit retail business but distributed its products f. o. b. Springfield through regular and dealer channels, and sales promotions were principally conducted by a manufacturer's representative who solicited business, in common with other lines, against an overriding discount or commission, the manufacturer was not "doing business" in California and service upon manufacturer was not effectuated by service on manufacturer's representative.

See publication Words and Phrases, for other judicial constructions and definitions of "Doing Business".

2. Corporations 🔑642(1)

Whether a corporation is doing business in a state in the sense required by a process statute is peculiarly dependent upon the facts of the particular case.

3. Corporations 🔑668(16)

In action against foreign corporation, plaintiff had burden of proving that person upon whom process was served was the authorized agent or general manager of corporation in California. West's Ann.Corp. Code, § 6501.

4. Corporations 🔑668(16)

In action against foreign corporation, evidence supported implied finding that the person upon whom process was served was not the authorized agent or general manager of corporation in California. West's Ann.Corp. Code, § 6501.

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* Opinion vacated 346 P.2d 409.

5. Appeal and Error ⚷914(1)

On appeal from order granting defendant foreign corporation's motion to quash service of process, District Court of Appeal was required to accept as true the statements of foreign corporation's president in his affidavit that corporation had no agents, salesmen or other employees residing in California.

◆

Morris B. Chain and Milton M. Younger, Bakersfield, for appellant.

Borton, Petrini, Conron & Brown, Bakersfield, for respondent.

MUSSELL, Justice.

This is an action for personal injuries alleged to have been sustained by plaintiff when the cylinder of a revolver, purchased by him from defendant F. Morton Pitt and manufactured by Smith & Wesson, Inc., a Massachusetts corporation, "exploded and blew apart", causing the permanent loss of vision in plaintiff's right eye.

[1] Service of summons and complaint on Smith & Wesson, Inc., was attempted to be made by serving Walter K. Lookabaugh as the alleged agent, sales manager and manufacturer's representative for Smith & Wesson Arms Company in California. Special appearance on motion to quash service was made by Smith & Wesson, Inc., supported by the affidavit of Carl L. Hellstrom, president of said company. The motion was heard on this affidavit and on counter affidavits filed by plaintiff. The trial court granted the motion to quash service of summons and plaintiff appeals from the order granting it, claiming that Smith & Wesson, Inc., was "doing business" in the state of California and that proper service upon Smith & Wesson, Inc., was effected by service upon Walter K. Lookabaugh. These issues were tried on affidavits and involved issues of fact.

In Griffith Co. v. San Diego College for Women, 45 Cal.2d 501, 507, 508, 289 P.2d 476, 479, 47 A.L.R.2d 1349, the court said:

> " 'An appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated. When the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify. So far as it has passed on the weight of evidence or the credibility of witnesses, its implied findings are conclusive. This rule is equally applicable whether the evidence is oral or documentary.' "

In Fuller v. Lindenbaum, 29 Cal.App.2d 227, 230, 84 P.2d 155, 157, on an appeal from an order granting a motion to quash service of summons, the court said:

> "Furthermore, in the consideration of an appeal from an order made upon affidavits involving the decision of a question of fact, an appellate court is bound by the same rule that controls it where oral testimony is presented for review. If there is any conflict in the affidavits, those in favor of the prevailing party must be taken as true, and the facts stated therein must be considered established. (Citations.)"

In Murray v. Superior Court, 44 Cal.2d 611, 619, 284 P.2d 1, it is said that an appellate court will not disturb the implied findings of fact made by a trial court in support of an order, any more than it will interfere with express findings upon which a final judgment is predicated; that when the evidence is conflicting, it will be presumed that the court found every fact necessary to support its order that the evidence would justify; that so far as it has passed on the weight of the evidence, its implied findings are conclusive; and that this rule is equally applicable whether the evidence is oral or documentary.

The affidavit of Carl R. Hellstrom, president of Smith & Wesson, Inc., filed in support of the motion to quash, is as follows:

> "I, Carl R. Hellstrom, President of Smith & Wesson, Inc. on oath depose and say:
>
> "That Smith & Wesson, Inc. is a Massachusetts Corporation with its offices and manufacturing facilities in Springfield, Massachusetts.
>
> "That Smith & Wesson, Inc. is not qualified to do business in California, and has not filed an application to do business in California, and has not requested the Secretary of State, or other lawful authority, to do business in California.
>
> "That Smith & Wesson, Inc. has no agents, salesmen, or other employees residing in California, nor any resident representative authorized to adjust any claims or complaints against Smith & Wesson, Inc. in California.
>
> "That Smith & Wesson, Inc. has never had, nor does it now have offices in California, nor has it held any sales conventions in California.
>
> "That Smith & Wesson, Inc. has no property, inventory or assets in California.
>
> "That Smith & Wesson, Inc. does not solicit retail business, but distributes its products F.O.B. Springfield through regular wholesale and dealer channels. Sales promotions are principally conducted by long established firms known as manufacturer's representatives, which on their own time and expense solicit business in several allied lines against an over-riding discount, or commission, on business initiated by them.
>
> "That the Walter Lookabaugh Co. of California and its predecessor, the Paul S. Linforth Co., have been known to us as general manufacturer's representatives specializing in the sporting goods field.
>
> "That Smith & Wesson, Inc. has never had, nor does it now have, any contract or agreement with them except that they were, in common with their other lines, to promote on a non-exclusive basis the sale of our products on the west coast against a straight commission of 5%.
>
> "That Smith & Wesson, Inc. does not now have, nor has it ever had, any financial interest in the Lookabaugh Co. or its predecessors, and that Smith & Wesson, Inc. does not have any control or jurisdiction of the Walter Lookabaugh Co. or its employees.
>
> "That the Walter Lookabaugh Co. buys its own samples and that no help or assistance is given them by Smith & Wesson, Inc., except such advertising material as is furnished by Smith & Wesson, Inc. to the general jobbing trade throughout the world.
>
> "/s/ Carl R. Hellstrom
>
> "Then appeared personally, Carl R. Hellstrom, President of Smith & Wesson, Inc., and swore that the above recited facts are true and correct to the best of his knowledge and belief.
>
> "/s/ Vera G. Rockstroh"

In opposition to the motion appellant filed the affidavit of counsel for appellant in which he stated that on May 7, 1957, he took the deposition of Walter K. Lookabaugh in which Lookabaugh made certain statements relative to his business transactions with Smith & Wesson, Inc. This deposition was not signed or filed with the trial court and the court ruled that it was not admissible. Moreover, the statements in the affidavit of counsel alleged to have been made by Lookabaugh are clearly hearsay and of no probative value. Other statements of counsel in his affidavit are made on information and belief.

In the affidavit of Lynn A. White, deputy chief of police in Los Angeles, filed in opposition to the motion, affiant states that in 1956 he wrote to Smith & Wesson, Inc., asking that a representative of the company be sent to call upon them to discuss alleged structural weaknesses of Smith &

Wesson firearms and that Lookabaugh called upon him and stated that he was a representative of the company and had come to discuss complaints.

Depositions of Hannah A. Giegerich, Frank W. Symonds and Harold O. Austin were offered by appellant. Objection to these depositions and motions to suppress them were made by Smith & Wesson, Inc., and the trial court ruled that they were not admissible as depositions since they were taken without notice. However, the court evidently considered them as affidavits. These alleged depositions or affidavits are not made a part of the record before us and while they might result in a conflict in the evidence, the facts stated in the affidavit of Carl Hellstrom, president of Smith & Wesson, Inc., substantially support the trial court's conclusions that

> "1) Walter Lookabaugh is not (a) an officer of defendant Smith and Wesson, Inc., nor (b) 'the general manager in this state' of said defendant, nor (c) the designated agent of said defendant for service of process in California;
>
> "2) That defendant Smith and Wesson, Inc., is not doing business in California in the sense required to make it amenable to process there."

In Gordon Armstrong Co. v. Superior Court, 160 Cal.App.2d 211, 217, 325 P.2d 21, 24, the court, in discussing the concept of "doing business" which will subject a foreign corporation to local process, quoted the following from Jeter v. Austin Trailer Equipment Co., 122 Cal.App.2d 376, 388, 265 P.2d 130:

> " 'By way of recapitulation of the current state of the law under the evolving concept of the "doing business" requirement, it is deducible from the cases that the essentials of due process are fully met, at least for the purposes of amenability to local process and jurisdiction, if a foreign corporation maintains substantial contacts with a state through a course of regularly-established and systematic business activity, as distinguished from casual, isolated, or insubstantial contacts or transactions. The court must be astute to weigh the facts of the individual case to determine whether the particular type of activity in, relation to, or nexus with, the forum is of such substance as will make it just and equitable to conclude that a corporation is "doing business" in the sense required by the purpose at hand.' "

In West Publishing Co. v. Superior Court, 20 Cal.2d 720, 727, 128 P.2d 777, 780, it is said:

> " 'A foreign corporation is amenable to process to enforce a personal liability, in the absence of consent, only if it is doing business within the state in such manner and to such extent as to warrant the inference that it is present there. And even if it is doing business within the state, the process will be valid only if served upon some authorized agent.' The determination of this jurisdictional question 'is often a matter of great difficulty and extreme nicety. No all-embracing rule as to what is doing business has been laid down.' "

In the instant case the affidavit of the president of Smith & Wesson, Inc., establishes on appeal not only the facts stated therein but all facts which reasonably may be inferred therefrom. It appears from said affidavit that Smith & Wesson, Inc., is a Massachusetts corporation with its offices and manufacturing facilities in Springfield, Massachusetts; that it is not qualified to do business in California; that it has no agents, salesmen, or other employees residing in California, nor any resident representative authorized to adjust any claims or complaints for the company; that it has no offices in California and has no property inventory or assets in California; that it does not solicit retail business but distributes its products f. o. b. Springfield through regular and dealer channels; that sales promotions are principally conducted by firms known as manufacturers' representatives, which on their own time and at their own expense solicit business in several allied lines against an overriding discount or commission on business initiated by them; that the company has never had a contract or agreement with the Lookabaugh Company, except that they were, in common with other lines, to promote on a nonexclusive basis the sale of Smith & Wesson products on the west coast against a straight commission of five per cent; that Lookabaugh Company buys its own samples and that no help or assistance is given them by Smith & Wesson except such advertising material as is furnished by Smith & Wesson to the general jobbing trade throughout the world.

Accepting the foregoing facts stated in said affidavit as true, and the facts which reasonably may be inferred therefrom, we can not say as a matter of law that Smith & Wesson, Inc., was "doing business" in California under the rules announced in the foregoing decisions.

[2] As is said in Jeter v. Austin Trailer Equipment Co., supra, 122 Cal.App.2d 376, 381, 265 P.2d 130, 134: "Whether a corporation is doing business in a state in the sense required by a process statute is peculiarly dependent upon the facts of the particular case." And in Confidential, Inc. v. Superior Court, 157 Cal.App.2d 75, 79, 320 P.2d 546, 549, it was held that "The burden rests upon a plaintiff who has served process upon a foreign corporation to establish that it was doing business in the state at the time of service, or had other sufficient contacts with its people or affairs to warrant the inference that it had subjected itself to the state's jurisdiction. (Citations.)"

[3–5] The implied finding of the trial court that plaintiff failed to establish that Smith & Wesson, Inc., was doing business in the state of California is supported by the record before us. The purported service was not made on the secretary of state as provided for in Corporations Code, section 6501, nor was a preliminary order under said section obtained. Service was attempted under section 6500 of the Corporations Code, which provides for service of process on a foreign corporation by delivery by hand of process to "(a) to the president or other head of the corporation, a vice president, a secretary, an assistant secretary, the *general manager in this State,* or if the corporation be a bank to a cashier or an assistant cashier, * * *". (Italics added.) Appellant's contention is that Walter K. Lookabaugh is the general manager of Smith & Wesson, Inc., in this state. The burden of proving that Lookabaugh was the authorized agent or general manager of said corporation in this state was upon plaintiff. In this connection, it appears from the affidavit of Carl H. Hellstrom that Smith & Wesson, Inc., has no agents, salesmen or other employees residing in California and there is no evidence that Lookabaugh was or is the general manager of said corporation. On appeal we are required to accept the statement of Hellstrom as true. Fuller v. Lindenbaum, supra, 29 Cal.App.2d 227, 228, 84 P.2d 155. In West Publishing Co. v. Superior Court, supra, 20 Cal.2d 720, 727, 128 P.2d 777, it is held that even if a foreign corporation is doing business in this state the process will be valid only if served upon some authorized agent. The same rule is recognized in Jeter v. Austin Trailer Equipment Co., supra, where the court said, 122 Cal. App.2d at page 388, 265 P.2d at page 138:

> "A foreign corporation may be doing business in a state through the instrumentality of independent contractors located therein, yet those persons through whom its local business is conducted may not be so bound to the foreign corporation as to make them agents capable of receiving process on behalf of the corporation. (Citations.)"

In Smith and Wesson, Inc. v. Municipal Court, 136 Cal.App.2d 673, 289 P.2d 26, an attempt was made to support the agency of Lookabaugh by the statements of Lookabaugh to an investigator that he was a sales representative of the corporation and had an office in San Francisco. It was there held that the statements of Lookabaugh were not admissible to prove that he was an agent of the company. It was further held that the facts adduced at the hearing of the motion to quash service of summons and complaint were not sufficient to make Smith & Wesson, Inc., amenable to process of the courts of this state.

Appellant relies heavily on Gray v. Montgomery Ward, Inc., 155 Cal.App.2d 55, 317 P.2d 114, also decided by this court. In that case defendant Duro-Metal Products Company filed a special appearance and motion to set aside service of summons and complaint on the ground that the corporation was not doing business in California. The matter was heard on affidavits and the affidavit of E. Bellezzo, the manufacturer's agent handling Duro-Metal products in California, showed that he was the manufacturer's agent in California; that he called upon dealers and prospective dealers in California and new dealers were appointed upon his recommendation; that he checked proposed dealers' credit, type of distribution and type of salesmen employed. He testified that once a dealer for Duro was appointed he called upon him urging him to stock with and promote sales of Duro-Metal products; that he occasionally delivered catalogues and brochures furnished by Duro-Metal products to dealers and was under the supervision of a sales manager who maintained an office in Illinois; that he received a commission on orders delivered to him personally and on others mailed directly to the company. Under the circumstances, it was held that Duro-Metal was doing business through him. The factual situation in that case differs materially from that in the case before us and the opinion is not inconsistent with what we have heretofore said herein.

The record shows that on July 14, 1958, appellant filed an application herein to produce additional evidence, including the deposition of Walter K. Lookabaugh. The application was denied by order of this court on August 27, 1958. Appellant, at the oral argument on appeal herein, made a motion that we reconsider the previous ruling on the application. The deposition of Walter K. Lookabaugh was lodged with the court and, while it was not received as additional evidence, we have read and considered it. The motion to reconsider is denied.

The order granting the motion to quash summons and complaint is affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

170 Cal.App.2d 151

William MULLER, Plaintiff and Appellant,
v.
Charles REAGH and Lelah Muller, Defendants and Respondents.
No. 18272.

District Court of Appeal, First District, Division 1, California.
May 5, 1959.

Tort action. After reversal of order transferring case to municipal court, the Superior Court, San Mateo County, Louis B. De Matteis, J., entered an order denying and striking certain items from memorandum of costs on appeal filed by plaintiff and allowing costs as thus reduced in amount, and plaintiff appealed. The District Court of Appeal, Bray, P. J., held, inter alia, that under West's Ann.Code Civ.Proc. § 1034, and West's Ann.Rules on Appeal, rule 26, successful litigant was entitled to reimbursement for only amount actually paid out for type of costs allowable as part of costs on appeal.

Order affirmed.

1. Costs 🔑247

Under rules on appeal, jury fees and mileage and reporter's fees advanced by plaintiff for first day of trial were not recoverable as part of "costs on appeal" from order of superior court erroneously transferring case to municipal court. West's Ann.Rules on Appeal, rule 26 and subd. (c); West's Ann.Code Civ.Proc. § 1034.

See publication Words and Phrases, for other judicial constructions and definitions of "Costs on Appeal".

2. Costs 🔑247

"Costs on appeal" allowable under rules on appeal do not include expenses incurred at trial of case. West's Ann.Rules on Appeal, rule 26 and subd. (c); West's Ann.Code Civ.Proc. § 1034.

3. Costs 🔑247

Under rules on appeal, whether notary's fee for jurat showing verification of affidavit of service in connection with order extending time should be allowed as part of costs on appeal was discretionary, and refusal of trial court to allow such item was not abuse of discretion. West's Ann.Rules on Appeal, rule 26 and subd. (c); West's Ann.Code Civ.Proc. § 1034.

4. Costs 🔑254(1)

Cost of preparation of an original and one copy of any type of record on appeal may be recovered as part of costs on appeal under rules on appeal. West's Ann. Rules on Appeal, rule 26 and subd. (c).

5. Costs 🔑254(1)

Proposed settled statement was not the "record on appeal" or any part thereof within meaning of rule on appeal allowing recovery of cost of preparation of an original and one copy of any such record as part of costs on appeal. West's Ann.Rules on Appeal, rule 26 and subd. (c).

See publication Words and Phrases, for other judicial constructions and definitions of "Record on Appeal".

6. Costs 🔑254(1)

Cost of typing proposed settled statement was not recoverable under rules on appeal as part of costs on appeal. West's Ann.Rules on Appeal, rule 26 and subd. (c).

7. Costs 🔑247

Only those costs recoverable by statute or rule of court are recoverable as part of costs on appeal, even though item may be a reasonable one. West's Ann.Rules on Appeal, rule 26 and subd. (c); West's Ann. Code Civ.Proc. § 1034.

8. Costs 🔑254(1), 258

Under rules on appeal, costs of preparing engrossed statement on appeal and appellant's opening and supplemental briefs are recoverable as part of costs on appeal, provided payment of definite sums for such purposes is shown. West's Ann.Rules on Appeal, rule 26 and subd. (c); West's Ann.Code Civ.Proc. § 1034.

9. Costs 🔑264

Party seeking recovery of costs as part of costs on appeal has the burden of proving such costs. West's Ann.Rules on Appeal, rule 26 and subd. (c); West's Ann.Code Civ.Proc. § 1034.

10. Costs 🔑254(6), 258

Allowance of $75 as part of costs on appeal for cost of preparing engrossed statement on appeal and appellant's opening and supplemental briefs, for which he claimed a total of $155, was fair, in view of evidence that such items included payment for appellant's own work in typing statement and briefs and absence of proof of amount actually paid out for such items. West's Ann.Rules on Appeal, rule 26 and subd. (c); West's Ann.Code Civ.Proc. § 1034.

11. Costs 🔑254(1)

The purpose of statute allowing recovery of costs in connection with appeal and preparation of record for appeal is to reimburse successful litigant for his actual out-of-pocket payment for the type of costs allowed, and not to pay him for his own work in connection with appeal. West's Ann.Rules on Appeal, rule 26 and subd. (c); West's Ann.Code Civ.Proc. § 1034.

12. Costs 🔑197

Statute and rule on appeal empowering reviewing court to deny or reduce costs did not deprive trial court of such power, where cost memorandum is filed in trial court. West's Ann.Rules on Appeal, rule 26(a); West's Ann.Code Civ.Proc. § 1034.

13. Appeal and Error 🔑662(4), 760(1)

Reviewing court is bound by the record, including narrative statement, and record cannot be impeached merely by assertions in briefs.

◆

William Muller, Redwood City, appellant in pro. per.

Charles Reagh, San Francisco, for respondents.

BRAY, Presiding Justice.

Successful on appeal in Muller v. Reagh, 1957, 150 Cal.App.2d 99, 309 P.2d 826, plaintiff filed a memorandum of costs on appeal. Defendants moved to strike the whole and all parts thereof. After a hearing the court denied and struck out the items hereafter discussed, reducing the amount from $262—sought by plaintiff—to $91.50, which the court allowed. Plaintiff appeals on a settled statement.

Items Denied.

[1, 2] These items will be referred to herein by their numbers in the cost bill. Item 1: One day's jury fees, $36. Item 2: One day's reporter's fees, $20. Item 5: Jury mileage, $22. These sums were advanced by plaintiff for the first day's trial of the above action. On that day the superior court transferred the case to the municipal court, and the trial ended. In Muller v. Reagh, supra, it was held that the transfer was erroneous. Plaintiff contends that therefore he is entitled to recover the above items as costs on appeal. Costs on appeal are governed by rule 26, Rules on Appeal, and the items allowable are set forth in rule 26(c). They include none of the above mentioned charges. Costs on appeal do not include expenses incurred at the trial of the case. Monson v. Fischer, 1933, 219 Cal. 290, 26 P.2d 6; see also Rosenfield v. Vosper, 1943, 57 Cal.App.2d 605, 608, 134 P.2d 529, 135 P.2d 579; Code Civ.Proc. § 1034.

[3] Item 4: Affidavit of service, order extending time, $.50. (Apparently this refers to the notary's fee.) Rule 26(c) includes as recoverable costs on appeal "notary fees." The trial court allowed notary's fees in seven instances, but felt that it would be unfair to charge a party with an expense incurred solely for the convenience of his adversary. Such an item is within the court's discretion to allow or disallow. In Stenzor v. Leon, 1955, 130 Cal.App.2d 729, 735, 279 P.2d 802, in dealing with the costs of trial allowed by section 1032, Code of Civil Procedure, it was held that the trial court could look to the necessity of the disbursement and its determination was within the discretion of the trial court. There was no abuse of discretion here.

[4–7] Item 9: Cost of typing proposed settled statement, $12. "The cost of preparation of an original and one copy of any type of record on appeal" may be recovered under rule 26(c). A proposed settled statement is not the record on appeal or any part thereof. There is no provision in the rules for allowance of this type of item. Costs recoverable are only those recoverable by statute or rule of court even though the item may be a reasonable one. Turner v. East Side Canal & Irr. Co., 1918, 177 Cal. 570, 573, 171 P. 299; see also Agnew v. Cronin, 167 Cal.App.2d 154, 334 P.2d 256.

[8] Item 10: Cost of preparing engrossed statement on appeal (typing original and copy), $65. Item 13: Cost of preparing appellant's opening brief (original and 26 copies), $70. Item 15: Cost of preparing appellant's supplemental brief (original and 8 copies), $20. The subject matter of these items are recoverable costs on appeal. The difficulty here is that plaintiff failed to prove that he had expended the amounts set forth.

[9] Section 1034, Code of Civil Procedure, is the statutory authorization for the power to enact rule 26(c), Rules on Appeal. The section allows only "amounts actually paid out by him in connection with said appeal, and the preparation of the record for the appeal." A definite sum of money must be paid out. Turner v. East Side Canal & Irr. Co., supra, 177 Cal. 570, 573, 171 P. 299. The court was interpreting section 1027, Code of Civil Procedure. That sec-

tion was later repealed and section 1034 amended to include provision for costs on appeal. The phrase "amounts actually paid out" which appeared in section 1027 was retained in section 1034. Presumably the Legislature was aware of the Turner case and amended section 1034 in light thereof. See Stafford v. Realty Bond Service Corp., 1952, 39 Cal.2d 797, 805, 249 P.2d 241. The burden of proving the costs asked for is on the claimant. City of Los Angeles v. Abbott, 1933, 129 Cal.App. 144, 18 P.2d 785.

[10, 11] At neither hearing did plaintiff offer any receipts or vouchers, nor did he request an opportunity to produce any. The trial court stated: "The evidence submitted as to the costs incurred was very weak, uncertain and unsatisfactory." Plaintiff admitted that he typed appellant's supplemental brief himself, and as to the charges on the other two items he said that when he stated "it cost me" he meant to include his own work in typing. For the three items plaintiff claimed $155. The court allowed $75. In view of the lack of proof of the amounts which these items actually cost plaintiff the allowance was very fair indeed. The purpose of section 1034 is not to pay a successful litigant for his own work, but to reimburse him for his actual out-of-pocket payment for the type of costs allowed. For these same reasons the court properly refused plaintiff's motion to increase his demand under Item 13 from $70 to $81.25.

[12] Plaintiff contends that only the appellate court may reduce costs, relying on section 1034, Code of Civil Procedure, and rule 26(a). Those empower the appellate court to deny or reduce costs, but there is no indication that the trial court is deprived of this power when a cost memorandum is filed in the trial court.

[13] Plaintiff, in his briefs, attempts to impeach the record, stating, among other matters, that the narrative of the oral hearing contains prejudicial untruths. We are bound by the record including the narrative statement. "* * * [The reviewing] court cannot, however, act upon a mere assertion of an appellant in his brief as to matters not shown by the record, and reverse a judgment of the trial court * * *" Nevada County v. Phillips, 111 Cal.App.2d 428, 430, 244 P.2d 495, 497; Williams v. Goldberg, 1944, 66 Cal.App. 2d 40, 46, 151 P.2d 853.

The order is affirmed.

FRED B. WOOD and TOBRINER, JJ., concur.

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170 Cal.App.2d 155

Guy HOCKETT, Petitioner,

v.

INDUSTRIAL ACCIDENT COMMISSION of the State of California, Vaughn Interior Walls, Inc., a corporation; Pacific Employers Insurance Company, a corporation, Respondents.

Civ. 23668.

District Court of Appeal, Second District, Division 1, California.

May 5, 1959.

Proceeding on petition to annul award of Industrial Accident Commission denying him a penalty of 10 per cent on certain items of Commission's award to him. The District Court of Appeal, Nourse, J. pro tem., held that where payment of compensation had been unreasonably delayed and refused, claimant was entitled to an award of a 10 per cent penalty on the amount incurred by him for medical and hospital treatment.

Award annulled in part and in all other parts affirmed, and cause remanded.

1. Workmen's Compensation 🔑1042

Workmen's compensation statute providing that when payment of compensation has been unreasonably delayed or refused full amount of award should be increased by 10 per cent, the "award" referred to is the award of compensation which includes every benefit or payment conferred upon injured employee. West's Ann.Labor Code, §§ 3207, 4600, 5814.

See publication Words and Phrases, for other judicial constructions and definitions of "Award".

2. Workmen's Compensation ⚷1002

Where workmen's compensation carrier had unreasonably delayed and refused payment of compensation, claimant was entitled to an award of 10 per cent penalty on the amount incurred by him for medical and hospital expenses. West's Ann.Labor Code, §§ 3207, 4600, 5814.

3. Workmen's Compensation ⚷1002

Fact that payments for medical and hospital care were made by two insurance carriers who had by their private contracts undertaken to indemnify injured employee against liability for such expense, and by its award Industrial Accident Commission provided that the amounts of indemnity paid by these carriers on account of the medical and hospital treatment procured by injured employee be made directly to those carriers, did not render inapplicable that statute providing for an increase of 10 per cent of the amount of award in cases when payment of compensation has been unreasonably delayed or refused. West's Ann. Labor Code, § 5814.

4. Workmen's Compensation ⚷1042

Even though workmen's compensation carrier unreasonably delayed and refused to pay compensation claim, Industrial Accident Commission properly denied any increase in the award of $95 made on account of expense incurred by injured claimant in prosecuting claims since such award was not in the nature of compensation but in the nature of costs. West's Ann.Labor Code, § 5814.

5. Workmen's Compensation ⚷1042

Where workmen's compensation carrier unreasonably delayed and refused to pay compensation claim, Industrial Accident Commission correctly refused to add a 10 per cent penalty to a lien allowed another insurance carrier on account of its payments under unemployment compensation policy issued by it since lien was granted on that portion of award which was made on account of temporary disability and was not an award of additional compensation, and Commission having increased by 10 per cent of weekly indemnity to which injured claimant was entitled, assessed full penalty it was authorized to assess under statute on account of disability benefit. West's Ann. Labor Code, §§ 4903(f), 4904, 5814.

Levy, Russell, DeRoy & Geffner, and Celia Cohn, Los Angeles, for petitioner.

Everett A. Corten, San Francisco, and Edward A. Sarkisian, Los Angeles, for respondent Industrial Accident Commission.

NOURSE, Justice pro tem.

By writ of review petitioner seeks to annul an award of the respondent commission which denied him a penalty pursuant to section 5814 of the Labor Code, of 10 per cent on certain items of the commission's award to him.

Petitioner, in the scope and course of his employment, sustained injuries which required medical care and hospital treatment. Despite the report of its own examining physician that petitioner had sustained a disabling injury, the employer's compensation insurance carrier denied liability and refused to make payments of compensation or to provide medical and hospital treatment. Petitioner was disabled for 22 weeks and incurred reasonable medical and hospital expenses in the sum of $1,141.43; he also expended the sum of $95 for the examination by and report of a physician for the purpose of establishing his claim.

During the period of his disability Continental Casualty Company, the unemployment compensation insurance carrier of petitioner's employer, made disability payments to petitioner in the sum of $964.29.

The commission found that the payment of compensation had been unreasonably delayed and refused. It, as a penalty, increased the payments of compensation on account of temporary total disability by 10 per cent, that is it increased those payments from $50 to $55 per week. It denied petitioner the penalty of 10 per cent provided by section 5814 on the amount of his medical and hospital bills, the item of $95 incurred by the examination for the report of the physician which was used to establish his claim and upon the amount paid by the Continental Casualty Company as unemployment compensation benefits, but allowed that company a lien for the amount of its advances, to-wit, $964.29 upon the award for disability benefits. Petitioner asserts that the commission erred in denying him 10 per cent upon the entire award including the amount advanced for his benefit by Continental as employment compensation benefits.

[1, 2] We have concluded that the commission was in error in denying petitioner 10 per cent on the amount incurred by him for medical care and hospital treatment. Section 5814 of the Labor Code is not ambiguous and expressly provides that "When payment of compensation has been unreasonably delayed or refused, * * * the *full amount of the * * * award shall* be increased by 10 per cent." (Emphasis added.) The award referred to is the award of compensation. "Compensation" includes every benefit or payment conferred upon an injured employee by Division IV of the Labor Code, (Labor Code, § 3207). Medical, surgical and hospital treatment reasonably required to cure or relieve from the effects of injury were benefits so conferred (Labor Code, § 4600) and reimbursement for the amount reasonably incurred for such care is compensation under the statute. Bige v. Industrial Accident Comm., 105 Cal.App. 210, 287 P. 577; Heaton v. Kerlan, 27 Cal.2d 716, at page 719, 166 P.2d 857. It necessarily follows that as such care was unreasonably refused by the compensation insurance carrier and payment therefore unreasonably delayed, petitioner was entitled to have this portion of the award increased by 10 per cent, that is, by the sum of $114.14.

[3] Respondent commission argues that inasmuch as the payments for medical and hospital care were made by two insurance carriers who had by private contract undertaken to indemnify the petitioner against the liability for such expense and as by its award the commission provided that the amounts of indemnity paid by these carriers on account of the medical and hospital treatment *procured by petitioner* be made directly to those carriers, that section 5814 is not applicable. There is no merit in this contention. The fact that the petitioner or his employer had providently provided, through contracts of indemnity, separate sources of funds to meet the expenses of this nature does not relieve the compensation carrier from the penalty imposed upon it for its default. Petitioner does not complain that these third party indemnitors were given a lien upon the award made to him for medical and hospital expenses and the fact that such a lien was given by the commission does not in anywise affect the compensation carrier.

[4] We are convinced, however, that the commission was correct in denying any increase in the award of $95 made on account of an expense incurred by the petitioner in prosecuting his claim. This award is not in the nature of compensation but is in the nature of costs. Kaiser Co. v. Industrial Acc. Comm., 109 Cal.App.2d 54, at page 59, 240 P.2d 57. Further, there was no delay in connection with this portion of the award as it was not due until the commission had, in the exercise of its discretion, awarded it as a cost of prosecution of the claim.

[5] The commission also acted correctly in refusing to add a 10 per cent penalty to the lien allowed the Continental Casualty Company on account of its payments under the unemployment compensation policy issued by it. This lien was granted pursuant to section 4903(f) of the Labor Code upon that portion of the award which was made

on account of temporary disability (Labor Code, § 4904). It was not an award of additional compensation. The commission having increased by 10 per cent the weekly indemnity to which petitioner was entitled, it had assessed the full penalty which it was authorized to assess under section 5814 on account of disability benefits and to have increased the portion of the award for those benefits which was made payable directly to Continental would have been to duplicate the penalty.

For the reasons above stated all parts of the award are affirmed except that portion which denies the penalty of 10 per cent upon the reasonable expense of the employee's medical and hospital treatment. As to that portion of the award, it is annulled and the cause remanded to the respondent commission with directions to increase its award by ordering paid to the petitioner an additional sum of $114.14.

WHITE, P. J., and LILLIE, J., concur.

170 Cal.App.2d 85

Charolette McDONALD, a minor, by her Guardian ad litem, Ernest E. McDonald, Plaintiff and Appellant,

v.

FOSTER MEMORIAL HOSPITAL, Doe One, Doe Two, and Doe Three, Defendants.

Foster Memorial Hospital, Defendant and Respondent.

Civ. 23275.

District Court of Appeal, Second District, Division 1, California.

May 1, 1959.

Hearing Denied June 24, 1959.

Action for injuries sustained by plaintiff when she fell out of bed in defendant's hospital. The Superior Court of Ventura County, Charles F. Blackstock, J., discharged the jury upon its failure to agree on verdict and granted defendant's motion for judgment in its favor, and plaintiff appealed. The District Court of Appeal, Lillie, J., held that it could reasonably have been concluded that accident was of kind that would not normally occur unless someone had been negligent; and held that since there had been no contention that injury had not been caused by agency or instrumentality within exclusive control of defendant or that it had been due to voluntary action or contribution on part of plaintiff, it had been error to refuse to give proffered instruction based on doctrine of res ipsa loquitur and to refuse to permit jury to decide whether proper preclusive measures had been taken in light of circumstances.

Reversed.

Fourt, J., dissented.

1. Judgment 🔑197

The rules governing the determination of a motion for judgment under the statute are the same as those applicable to motions for judgment of nonsuit and directed verdict, which motions may be properly granted when, and only when, disregarding conflicting evidence, giving to plaintiff's evidence all value to which it is legally entitled, and indulging in every legitimate inference which may be drawn from that evidence, result is a determination that there is no evidence of sufficient substantiality to support verdict in favor of plaintiff. West's Ann.Code Civ.Proc. § 630; Rules on Appeal, rule 15(a), West's Ann. Code.

2. Negligence 🔑6, 136(9, 14)

An act in violation of statute is negligence as a matter of law; but unusual conditions may be shown to excuse or justify violation, and whether violation was excusable under circumstances is ordinarily a question of fact for jury, except where reasonable men could draw but one inference from facts disclosed.

3. Negligence 🔑5, 6

Doctrine of customary usage is not applied to question of legal duty under law of negligence, and act in violation of statute may be negligent even though conforming to custom.

4. Negligence 🔑56(3)

Before violation of statute creates any liability, it must be proximate cause of injury complained of; and this is equally true in cases involving failure to obtain license required by statute.

5. Negligence 🔑136(25)

Proximate cause is question of fact except when reasonable men could draw but one inference from facts disclosed.

6. Hospitals 🔑7, 8

Even if statutes permitted administration of drugs only by nurses licensed in state, it did not follow that hospital had been negligent per se in permitting nurses not licensed in state to administer drugs to plaintiff or that such negligence had been proximate cause of injury sustained by plaintiff when she fell out of hospital bed; and, on record presented, trial court was not required to find as a matter of law that negligence in that regard had proximately caused plaintiff's injuries. West's Ann.Bus. & Prof.Code, § 2725.

7. Hospitals 🔑7

Liability may attach to hospital if it negligently employs an incapable nurse through whose carelessness or lack of ability in course of her duties patient is injured; but facts of each case must be judged according to their own merits.

8. Hospitals 🔑7

Hospital was obliged to furnish patient with services and care of competent nurses possessing that degree of skill and learning customarily applied in community; with care and diligence to be measured by capacity of patient to care for herself, but unlimited by rule that no one is required to guard against or take measures to avert that which a reasonable person under circumstances would not anticipate as likely to happen.

9. Hospitals 🔑7

A private hospital is not an insurer of a patient's safety.

10. Hospitals 🔑8

In action for injuries sustained by plaintiff when she fell from hospital bed, evidence would not sustain plaintiff's contention that she had theretofore displayed "all the classic symptoms of a drug reaction" and that hospital's employees had therefore been negligent in administering drugs or in failing to take additional safety measures.

11. Hospitals 🔑7

Any alleged violation of hospital licensing regulation would be immaterial unless plaintiff could show that defendant's violation of regulation had been proximate cause of injuries sustained by plaintiff.

12. Hospitals 🔑8

In action for injuries sustained by plaintiff when she fell out of bed in defendant's hospital, it could reasonably have been concluded that accident was of kind that would not normally occur unless someone had been negligent; and there being no contention that injury had not been caused by agency or instrumentality within exclusive control of defendant or that it had been due to voluntary action or contribution on part of plaintiff, it was error to refuse to give proffered instruction based on doctrine of res ipsa loquitur and to refuse to permit jury to decide whether proper preclusive measures had been taken in light of circumstances.

Morgan & Beauzay, San Jose, for appellant.

Callaway, Kirtland & Packard, Robert C. Packard, Bertram L. Linz, Los Angeles, for respondent.

LILLIE, Justice.

Plaintiff, a child of ten years, was admitted to defendant hospital for the removal of tonsils and adenoids. She sustained certain injuries prior to surgery and sued defendant for damages caused by its alleged negligence. Although the cause involved four days of trial, and the jury had deliberated only less than three hours, the trial judge discharged the jury upon its failure to agree on a verdict. Motions for nonsuit and a directed verdict having been previously denied, defendant moved under section 630, Code of Civil Procedure, for judgment in its favor. The motion was granted and plaintiff has appealed from the judgment which followed.

[1] Motions under section 630, Code of Civil Procedure, are governed by the same rules applicable to motions for nonsuit and directed verdict. Thus, they may properly be granted "when, and only when, disregarding conflicting evidence, and giving to plaintiff's evidence all the value to which it is legally entitled, indulging in every legitimate inference which may be drawn from that evidence, the result is a determination that there is no evidence of sufficient substantiality to support a verdict in favor of the plaintiff" (Carpenter v. Atchison, T. & S. F. Ry. Co., 109 Cal.App.2d 18, 23, 240 P.2d 5, 8). In the light of the foregoing rule, the following is a fair summary of the pertinent facts. Our task in this respect has not been made easier by the failure of appellant's counsel to support their statements by appropriate references to the record (Rule 15(a).

Plaintiff, ten years old, entered defendant hospital in mid-afternoon of December 26, 1955. She was assigned to the second floor and placed in a hospital bed of standard size equipped with side rails extending about 15 inches above the bed. Three nurses, all assigned to the 3:00 p. m.—11:00 p. m. shift, were on duty. Of these three, Nurse Sallee was in charge and, although licensed and registered in Idaho, she had not yet received her license under this state's reciprocity law; the other two nurses on duty were registered and licensed in California.

There is no record on the temperature and pulse chart that, upon admission, plaintiff's pulse was taken. However, later she was given a physical examination by Dr. Martin, her anesthesiologist, who prescribed the following preoperative medication: one and one-half grains of nembutal to be administered at the hour of sleep, and again at 6:00 a. m., three-fourths of a grain to be repeated if needed; fifty milligrams of demoral and one one-fiftieth grain of atropine at 7:00 a. m. At 9:15 p. m., Nurse Sallee administered the first dosage of nembutal.

At 11 o'clock, Nurse Detter came on duty. She was registered in Great Britain, but not in California, and had been employed by defendant since 1951, during which time she had been regularly giving injections. At 11:10 p. m., finding plaintiff outside her room, she put her back in bed; at 11:30 p. m., after checking Dr. Martin's preoperative orders, she gave plaintiff three-fourths of a grain of nembutal. Plaintiff's pulse and temperature were not taken thereafter, but Nurse Detter subsequently advised her night supervisor of the additional medication administered. Between 5:30 a. m. and 6:00 a. m., plaintiff was taken to the bathroom by an attendant nurse after first being clothed with a cap and gown for surgery; at that time she was sleepy and under sedation. Upon being returned to her bed, the side rails were put up. At 6 o'clock, plaintiff was awake and Nurse Detter gave her a grain and a half of nembutal. At 6:15, she was still awake and talked to the night supervisor. At 7:00, plaintiff appeared to be asleep again and Nurse Detter then injected intramuscularly the prescribed dosages of demoral and atropine. Plaintiff was not awakened although her muscles reacted to the stimulus. When Nurse Detter last saw plaintiff at 7:00 a. m., she was under the influence of hypnotics and appeared to be asleep.

At 7:15 plaintiff's temperature was taken by a registered nurse who had just come on duty; she was then sleeping quietly, her color was good, and she was breathing normally. At approximately the same time her pulse was taken by another registered nurse who described her condition as normal for a patient under preoperative medication. Plaintiff's pulse was noted to be 104, which, according to the nurse, was within normal range under the circumstances, and she did not report the fact to her supervisor. Both of these registered nurses testified that the bed's side rails were up, as did plaintiff's father who looked into his daughter's room and stated that she did not appear to be restless.

At 7:23 a. m., plaintiff fell out of her bed, sustaining a lineal fracture of the jaw. When plaintiff was found on the floor the side rails of her bed were still up. She testified that when she returned from the bathroom at 6 o'clock a. m., she went back to sleep and could recall nothing, including the fall, until 8 o'clock. Dr. Martin examined plaintiff at 7:35 a. m., and stated she was then conscious, although sedated, and responded to his questions. He further testified that he did not observe any condition which indicated that plaintiff had any side effects from the medication administered, such as reaction, allergy or susceptibility. At 11:40 a. m., however, his progress report disclosed that plaintiff was then complaining of headache and seeing double "which is not incompatible with a hangover from medication, however it could be due to the fall." The hospital records also included an entry by another doctor that immediately after the fall plaintiff complained of double vision.

The chief contentions urged by appellant concern the sufficiency of the evidence, aided by the doctrine of res ipsa loquitur, to support a judgment in her favor; and error by the trial court in refusing proffered instructions on the care required of respondent hospital and the application thereto of res ipsa loquitur. Supportive of her claims that the evidence was sufficient to sustain a verdict against respondent, appellant argues that the hospital was guilty of negligence as a matter of law in violating certain statutes governing the nursing profession and the administration of narcotic and hypnotic drugs; and that jury questions were raised by evidence establishing, or tending to establish, that respondent and its employees failed to furnish the care and facilities commensurate to her needs.

[2-6] We first consider whether the law prohibits the furnishing of drugs by nurses in the category of Nurses Sallee and Detter. Section 2725, Business & Professions Code, defines the practice of nursing as "the performing of professional services requiring technical skills and specific knowledge * * * acquired * * * in an accredited school * * * and practiced in conjunction with curative or preventive medicine as prescribed by a licensed physician and the application of such nursing procedures as involve understanding cause and effect in order to safeguard life and health of a patient and others." It is therein further declared that "A professional nurse * * * is a person who has met all the legal requirements for licensing as a registered nurse in the State * * *." Section 2732 of the same code provides that no person shall practice nursing as defined by section 2725 without a license. Next, and with reference to the control of hypnotic drugs (nembutal being in that category) by a hospital not employing a pharmacist, section 4225, Business & Professions Code, specifies that "(t)he supply is to be made available to a registered nurse, for administration, on the order or direction of a physician, to patients registered in the hospital, or to emergency cases under treatment in the hospital." Appellant contends that by virtue of the foregoing statutes only a California registered nurse could administer the drugs prescribed for her, and neither Nurse Sallee nor Nurse Detter having been licensed in this State, both were guilty of negligence *per se*.

Without going further into the matter of whether both nurses technically may have violated one or more statutes by the administration of the drugs prescribed, it does not follow that if such violation be deemed to exist, it must be considered as negligence *per se*. While it is elementary that an act in violation of a statute is negligence as a matter of law, it is also established that unusual conditions may be shown to excuse or justify the violation. "Each violation must be considered in connection with the surrounding circumstances" (Curtis v. Q. R. S. Neon Corp. Ltd., 147 Cal.App.2d 186, 189, 195, 305 P.2d 294, 300). In Alarid v.

Vanier, 50 Cal.2d 617, 624, 327 P.2d 897, 900, the Supreme Court recently restated the rule as follows: "In our opinion the correct test is whether the person who has violated a statute has sustained the burden of showing that he did what might reasonably be expected of a person of ordinary prudence, acting under similar circumstances, who desired to comply with the law." Whether such violation was excusable under the circumstances ordinarily presents a question of fact for the jury except in a case where reasonable men can draw but one inference from the facts (Figlia v. Wisner, 150 Cal.App.2d 109, 112, 309 P.2d 832).

Nurse Sallee, who administered the first dosage of nembutal, was registered in Idaho; Nurse Detter, who furnished the remainder of the preoperative medication, had been registered in Great Britain since 1931 and had given many injections of the type in question. Dr. Martin, without specifying that his statement was limited to California registered nurses, testified that it was standard practice in the community for nurses to give medication pursuant to doctors' orders. However, the doctrine of customary usage does not apply to the question of legal duty under the law of negligence (Robinet v. Hawks, 200 Cal. 265, 274, 252 P. 1045). As further stated in Hurtel v. Albert Cohn, Inc., 5 Cal.2d 145, 148, 52 P.2d 922, 924: We do not think that an established use or custom among men engaged in the same line of work can avail as against the positive requirements of the ordinance, or statute"; in other words, although evidence is admissible to establish whether the degree of care, skill and diligence exercised by a hospital and its attendants is the same as that generally exercised by hospitals in the same community (Thomas v. Seaside Memorial Hospital, 80 Cal.App.2d 841, 848, 183 P.2d 288), the customary practice in such community must not be violative of an applicable statute. Assuming that in the record before us no circumstances are present justifying the inference of sufficient excuse for the violation contended, we proceed with the controlling element of proximate cause.

It is well established that before the violation of a statute creates any liability, it must be the proximate cause of the injury complained of (Hickenbottom v. Jeppesen, 144 Cal.App.2d 115, 120, 300 P.2d 689; Satterlee v. Orange Glenn School Dist., 29 Cal.2d 581, 590, 177 P.2d 279). This principle also applies to cases involving the failure to obtain a license (35 Cal.Jur.2d 509). As to this particular phase of the appeal, there is no reason to believe that there would have been less likelihood of injury to appellant had both Nurses Sallee and Detter been licensed in California; at least there is no evidence in the record before us that the results would have been otherwise. The law in California appears to be unchanged since the early malpractice case of Bute v. Potts, 1888, 76 Cal. 304, 18 P. 329. There the defendant physician was unlicensed and the court declared: "The fact that he had or had not certificates and diplomas as a physician and surgeon is no proof either that he had skill as such or lacked it. A certificate or diploma could be no proof that he acted with skill in attending a given patient, or that he did not so act. His services as to skill or the contrary must be determined by his acts and conduct in attending the patient. It is the manner in which the services are performed that is the test of their character." In Brown v. Shyne, 1926, 242 N.Y. 176, 179, 151 N.E. 197, 198, 44 A.L.R. 1407, the plaintiff recovered a judgment for damages allegedly sustained at the hands of an unlicensed chiropractor. The Court of Appeals in reversing it stated: "If violation of the statute has no direct bearing on the injury, proof of the violation becomes irrelevant. For injury caused by neglect of duty imposed by the penal law there is civil remedy; but, of course, the injury must follow from the neglect." In Janssen v. Mulder, 232 Mich. 183, 205 N.W. 159, it was held that while the failure to comply with a licensing statute might subject a chiropractor to criminal prosecution, such a failure is not sufficient to support a charge of malpractice absent a showing that the result complained of was due to negligence or unskilled treatment. To the same general effect is Martin v. Carbide & Carbon Chemicals Corp., 1946, 184 Tenn. 166, 197 S.W.2d 798. In Levy v. Vaughan, 1914, 42 App.D.C. 146, the court affirmed a directed verdict for the defendant and held, among other things, that there was no negligence in permitting the anesthetic (ether) to be administered by an advanced medical student as long as there was some form of supervision. Expert testimony established that such practice was customary in the District of Columbia; furthermore, in the court's opinion it was immaterial that the supervising physicians were not licensed in the District since the possession of such a license would not have added to their competency as doctors.

Appellant has presented nothing to distinguish her case from the rules and reasoning found in the foregoing decisions except the reassertion that it was for the jury to decide whether the administration of the prescribed drugs by an unlicensed California registered nurse proximately contributed to her injuries. Whether such causation exists is a question of fact except when reasonable men can draw but one inference from the facts (Figlia v. Wisner, 150 Cal. App.2d 109, 112, 309 P.2d 832) or, as has been stated, unless there exists reasonable grounds for the belief that the violation was a proximate cause of the injury (Green v. Menveg Properties, Inc., 126 Cal.App.2d 1, 11, 271 P.2d 544). It is not suggested that the actual administration of the medication was negligently performed or that such administration by a licensed nurse would have effected a different result. Appellant calls attention to a statement in Biakanja v. Irving, 49 Cal.2d 647, 651, 320 P.2d 16, 17, reliance on which appears to be misplaced. The action there involved a damage suit against a notary public for drawing an invalid will, and the court observed that the drawing of wills required specialized skill which the defendant did not possess. The statement by the court that defendant "engaged in unauthorized practice of law" appears to be dictum, incidental to the result reached.

[7, 8] Related to the matters just discussed and determined is appellant's additional claim that respondent was negligent in its selection of unlicensed nurses to administer dangerous drugs and that it negligently supervised these employees whose alleged inaction in the presence of danger signals proximately caused the injuries sustained. There is authority generally for the first of the foregoing contentions; thus, liability may attach to a hospital if it negligently employs an incapable nurse through whose carelessness or lack of ability in the course of her duties the patient is injured (England v. Hospital of Good Samaritan, 16 Cal.App.2d 640, 644, 61 P.2d 48). However, the facts of each case must be judged according to their own merits, and the situation in the England case is hardly comparable, it there appearing that the defendant hospital failed to check the references in the nurse's application for employment, and the pertinent public records showed that her application for registration as a nurse had been rejected. As to appellant's second contention, respondent was obliged to furnish her with the services and care of competent nurses possessing that degree of skill and learning customarily applied in the same community (Valentin v. La Societe Francaise, 76 Cal. App.2d 1, 4–5, 172 P.2d 359), proof of which is usually made by expert testimony (Perkins v. Trueblood, 180 Cal. 437, 443, 181 P. 642), and such care and diligence must be measured by the capacity of the patient to care for herself (Valentin v. La Societe Francaise, supra, 76 Cal.App.2d at page 4, 172 P.2d at page 361), but limited by the rule that no one is required to guard against or take measures to avert that which a reasonable person under the circumstances would not anticipate as likely to happen. Wood v. Samaritan Institution, 26 Cal.2d 847, 852, 161 P.2d 556.

There can hardly be any doubt that appellant possessed some special susceptibility either to the drugs administered or to the dosage prescribed. The claim is advanced that there was evidence forewarning respondent's employees which would have moved a reasonably intelligent attendant to take necessary precautions to prevent what thereafter occurred. Dr. Martin, who was not named as a defendant, testified that he examined appellant before the preoperative medication was prescribed, checked her history, looked at her throat, listened to her heart and lungs, and took her blood pressure and pulse. He found that she was apprehensive and jittery, but otherwise perfectly normal. Edna Toutz, a California registered nurse, stated that it is not ordinary and customary practice in hospitals to take a child's pulse on admission because the variation is so great that it would not be significant in the case of a tonsillectomy. She further testified that she took appellant's pulse at 7:15 a. m., and did not report the fact it was 104 because a child's pulse varies more than an adult's, and appellant's pulse was within normal range in view of the anesthetic state in which she had been placed. Norma Ford, also a California registered nurse, stated that the preoperative medication was the standard, normal preoperative medication for a patient of appellant's age and size. This view was concurred in by Dr. Martin, who also gave the following testimony: that his medication orders had been carried out; that a pulse of 104 for a child of appellant's age and weight and with preoperative medication is not unusual and within normal limits and that the medication given was standard for a person in appellant's age and weight category; that the side rails on appellant's bed were standard size and that it was customary practice to place a child of appellant's age in a regular bed, rather than in a crib or small bed; that the side rails should be kept up—(there is no claim that such precaution was not taken)—and if the patient shows any tendency to become disturbed, she should be watched but not restrained (to physically restrain a person would make him wilder), that he relied on the nurses to adhere to such practices and that he would not have administered an additional dosage of nembutal if appellant had exhibited any excitement or manifested an allergic reaction thereto. No expert testimony was introduced to negative the foregoing.

[9, 10] Based on the above facts, and other evidence either already narrated or of a cumulative character not necessary here to summarize, appellant argues that despite "all the classic signs of a drug reaction" respondent's employees administered an excessive dosage of drugs, sufficient to "trigger" a latent susceptibility thereto; if not, they had notice or knowledge of facts reasonably indicating that she would be likely to harm herself unless preclusive measures were taken. Neither contention, in our opinion, has merit. A private hospital is not an insurer of a patient's safety (Gray v. Carter, 100 Cal.App.2d 642, 644, 224 P.2d 28). Reiterating what was heretofore said with respect to the alleged negligence in the actual administration of the drugs, there is nothing by way of expert testimony or otherwise that a California registered nurse would have been more constant and skillful in observing appellant for symptoms indicating that too much anesthetic was being given, either by way of additional nembutal at 6:00 a. m., or atropine and demoral by way of intramuscular injection at 7:00 a. m. Too, only eight minutes elapsed between 7:15 a. m. when appellant was observed to be sleeping quietly with the bed rails up and her fall from the bed which occurred at 7:23 a. m. The record does not support appellant's claim that she theretofore displayed "all the classic symptoms of a drug reaction." The situation is far different from that in Valentin v. La Societe Francaise, supra, 76 Cal.App.2d 1, 172 P.2d 359, where the danger signals, indicating the onset of tetanus, continued for a period of several hours. Also distinguishable is Thomas v. Seaside Memorial Hospital, supra, 80 Cal.App.2d 841, 183 P.2d 288, which involved the failure to maintain proper vigilance over an eight month old baby following minor surgery, the nurse responsible therefor being absent for fifteen

minutes. Furthermore, in each of the foregoing cases, expert testimony was elicited to establish a standard of care. On the other hand, language and reasoning are found in Gray v. Carter, supra, 100 Cal. App.2d 642, 224 P.2d 28 which seems determinative, even though the plaintiff there was not a minor under anesthesia. That case was followed in Ericson v. Petersen, 116 Cal.App.2d 106, 253 P.2d 99, where the Supreme Court denied a hearing. Both cases stand for the proposition that a hospital may not be held liable in the absence of evidence which would support an inference that the hospital or its servants are chargeable with knowledge of any sudden change in a patient's mental condition sufficient to forewarn them that the patient was likely to fall from the bed. Appellant here did not contract for special nurses furnishing constant bedside attention, and a hospital is liable only for want of ordinary care (Welsh v. Mercy Hospital, 65 Cal.App.2d 473, 478, 151 P.2d 17). The record, we conclude, is barren of evidence which would support a judgment in appellant's favor on the theories hereinbefore discussed.

[11] Likewise without merit is the contention that liability arose by virtue of respondent's failure to keep proper hospital records; specifically, its omission to take and record appellant's pulse and temperature upon her admission. We are asked in that respect to take judicial notice of Hospital Licensing Regulation No. 280, which assertedly governs. Again, however, any alleged violation of such a regulation becomes immaterial unless appellant can show that the same was a proximate cause of her injuries. In Costa v. Regents of Univ. of California, 116 Cal.App.2d 445, 461, 254 P. 2d 85, 95, it was stated: "The allegedly negligent handling of defendants' hospital records which according to appellant made them unreliable concededly had not been a proximate cause of the injury for which the action was brought." It is not suggested, nor must it be overlooked, that Dr. Martin made an examination of appellant immediately prior to prescribing the medication administered, and the maintenance of records consistent with the requirements of the regulation would not, as appellant argues, have indicated that she had an abnormal pulse; indeed, the evidence was to the effect that a pulse of 104 was normal and within proper range under the then circumstances.

[12] Appellant's next contention that she established a prima facie case by evidence which was sufficient to invoke in her favor the doctrine of res ipsa loquitur is a decisive one. The elements essential to the application of res ipsa loquitur, well settled by the decisions, are summarized in Snyder v. Hollingbery, 141 Cal.App.2d 520, at page 528, 297 P.2d 485, at page 490: "(a) There is a basis of experience, either common to the community or brought out in evidence, from which it may reasonably be concluded that the accident is of a kind which does not normally occur unless someone has been negligent. (b) It must be caused by an agency or instrumentality within the exclusive control of the defendant. (c) It must not have been due to any voluntary action or contribution on the part of the plaintiff." Wolfsmith v. Marsh, 51 Cal.2d 832, 337 P.2d 70; Cavero v. Franklin, etc., Benevolent Soc., 36 Cal. 2d 301, 223 P.2d 471; Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258; Bauer v. Otis, 133 Cal.App.2d 439, 284 P.2d 133.

In this case, conditions (b) and (c), supra, were obviously present and respondent does not appear to contend otherwise. The question is: Was (a) also present? "As a general rule, res ipsa loquitur is applicable where it appears that the accident is of such a nature that it can be said, in the light of past experience, that it *probably* was the result of negligence by someone and that the defendant is *probably* the person who is responsible." Stanford v. Richmond Chase Co., 43 Cal.2d 287, 292, 272 P.2d 764, 766, quoting from Zentz v. Coca Cola Bottling Co., 39 Cal.2d 436, 442–443, 247 P.2d 344. Dean Prosser has observed in 37 Cal.Law Review, at page 195: "The more recent decisions * * * have held that the inference is not required to be an exclusive or compelling one. It is enough that the court cannot say that reasonable men could not draw it." Only in a restrictive class of cases was the doctrine of res ipsa loquitur first applied in malpractice actions, and then in obvious situations where sponges or surgical instruments were left inside a patient, etc. In each, the application was allowed because common knowledge and experience teaches that the result was one which would not have occurred had due care been exercised. The doctrine was rejected where medical evidence was required to show not only what occurred but how and why it occurred (Engelking v. Carlson, 13 Cal.2d 216, 88 P.2d 695). Later, the doctrine was extended to a plaintiff unconscious from anesthesia during an appendectomy, who suffered traumatic injury to his shoulder, a healthy part of the body outside the area of surgery, which a layman could say would not have occurred in the absence of negligence, although expert testimony was received showing the cause of plaintiff's condition to be trauma by pressure or strain applied between the right shoulder and neck and not arising from pathological causes and not systemic (Ybarra v. Spangard, 25 Cal.2d 486, 154 P.2d 687, 162 A.L.R. 1258). When an injury of that character occurs, the court reasoned, it is within a layman's common knowledge that someone's negligence was probably the contributing cause. The Ybarra case further liberalized the rule as follows: While the patient is unconscious, the exclusive control requirement included "collective control" or the right to control. The group having the right to control has the burden of giving an exculpatory explanation to avoid the inference of negligence since they are in a better position to explain than the plaintiff. In Dierman v. Providence Hospital, 31 Cal.2d 290, 188 P.2d 12, the court upheld the application of res ipsa loquitur where a general anesthetic exploded while the doctor was using an electric needle to cauterize a wound. Although the probability of defendant's negligence was there speculative, the court reasoned that the evidence as to cause was in control of the doctor, and his failure to produce the evidence justified a presumption that such evidence was adverse. At page 295 of 31 Cal.2d, at page 14 of 188 P.2d, the court said: "It is not to say that a defendant must in every such case produce evidence of the actual cause of the accident. It is not to say that the question of the sufficiency of a defendant's explanation—or, if he cannot explain, the sufficiency of his evidence of due care and of impossibility of explanation—is not ordinarily for the jury * * * the defendant will not be held blameless except upon a showing either (1) of a satisfactory explanation of the accident; that is, an affirmative showing of a definite cause for the accident in which cause no element of negligence on the part of the defendant adheres; or (2) of such care in all possible respects as necessarily to lead to the conclusion that the accident could not have happened from want of care, but must have been due to some unpreventable cause, although the exact cause is unknown. In the latter case, inasmuch as the process of reasoning is one of exclusion, the care shown must be satisfactory, in the sense that it covers all causes which due care on the part of defendant might have prevented."

Still our courts were reluctant to apply the doctrine of res ipsa loquitur under conditions in which medical testimony was given, the inference based on common knowledge being at the root of the res ipsa loquitur doctrine. Moore v. Belt, 34 Cal.2d 525, 212 P.2d 509. However, in Cavero v. Franklin, etc., Benevolent Soc., 36 Cal.2d 301, 223 P.2d 471, a case involving the death of a child during a tonsillectomy while under the influence of an anesthetic, "there was no suggestion at the trial that plaintiff's son died as the result of a preexisting condition, whether pathological or systemic in nature. The expert evidence was to the contrary, and in this respect is wholly uncontradicted. It shows that, except for infected tonsils and adenoids and a slight temperature due to such infection, the child was normal and healthy, and the tonsillectomy was not a major operation nor performed as an emergency. Dr. Nellie Null, as heretofore stated, testified that in her forty years of practice she had performed hundreds of these tonsillectomies, and that 'this was the first case in which a death has ever occurred in one of' them." In applying the doctrine, the Supreme Court stated: "Under the circumstances shown we hold tenable plaintiff's position that the evidence prima facie establishes, in the absence of explanation, that 'the child's death was due to something which ordinarily does not occur in the absence of negligence, that it was caused by an agency or instrumentality within the control of defendants, and that it was not due to any (legally material) voluntary action or contribution on the part of either plaintiff or the child,' and, consequently, that the res ipsa loquitur instruction was properly given." 36 Cal.2d at page 311, 223 P.2d at page 477.

Thereafter in Bauer v. Otis, 133 Cal. App.2d 439, 284 P.2d 133, plaintiff, while under treatment for neuritis, was administered an injection of Thex in his right arm, immediately resulting in a "wrist drop." The court reversed a judgment in favor of both the doctor and nurse because of the lower court's failure to give an instruction on res ipsa loquitur and stated, 133 Cal.App.2d at page 443, 284 P.2d at page 136: "While injections and the use of Thex are primarily medical matters, it is a matter of common knowledge among the laymen that injections in the muscles of the arm, as well as other portions of the body, do not cause trouble unless unskillfully done or there is something wrong with the serum * * * if something does go wrong it is a matter for explanation by the person causing the injury." In Cavero v. Franklin, etc., Benevolent Soc., supra, 36 Cal.2d 301, 223 P.2d 471, it was likewise stated to be a matter of common knowledge that anesthesia properly applied causes no injury. In Bauer v. Otis, supra, 133 Cal.App.2d 439, 284 P.2d 133, expert testimony was given in the court below, and two doctors gave testimony that contradicted another as to common medical knowledge. The court, holding that this merely created a conflict of testimony for the jury to resolve, stated at page 445 of 133 Cal.App.2d, at page 137 of 284 P.2d: "The court in giving res ipsa loquitur instructions could have qualified them by instructing the jury that if it should find that common medical knowledge was contrary to common layman knowledge, namely, that the injury here could have resulted without negligence, then it must not apply the doctrine."

Now it is well established that "(I)n determining whether an accident was of such a nature that it probably was the result of negligence by someone, the courts have relied upon both (a) common knowledge and (b) the testimony of expert witnesses, as well as the circumstances relating to the accident in each particular case. (Zentz v. Coca Cola Bottling Co., 39 Cal. 2d 436, 446 [13], [14], 247 P.2d 344; Bauer v. Otis, supra, 133 Cal.App.2d at page 443, 284 P.2d at page 136.)" Wolfsmith v. Marsh, 51 Cal.2d 832, 337 P.2d 70, 72.

We reiterate that Dr. Martin was not named a defendant, and appellant does not claim that he was acting as respondent's agent. Under the theory of "collective control" however, as well as the doctor's statement that he "relied" on them to maintain proper surveillance over his anesthetized patient, the duty devolved on respondent's nurses to adhere to the standard of care required; but the rules of the Dierman case are applicable to them only. After a careful examination of the record, we do not believe that respondent has shown that its care of appellant was "satisfactory, in the sense that it covers all causes which due care on the part of the defendant might have prevented." Dierman v. Providence Hospital, supra, 31 Cal.2d 290, 295, 188 P.2d 12, 15. No explanation was given by anyone as to the actual cause of the accident. As in Cavero v. Franklin, etc., Benevolent Soc., supra, 36 Cal.2d 301, 223 P.2d 471, there was no suggestion by respondent here that appellant suffered from any pre-existing condition; on the contrary, Dr. Martin stated that except for infected tonsils and adenoids, the child was normal and healthy. He also testified that the responsibility for administering the drugs was in effect co-equal with his duty in that respect. Furthermore, an inference can readily be drawn from the testimony of the nurses that the accident suffered by appellant was rare, if not unprecedented.

Although wisely stated in Salgo v. Leland Stanford, etc., Bd. of Trustees, 154 Cal.App.2d 560, at page 569, 317 P.2d 170, at page 175, that: "The great difficulty in the application of the doctrine is to determine where to draw the line," we feel that the Wolfsmith, Cavero and Bauer cases are controlling here. Interestingly enough, of the numerous cases cited and discussed at length by respondent on the issue of res ipsa loquitur, it has avoided any mention of these authorities. Respondent claims that Seneris v. Haas, 45 Cal.2d 811, 291 P.2d 915, 53 A.L.R.2d 124, holds that the problem here presented could be resolved only by expert testimony; to the contrary, that case holds (45 Cal.2d at pages 824–825, 291 P.2d at pages 922–923) that the doctrine of res ipsa loquitur is applied where it is a matter of common knowledge among laymen, or medical men, or both, that the injury could not have occurred without negligence.

It appears to us that the jury should have been permitted to decide whether proper preclusive measures were taken in the light of the circumstances at bar. Citing Seneris v. Haas, 45 Cal.2d 811, at page 827, 291 P.2d 915, 53 A.L.R.2d 124, the Supreme Court in Wolfsmith v. Marsh, 51 Cal.2d 832, 337 P.2d 70, 72, said: "The conclusion that negligence is the most likely explanation of an accident or injury is not for the trial court to draw or refuse to draw so long as plaintiff has produced sufficient evidence to permit the jury to draw the inference of negligence, though the court itself would not draw that inference. The court must leave the question to the jury where reasonable men may differ as to the balance of probabilities."

Appellant's final contention relates to the trial court's refusal to give a proffered instruction based on the doctrine of res ipsa loquitur. Since we have determined that the doctrine is here applicable, it was error for the court so to do.

For the foregoing reasons, the judgment is reversed.

WHITE, P. J., concurs.

FOURT, J., dissents.

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170 Cal.App.2d 289

CROCKER-ANGLO NATIONAL BANK, a National Banking Association, Plaintiff, Cross-Defendant and Appellant,

v.

AMERICAN TRUST COMPANY, a California Banking Association, as Executor of the Estate of Alfred J. Guidotti, also known as A. J. Guidotti, Deceased, Defendant, Cross-Complainant and Respondent,

Ann Guidotti, also known as Mrs. A. J. Guidotti, Defendant, Cross-Defendant, Plaintiff in Intervention and Appellant.

No. 18135.

District Court of Appeal, First District, Division 1, California.

May 11, 1959.

As Amended on Denial of Rehearing June 9, 1959.

Hearing Denied July 8, 1959.

Interpleader action. The Superior Court, Monterey County, Thomas F. O'Donnell, J., rendered the judgments challenged on appeal. The District Court of Appeal, Bray, P. J., held that as used in Financial Code section, providing that when deposit is made in names of two or more persons "in such form" that moneys in account are payable to survivor deposit and all additions thereto shall be property of such persons as joint tenants, quoted words meant only that bank could determine particular form of writing, provided that writing clearly indicated an intention of declarant or declarants to create joint tenancy, and held that it was not contemplated by legislature that bank should have right to permit creation of joint tenancy orally.

Affirmed.

See also 155 Cal.App.2d 812, 318 P.2d 740.

1. Joint Tenancy 🔑3

As used in Financial Code section providing that when deposit is made in names of two or more persons "in such form" that moneys in account are payable to survivor deposit and all additions thereto shall be property of such persons as joint tenants, quoted words meant only that bank could determine particular form of writing, provided that writing clearly indicated an intention of declarant or declarants to create joint tenancy; and it was not contemplated by Legislature that bank should have right to permit creation of joint tenancy orally. West's Ann.Financial Code, § 852.

See publication Words and Phrases, for other judicial constructions and definitions of "In Such Form".

2. Husband and Wife 🔑14(3)

Merely adding wife's name to bank account signature cards did not create joint tenancy. West's Ann.Financial Code, § 852.

3. Customs and Usages 🔑8

Even if it were bank's practice to require no writing for creation of joint tenancy account, such practice could not supersede law. West's Ann.Civ.Code, § 683; West's Ann.Financial Code, § 852.

4. Trial 🔑105(1)

Material evidence which is technically inadmissible under an exclusionary rule may, if offered and received without objection, be considered in support of judgment.

5. Husband and Wife 🔑14(3)

In interpleader action brought by bank against executor, and against widow, of deceased depositor, burden of establishing joint tenancy with decedent in bank accounts in question was on widow; and, on record presented, it was not error to find that such burden had not been sustained. West's Ann.Financial Code, § 852.

6. Interest 🔑46(1), 50
Interpleader 🔑21

Where (1) bank, filing complaint in interpleader against executor, and against widow, of deceased depositor, did not purport to deposit under Code section permitting partial deposits, and bank conditioned making of deposit on grant of complete discharge, and, (2) executor filed cross-complaint for sums withdrawn from accounts, it was not error to deny motion for order authorizing bank to deposit in court sum which bank held in its possession after stopping payment of balance in accounts; and court thereafter granting relief to executor properly allowed interest on total amount of deposit from date demand for payment was made by executor upon bank. West's Ann. Civ.Code, § 3287; West's Ann.Code Civ. Proc. § 386.

Severson, Davis & Larson, Randell Larson, San Francisco, for appellant Crocker-Anglo Nat. Bank.

Mandl & Atteridge, Salinas, Brown, Smith & Taber, Oakland, for appellant Guidotti.

Paul I. Pioda, Raymond W. Shellooe, J. T. Harrington, Salinas, for respondent American Trust Co.

BRAY, Presiding Justice.

Two appeals—one by defendant Ann Guidotti and the other by plaintiff. The nature of these appeals is hereinafter set forth.

Questions Presented.

A. Defendant Ann Guidotti's appeal.

1. Was a joint tenancy created under section 852, Financial Code?

2. Are the findings of fact supported?

B. Plaintiff Crocker-Anglo's appeal.

Was it error to deny plaintiff's motion to deposit $39,304.99 in court and to allow interest on that sum?

Record.

Plaintiff filed a complaint in interpleader against defendants American Trust Company, as Executor of the Estate of Alfred J. Guidotti, and Ann Guidotti, which stated that it had $39,304.99 on deposit which sum was claimed by both defendants. Plaintiff prayed that defendants be required to interplead and that upon deposit by plaintiff of said sum in court, plaintiff be discharged from any and all liability to any and all of the defendants in relation thereto. Defendant American Trust as executor filed an answer and cross-complaint against plaintiff and defendant Ann wherein it sought the sum of $43,005.78 (the amount which at the time of Alfred's death was in the bank accounts hereafter discussed, plus certain interest). Plaintiff filed answer to this cross-complaint and a cross-complaint against defendant Ann Guidotti praying that in the event plaintiff should be required to pay defendant American Trust the sum demanded by said defendant, defendant Ann be required to repay plaintiff such sum. The court found that the bank accounts in question were not joint tenancy accounts, belonged to defendant American Trust as executor, that defendant Ann had no right therein, and gave judgment in favor of defendant American Trust against plaintiff in the sum of $43,005.78 plus interest from September 27, 1956. It then gave judgment in favor of plaintiff and against defendant Ann in the sum of $4,922.82.

Facts.

The controversy is whether certain bank accounts in plaintiff's bank at Salinas (formerly Salinas National Bank) were held in the joint tenancy of Alfred J. Guidotti, now deceased, and his wife, defendant Ann Guidotti. Alfred and Ann were married October 21, 1950, and lived as husband and wife until Alfred's death. At the time of marriage Alfred had standing in his name in the Salinas National Bank two accounts, one savings, the other commercial. In October, 1953, Ann's signature was added below that of Alfred on the savings account signature card. The bank's assistant cashier testified that Alfred came into the bank and "wanted to have his wife added to that card so that she could withdraw funds and so that it would be a joint account, and so that if something happened that the account would go in her name." Ann then signed the car below Alfred's signature. The heading of the card "A. J. Guidotti" was not changed. A few days after the official had given Alfred a signature card headed "A. J. Guidotti or Mrs. A. J. Guidotti," Alfred and Ann came to the bank and signed it where indicated by the assistant cashier. This was for the commercial account. Thereafter Ann wrote checks on the commercial account. To impeach the assistant cashier defendant bank introduced his deposition in which after stating that Alfred "asked to have his checking account set up as a joint account with his wife" he was asked if Alfred said anything more. The witness answered "No" but corrected the answer to read "I don't remember at this time." To the question "Did he tell you the purpose for which he wanted that joint account set up" he answered "No" but corrected the answer to read "I can't recall right now." The witness explained the difference in his testimony at the deposition and at the trial by saying that he was upset at the former and could not think clearly. At all times the bank's ledger sheets for both accounts were in Alfred's name solely. The assistant cashier testified that in determining the relationship between the bank and the depositor, the bank depended on the signature card and not on the ledger or other bookkeeping items. The reverse sides of the signature cards containing forms for the creation of joint tenancy accounts were not signed by either party. Two Salinas National employees testified that the practice of the bank was rarely to use the reverse side of the signature card, although instructions had been given by the bank that in the event a joint tenancy account was to be opened the reverse side of the signature card should be signed. Alfred had been the survivor of a joint account with his mother which had been set up similarly to the instant ones in that the joint tenancy portion of the signature card had not been signed. (There is a difference, however, in that the signature card of the mother's card contained the notation "Two signatures required to withdraw funds.") Depositors in the Salinas bank were personally known to the officials and employees and accounts were opened, transferred or changed with informality. Mr. Corbin, an employee of the Salinas bank, testified that he overheard the conversation between the assistant cashier and Alfred. All that he could recall was that Alfred asked to have his wife's signature on his checking account "For the purpose of writing checks." Immediately thereafter Alfred asked the witness, "Will my wife have any trouble getting the money if anything should happen to me?" The witness told him "no," that the only thing that would be necessary would be the consent of the county treasurer. He then stated that in 1953 if a customer desired to open a joint tenancy account he would have had the signature card signed only on the front, and that on many occasions he had opened joint tenancy accounts that way. In fact his own joint tenancy account was set up that way. However, he testified that the employees were instructed in cases of opening joint tenancy accounts to stamp the signature cards with a rubber stamp reading "Joint Tenancy with Right of Survivorship." He had not known of this until after he opened many accounts and could not say whether the instructions were given prior to 1953, although it should have been the practice in 1953. Even after the instructions were given he and other employees did not always follow the instructions.

Ann's son, Gene Collins, testified that in 1955 Alfred told him that his mother was well taken care of in the event of Alfred's death. "[W]e have our joint banking accounts * * * is hers already because she will have—in case something should happen to me * * *." Ann testified that Alfred told her he had made arrangements with the bank to set up joint tenancy accounts "for us," "that he thought it was best to set up a joint tenancy account in case that anything should ever happen to him that I would have money." After she signed the signature card, he said "That money is yours, in case anything ever happens to me, that money is yours." In another hearing Ann stated that the first time the joint account was mentioned was when she told him she would need some money. He then said "I see no reason why you should not write checks yourself because I have had a joint account made out." She also testified that she did not know in 1953 or at all that Alfred had a savings account in the Salinas bank. In a deposition she said the first conversation on the subject was after she signed the signature card. On his returning home he told her that "he had made out joint accounts—joint savings accounts * * *."

Alfred died December 16, 1955. At that time there was $10,922.27 in the savings account and $32,083.51 in the commercial account—total, $43,005.78. In his will drawn in March, 1954, Alfred stated "I am the owner of certain accounts which I have maintained in the Salinas National Bank * * *." At that time as well as upon his death Alfred had at least two accounts in his name other than the two claimed to be joint tenancy accounts. (Unless otherwise designated all reference herein to accounts will mean the latter two accounts.) Three days after Alfred's death Ann and her attorney went to the bank and had the alleged joint tenancy accounts closed and the moneys transferred to Ann's individual account. On January 13, 1956, an officer of the American Trust Company, executor, inquired at the Salinas bank as to the status of accounts in Alfred's name. The assistant manager informed him that the accounts were joint tenancy accounts in Alfred's and Ann's name. The executor then listed them in the estate inventory as joint tenancy accounts. In September, 1956, defendant executor demanded of plaintiff Crocker-Anglo, which had succeeded to the ownership of Salinas National

Bank, payment of the amounts which were in the accounts at Alfred's death, plus interest.

The court found that both accounts were the separate property of Alfred, and were not held in joint tenancy, that the pass books were at all times in decedent's possession, that Alfred did not inform Ann nor the bank at the time the cards were signed that he intended to transfer the funds in said accounts to a joint tenancy of himself and wife, or to create any joint tenancy; that the sole purpose of causing the name of his wife to go on the cards "was for a convenience in withdrawing monies from said accounts" and that defendant American Trust as executor was entitled to the $43,005.78 on deposit at Alfred's death with interest at 7 per cent per annum from September 27, 1956, the date defendant bank demanded payment from plaintiff. On that date plaintiff withheld from Ann's account the balance of the $43,005.78 which it had theretofore transferred to her amounting to $38,082.96, as Ann had withdrawn the difference, $4,922.82. Defendant bank as executor was awarded on its cross-complaint judgment against Ann for the latter amount.

A. Defendant Ann's Appeal.

1. *Joint tenancy.*

[1-3] Section 683, Civil Code, provides "A joint interest is one owned by two or more persons in equal shares, by a title created by a single will or transfer, when expressly declared in the will or transfer to be a joint tenancy * * * A joint tenancy in personal property may be created by a *written* transfer, instrument or agreement." (Emphasis added.) It is obvious that there was no written transfer, instrument or agreement here. Therefore defendant Ann may not claim a compliance with said section. However, the section states further: "Provisions of this section shall not restrict the creation of a joint tenancy in a bank deposit as provided for in the Bank Act." The provision in the Bank Act to be considered here is section 852, Financial Code, which in part provides: "When a deposit is made in a bank in the names of two or more persons * * in such form that the moneys in the account are payable to the survivor or survivors then such deposit and all additions thereto shall be the property of such persons as joint tenants."

Defendant Ann contends that this section was complied with (1) as a matter of law and (2) as a matter of fact.

Defendant Ann contends that the two signatures on the face of the signature cards coupled with the testimony of the bank employees that the practice was rarely to use the reverse side of the cards to create a joint account shows a complete compliance with section 852. Defendant Ann contends further that "in such form" does not require a writing, particularly as in the same section the Legislature made a requirement of a writing for a limitation on the right of a joint tenant to withdraw funds; and that the Legislature has left to the particular bank the determination of what the "form" shall be. It is not reasonable to assume that the Legislature in section 852, Financial Code, intended to leave to the banks the right to permit the creation of a joint tenancy orally. In view of section 683, Civil Code, "in such form" in section 852, Financial Code, can only mean that the bank may determine the particular form of writing, provided that it clearly indicates an intention of the declarant or declarants to create a joint tenancy. The necessity for a clear written declaration of joint tenancy is shown by the decision in California Trust Co. v. Bennett, 33 Cal.2d 694, 204 P.2d 324, 325, which dealt with a somewhat analogous situation, that of a claimed joint tenancy safe deposit box. There the court, although it did not discuss the effect of the Bank Act, must have had it in mind because it quoted section 683 including the provision that the creation of a joint tenancy in a bank deposit as provided for in the Bank Act should not be restricted (at that time the section of the Bank Act dealing with joint accounts was 15a and used the same term "in such form" as is in section 852, Financial Code). In that case the decedent rented a safe deposit box in the bank, telling the clerk she wanted her husband to have access to the box and to have its contents if she should die. She then signed a signature card entitled "'Co-Renters Agreement (Survivor To Have Exclusive Right of Access)'" which among other things provided for right of access by either co-renter without notice to the other and "'* * * Upon the death of either of us, the survivor is and shall for every purpose be the sole renter of said box, with the exclusive right of access thereto and possession of the contents thereof * * *.'" 33 Cal.2d at page 695, 204 P.2d at page 325. The decedent brought the card home to her husband to sign, telling him that if anything happened she wanted him to have the contents of the box. Her sister testified that decedent placed $8,000 "'in her own box in the name of'" the husband. After holding that because of section 683, Civil Code, joint tenancies may be created *only* by a writing, the court held that this writing was not sufficient to create a joint tenancy. It then went on to discuss the same type of further contention that is made in our case (33 Cal.2d at page 699, 204 P.2d at page 327): "It is asserted, nevertheless, that decedent's declarations and the circumstances surrounding the renting of the safe deposit box may be used to interpret the rental card, and that, when interpreted with this evidence, the card is sufficient to satisfy the statutory requirement of a writing. It is well settled that where a statute requires the formality of a writing for the creation of an interest in property, it must contain words indicating an intent to transfer such interest, and in the absence of words which could be interpreted to show such intent, no parol evidence will be admitted. [Citations.] In the present case, the rental card is clear and, as we have seen, it does not purport to affect the title to the contents of the box, but relates only to rights of possession and access. [Citations.] Accordingly, the parol evidence could not be used to amplify the terms of the rental card so as to create a joint tenancy." In our case there likewise is no ambiguity in the writings that were signed, namely, the face of the cards. Both signature cards had printed on their faces "joint and individual." The obvious purpose of these words was to indicate that the card could be used for either an individual or a joint account. It in no wise is a declaration that signatures of more than one person placed thereon constitutes a declaration of joint tenancy.

Typed at the top of the savings account card was "A. J. Guidotti"; at the head of the commercial account card, "A. J. Guidotti or Mrs. A. J. Guidotti." Here, too, there was no declaration of joint tenancy or of payment to survivor. (Section 852, Financial Code, does not require statement of joint tenancy but does require statement of payment to survivor.) The language in Opp v. Frye, 70 Cal.App.2d 478, at page 485, 161 P.2d 235, at page 239, is applicable here: "There is no merit in the contention that one of the findings, that funds deposited in the bank account opened in 1920 were not owned by these parties as tenants in common, is not supported by the evidence. While Mrs. Opp's name appears on the signature card that card contained no statement that she was a co-owner of the account and it sufficiently appears that her signature was placed there sometime after the account was opened. A notation on the back of the card refers to Mr. Opp only. Moreover, the first three of the bank's ledger sheets in this account, covering a period of more than a year, contained only the name of Mr. Opp except that on the first one Mrs. Opp's name had been written in with a pen or pencil. A number of subsequent sheets contained only the name of Mr. Opp. There is no evidence that Mrs. Opp ever deposited any funds in this account * * *."

In Denigan v. Hibernia Savings & Loan Society, 127 Cal. 137, 59 P. 389, Ellen Denigan deposited certain moneys which were her separate property, in an account, receiving from the bank a pass book entitled "'* * * Frank Denigan or Ellen Denigan in Account with * * *'" the bank. The court held (127 Cal. at page 141, 59 P. at page 390): "The form in which the deposit was made is entirely consistent with a desire on the part of the wife to give to her husband authority to withdraw money from the bank from time to time as she might need it, and it should not be held that she intended to part with her title thereto by reason of an ambiguous phrase, which is quite consistent with a contrary purpose."

While there was evidence that individual employees of the bank did not always follow the practice required, the bank had instructed its employees that when a joint tenancy account was desired the signature cards should be stamped "Joint Tenancy with Right of Survivorship" with the stamp provided for that purpose. Even were it bank practice to require no writing, such practice could not supersede the law. Moreover, it appeared that the bank had provided the reverse side of the card with a proper writing which would comply with both section 683, Civil Code, and the Bank Act. This writing was, in effect, the bank's endeavor to supply the "form" mentioned in section 852, Financial Code.

Young v. Young, 1932, 126 Cal.App. 306, 14 P.2d 580, is not in conflict with our ruling. There, prior to the amendment of section 683, Civil Code, in 1935, requiring that the creation of a joint tenancy must be in writing, the court held that a joint tenancy in personal property could be created by an oral agreement. By the 1935 amendment such is no longer the law. As dicta, the court said: "Even to establish a joint tenancy account in a bank under the Bank Act, *a formal agreement between the depositors* is not necessary." 126 Cal.App. at page 311, 14 P.2d at page 582; emphasis added. We are not holding that as to a bank account a formal agreement between the depositors is necessary. We are holding that the requirement of section 852, Financial Code, that the deposit in bank "in such form that the moneys in the account are payable to the survivor" is that there be a writing to that effect. This writing need not be the agreement creating a joint tenancy between the parties required by section 683, Civil Code, but it must be a writing in such form as to show that the deposit is intended to be payable to a survivor.

2. *Findings.*

[4, 5] Defendant Ann contends that in any event the evidence brings the case within the rule that where a joint tenancy fails for technical reasons, the property becomes that of the survivor under a trust theory. See American Bible Soc. v. Mortgage Guarantee Co., 1932, 217 Cal. 9, 13, 17 P.2d 105; Drinkhouse v. German Savings & Loan Soc., 1911, 17 Cal.App. 162, 118 P. 953. She then contends that the findings which negative any intention of Alfred to create a joint tenancy are not supported by the evidence, but that the evidence as a matter of law shows such intention. If the evidence is conflicting, we, of course, may not disturb the trial court's findings. In re Estate of Teel, 1944, 25 Cal.2d 520, 154 P.2d 384; Ventimiglia v. Hodgen, 1952, 112 Cal.App.2d 658, 247 P.2d 123. After an examination of the record we cannot say that there is no conflict nor that as a matter of law a joint tenancy was intended to be created by Alfred. In the written statement the assistant cashier said concerning the signing of the savings account card by Ann, "It was my understanding that it was to be used in the business. If he was away she could draw out money for the business. I do not recall any other conversation by either of them. Regarding the checking account, it was the same understanding; she could draw money out if needed * * * There was no other conversation about the accounts. Nothing was said about survivorship." His testimony in his deposition was to the same effect. The conflict between his testimony at the trial and his statement and deposition was a matter for the trial court and the inconsistencies were such that the trial court was justified in giving little, if any, weight to his trial testimony.

Defendant Ann contends that the statement was hearsay and not admissible. However, no objection was made to its introduction in evidence. Material evidence which is technically inadmissible under an exclusionary rule, if offered and received without objection, may be considered in support of the judgment. Powers v. Board of Public Works, 1932, 216 Cal. 546, 552, 15 P.2d 156; see also Witkin, California

Evidence, p. 751, § 723. The weight to be given to Ann's self-serving testimony and that of her son Collins was again a matter for the trial court. The testimony of Corbin, in view of the circumstances of the case, did not have to be accepted by the trial court, nor if accepted did it necessarily establish that Alfred intended his wife to have the right of survivorship. The trial court had the right also to consider the circumstances of the creation and the form of the accounts and Ann's contradictory statement in a collateral proceeding. The burden of establishing a joint tenancy was on defendant Ann. Having failed so to do the finding that it was not Alfred's intention to create a trust or joint tenancy was supported.

B. Plaintiff's Appeal.

Denial of Deposit in Court.

[6] Plaintiff filed a notice of motion for an order authorizing it to deposit in court the sum of $39,304.99 which it held in its possession after stopping payment of the balance in Ann's account, which was that sum. The notice stated that plaintiff would also move for an injunction restraining the other parties from taking any proceeding or action "in relation thereto" and for an interlocutory decree for the discharge of plaintiff "from any and all liability in the premises" to the parties. The motion when made was denied, apparently upon the ground that plaintiff's offer to deposit was conditioned upon a complete discharge, while the amount offered was not the whole amount in dispute. Section 386, Code of Civil Procedure, provides: "* * * The amount which plaintiff or cross complainant admits to be payable under a contract may be deposited by him with the clerk of the court at the time of the filing of the complaint or cross complaint in interpleader without first obtaining order of the court therefor." The section then provides that interest on the amount deposited shall cease to accrue after the date of deposit. Plaintiff did not purport to deposit under section 386, which apparently permits a partial deposit, that is, a sum which the party admits it owes but which is less than the amount claimed by the opponent, for two reasons: (1) it made no deposit at the time of filing the complaint or cross-complaint as required by the section; (2) a reading of the notice of motion indicates clearly that the making of the deposit was conditioned on the court granting plaintiff a complete discharge and the granting of an injunction prohibiting defendants from taking any action or proceeding against plaintiff concerning defendants' claims. This, of course, the court could not do, as defendant American Trust was claiming (and eventually succeeded in its claim) that $43,005.78 was due from plaintiff and not only the $39,304.99 which plaintiff offered to deposit. The record fails to show that plaintiff at any time offered to make a partial deposit. Thus, the court properly denied plaintiff's offer to deposit.

For the same reasons, the court properly allowed interest on the total sum of $43,005.78 from September 27, 1956, the date demand for payment was made by defendant bank upon plaintiff. See Civ.Code, § 3287. Had plaintiff offered to make a partial deposit, and had it been refused, interest could not accrue thereafter on the amount of the partial deposit offered. But this was not done.

Subsequent to the denial of said motion plaintiff filed a cross-complaint against defendant Ann in which it prayed that the court designate a person to receive "the funds referred to in the Complaint" and that upon delivering "the funds referred to" to such designated person, plaintiff be discharged from all liability to defendants. The "funds" referred to in the complaint is the sum of $39,304.99, not the whole amount claimed by defendant bank. Again, no offer was made to deposit said sum as a partial deposit under section 386. No action was taken by the trial court on the offer in this cross-complaint. It is not clear whether the offer was called to the attention of the court. However, if it were, the court would have been required to deny it, as it, like the offer in the motion, was conditioned on a discharge of plaintiff.

The judgment is affirmed.

FRED B. WOOD, J., and HANSON, J. pro tem., concur.

170 Cal.App.2d 314

In the Matter of the ESTATE of Mary Ellen FOSTER, also known as Mary E. Foster, and as Mary Foster, Deceased.

L. S. (Luke) FOSTER, Appellant,

v.

Lovus B. FOSTER and Percy T. Foster, Respondents.

Civ. 9606.

District Court of Appeal, Third District, California.

May 11, 1959.

Proceeding in the matter of the estate of the deceased. Proceeding to probate the will of the deceased. From an order of the Superior Court, Sacramento County, Jay L. Henry, J., denying a motion for change of venue and overruling the plaintiff's objection to the jurisdiction of the trial court, the plaintiff appeals. The District Court of Appeal, Warne, J. pro tem., held that evidence supported the finding that Sacramento became the residence of the decedent who died at a convalescent home there so as to justify probating her will in that county though she had been a resident and taxpayer of the County of Yolo.

Order affirmed.

1. Appeal and Error ⚷912, 965

Where there is a conflict in the inferences to be drawn from the evidence, they must be resolved in favor of the trial court's order denying a motion for a change of venue and the question is not whether the evidence is conclusive but whether there is in the record such evidence as will sustain the order. West's Ann.Gov.Code, § 244 (a, g).

2. Domicile ⚷4(2)

Residence can be changed only by union of act and intent. West's Ann.Gov. Code, § 244(a, g).

3. Wills ⚷300

Evidence supported the finding that Sacramento became the residence of the decedent who died at a convalescent home there so as to justify probating her will in that county though she had been a resident and taxpayer of the County of Yolo on the ground that there was a union of act and intent on her part to make Sacramento her residence. West's Ann.Prob.Code, § 301; West's Ann.Gov.Code, § 244(a, g).

4. Appeal and Error ⚷1024(3)

Where jurisdiction is supported by substantial evidence the finding of the trial court thereon will not be disturbed.

◆

Cushing, Cullinan, Duniway & Gorrill, Hugh W. Killebrew, Jr., San Francisco, for appellant.

Wilke, Fleury & Sapunor, Sacramento, for respondents.

WARNE, Justice pro tem.

This is an appeal from an order denying a motion for change of venue, and overruling appellant's objections to the jurisdiction of the trial court.

The deceased, Mary Ellen Foster, died at a convalescent home in Sacramento at the age of 81 years. Two of her sons, the respondents herein, offered for probate in the county of Sacramento her last will and testament, wherein they were named as coexecutors. Another son, the appellant, opposed the petition for probate and made a motion for change of venue to the county of Yolo on the ground that at the time of decedent's death she was a resident of that county. Probate Code, sec. 301. It is uncontradicted that for many years prior to June, 1957, the decedent had been a resident and a taxpayer of the county of Yolo, although she maintained two inactive savings accounts in banks in Sacramento. In May or June, 1957, decedent suffered a heart attack and as the result thereof was confined in a hospital located in Woodland, Yolo County, known as the Woodland Clinic, for treatment. During her treatment at the Woodland Clinic, she told her son, L. B. Foster, one of the respondents herein, that she would no longer be able to take care of herself or live alone in her home at Woodland and requested that she live with him at his home in Sacramento. Her request was granted and she was taken to her son's home in Sacramento, where she stayed until January 3, 1958, when she entered Sutter Hospital in Sacramento. Thereafter she was placed in a convalescent home in Sacramento, where she remained until the time of her death. Up to the time of her death decedent was registered as a voter in Yolo County, although it does not appear that she voted at any election in Yolo County after coming to Sacramento; she also maintained her checking account in a bank in Woodland and made no disposition of her home in that city. Her tax bills were sent to her Woodland home, and there is no evidence of a notification of change of address having been given to the tax collector or various firms and persons with whom she transacted business, such as her insurance agent, the Pacific Gas and Electric Company, or the Woodland branch of the American Trust Company. However, the affidavit of L. B. Foster, one of the respondents, shows that after decedent came to stay with him she expressed the wish to employ a practical nurse to care for her in Woodland; but after inquiries were made as to the cost, she determined it would be too expensive and stated she knew she would never be able to return to Woodland and requested that he rent or sell her home in that city. This testimony was corroborated by affidavits of employees in his home. Although there was evidence to the contrary, the trial court resolved the conflict by finding that the decedent was a resident of the county of Sacramento at the time of her death and that jurisdiction vested in the superior court in and for the county of Sacramento for the probating of said estate. Hence appellant's motion to transfer the estate proceedings to Yolo County was denied, and his objections to jurisdiction were overruled.

[1] The issue before the trial court was one of fact, namely, in which of two counties (Sacramento or Yolo) was decedent a resident at the time of her death, and as stated in Benjamin v. Benjamin, 128 Cal.App.2d 367, 370, 275 P.2d 43, 45, "Where there is a conflict in the inferences to be drawn from the evidence they must be resolved in favor of the trial court's order. Blumer v. Kirkman Corp., 38 Cal.2d 480, 484, 241 P.2d 17. The question is not whether the evidence is conclusive but whether there is in the record such evidence as will sustain the order."

Section 244 of the Government Code provides in part that in determining a person's place of residence, among the rules to be observed are:

> "(a) It is the place where one remains when not called elsewhere for labor or other special or temporary purpose, and to which he returns in seasons of repose.
>
> * * * * * *
>
> "(g) The residence can be changed only by the union of act and intent. * * *"

[2] Since residence can be changed only by the union of act and intent, the question arises whether there is in the record evidence sufficient to justify the conclusion arrived at by the trial court that defendant intended to change and make her residence in the county of Sacramento and that her conduct was illustrative of such intention. Viewing the evidence in the light most favorable to the respondents, as we must, the evidence is ample to sustain the trial court's findings. Here we have the decedent stating to her son, while in the Woodland Clinic, that she would no longer be able to take care of herself or live in the Woodland house; her request that she live with her son in Sacramento; her removal to Sacramento where she remained until the time of her death; and her request, made to her son, that her Woodland home be sold or rented. Also the averments in the affidavit of one Irene Moore, that during the period from June, 1957, to and including January, 1958, she was employed from time to time by L. B. Foster as a housekeeper and cook; that she became acquainted with decedent and upon three or more occasions during said period

of time decedent stated to her that she was very happy and content living with her son in Sacramento and that she did not desire or intend to return to Woodland to live in her home in said city; and further that decedent stated to her that she would never return to live in Woodland because she did not desire to live alone and she no longer desired to ever return to live in Woodland. There is also an affidavit by one Ilo Reynolds, containing the following averments: "That during the period from June, 1957, to and including January, 1958, she was employed, from time to time, by L. B. Foster as a baby sitter; that during the course of her said employment, she was frequently in the home of said L. B. Foster * * *; that during the aforesaid period of time, she became acquainted with Mary Ellen Foster [decedent] * * *; that upon many of the occasions she was in and about the home of said L. B. Foster, as aforesaid, she carried on conversations with said decedent; that upon several occasions, during which she was baby sitting with the minor child of said L. B. Foster at his said home, Mary Ellen Foster told her that she did not wish to return to Woodland to live in the house that she owned in Woodland; that she told affiant upon these occasions that she was very happy in living with her son and her daughter-in-law at their home in Sacramento, California, and that she realized it would be impossible for her to ever again live alone because of her physical infirmities; that upon one of such occasions said decedent stated to affiant that she had asked L. B. Foster, her son, to consider selling her home at 810 Cross Street, in Woodland, California, because she did not intend to go back to Woodland to live; that during the aforesaid period of time said decedent received many letters through the mail addressed to decedent at said 3202 H Street, Sacramento, California."

[3] This evidence amply supports a conclusion of a union of act and intent upon the part of the decedent to make Sacramento her residence and fully justifies the court's finding that Sacramento became decedent's residence.

[4] When jurisdiction is supported by substantial evidence, the finding of the trial court will not be disturbed. Schecter v. Superior Court, 49 Cal.2d 3, 314 P.2d 10.

The order denying the motion for change of venue and overruling appellant's objections to jurisdiction of the trial court are affirmed.

PEEK, Acting P. J., and SCHOTTKY, J., concur.

170 Cal.App.2d 197

Eugene F. EVARTS and Monrova S. Evarts, Plaintiffs and Appellants,

v.

C. J. JONES and Marion Jones, Defendants and Respondents.

Civ. 23325.

District Court of Appeal, Second District, Division 3, California.

May 6, 1959.

Rehearing Denied May 22, 1959.

Hearing Denied July 1, 1959.

Purchasers' action to set aside, as void, judgments adverse to them in their prior action against vendors, for declaration of rights, and in vendors' prior action against purchasers, to quiet title. The Superior Court of Los Angeles County, John F. Aiso, J., made determinations adverse to plaintiffs, and they appealed. The District Court of Appeal, Parker Wood, J., held that no cause of action was stated.

Affirmed.

1. Evidence 🔑43(3)

Court could take judicial notice of its own records in prior case.

2. Judgment 🔑460(1)

In purchasers' action to set aside, as void, judgments adverse to them in their prior action against vendors, for declaration of rights, and in vendors' prior action against purchasers, to quiet title, complaint was insufficient to allege cause of action. West's Ann.Const. art. 1, § 13; U.S.C.A. Const. Amend. 14.

3. Limitation of Actions 🔑32(1)

Purchasers' cause of action for loss of personal property, for loss of use of that property, for "psychological damage" to children, and for damage to business, was barred by statute of limitations when complaint was not filed within three years after alleged loss of personal property occurred when purchasers were evicted by virtue of writ of possession. West's Ann.Code Civ. Proc. §§ 335, 338, subd. 3.

4. Appeal and Error 🔑1072
New Trial 🔑18

It was error to refuse to set motion for hearing on ground that motion for new trial does not lie where judgment of dismissal has been entered after sustaining of demurrer without leave to amend; but where there was no merit to contention which movant intended to advance on motion, error was not prejudicial. West's Ann.Code Civ.Proc. § 660.

5. Appeal and Error 🔑870(6)

Denial by operation of law of motion for new trial is reviewable on appeal from judgment. West's Ann.Code Civ.Proc. § 956.

6. Appeal and Error 🔑102

Order sustaining demurrer without leave to amend is not appealable. West's Ann.Code Civ.Proc. § 956.

7. Appeal and Error 🔑110, 870(6)

Order refusing to set "Notice for Intention to Move for a New Trial" was not appealable, but was reviewable on appeal from judgment. West's Ann.Code Civ. Proc. § 956.

Elon G. Galusha, Los Angeles, for appellants.

Ball, Hunt & Hart and William W. Dennin, Jr., Long Beach, for respondents.

PARKER WOOD, Justice.

Plaintiffs appeal from: (1) an order sustaining demurrer to amended complaint without leave to amend; (2) judgment in favor of defendants entered pursuant to order sustaining demurrer; and (3) order refusing to set motion for new trial for hearing.

There are three purported causes of action in the amended complaint. The allegations of the first cause of action are, in substance, as follows: On February 17, 1944, plaintiffs and defendant entered into a written agreement whereby plaintiffs agreed to purchase certain real property (specifically described therein) from defendants. (A copy of the agreement, signed by the parties, was set forth therein. Among other things, the agreement stated that $50 was received from plaintiffs as a deposit on the purchase price of $4,500, that the property was subject to a F.H.A. trust deed securing a loan of $3,550, and that plaintiffs would execute an agreement for the purchase of the property providing for a down payment of $300 and certain monthly payments.) The effect of that agreement was not discussed by any court in any of the prior proceedings. The plaintiffs complied with all the conditions of the agreement to be performed by them. On August 1, 1944, plaintiffs entered into possession and paid an additional $250 of the purchase price. They complied with the conditional sales contract of August 1, 1944, which purported to be an amplification of the February agreement. A copy of that agreement is attached to the amended complaint. Plaintiffs tendered to defendants the full amount payable under the terms indicated, and defendants refused the tender. About June, 1948, defendants said they would not accept any more money from plaintiffs. At the request of defendants, plaintiffs placed the contract of August 1, 1944, in an escrow with instructions that plaintiffs were tendering $4,700 for balance due for a deed. Defendants refused to place a deed in escrow. The tender was refused even though defendants received approximately $2,800 before refusing further payments in June, 1948. A dispute arose between the parties as to the amount of interest to be paid on the F.H.A. loan. Defendants claimed 6⁶⁄₁₀ per cent interest. Plaintiffs contended that 4½ per cent was the rate. In September, 1944, plaintiffs brought an action against defendants for declaration of rights. Demurrer of defendants was sustained. Before plaintiffs' appeal was determined, defendants filed a quiet title action. After service upon Mrs. Evarts, her attorney (Mr. Friday) demurred on the ground that the court had no jurisdiction because jurisdiction was in the appellate court on the appeal. Demurrer was overruled, and an answer of Mrs. Evarts was filed. After service of complaint on Mr. Evarts, the said attorney neglected to answer for him, and Mr. Evarts was not advised until after the expiration of six months that the attorney had not filed the answer. The default of Mr. Evarts had been entered. Several motions by Mr. Evarts to set aside his default were denied. At the trial of the quiet title action, Mrs. Evarts made a motion for a continuance in order to obtain counsel. The motion was denied, and she had to try the case herself. The court denied her motion for an order for subpoena duces tecum regarding defendants' agreements with the government in connection with F.H.A. matters. The denials of those motions were denials of due process of law. Plaintiffs' evidence has never been refuted, and there was no foundation for the judgment. Evidence introduced by her was offered to show that F.H.A. records required to be kept by defendants had been intentionally destroyed, and to show that the rate of interest was 4½ per cent. Mrs. Evarts appealed from the quiet title judgment, and Mr. Evarts appealed from the denial of his motion to set aside his default. The appellate court joined the two appeals and thereby violated plaintiffs' right to due process of law. The reporter's transcript was not reviewed by the appellate court, because the transcript did not arrive in time to be used, and that was a denial of the right to due process. The affirmance of the void judgment left the judgment as it was before the appeal was taken. The Supreme Court refused to consider the reporter's transcript, which was before it on petition for hearing, because the transcript had not been before the appellate court. That refusal was a denial of due process of law. About April 15, 1952, plaintiffs were evicted from their home, under a writ of possession, and plaintiffs' personal things and household furnishings have never been returned to their possession. A motion to recall the remittitur was on the calendar for April 27, 1953, but the motion was heard in March, and such hearing was a further denial of due process. There was no determination on the merits in any state or federal court regarding the rights conveyed under the contract of February 17, 1944. The affirmance of the decision of the circuit court by the Supreme Court simply opens the jurisdiction of the state court to hear the whole matter on its merits and to permit the plaintiffs to redeem from said sale; and this action in equity is brought for that purpose. The decision in Evry v. Tremble, 154 Cal.App. 2d 444, 316 P.2d 49, has been decided since that time and the rulings therein are applicable because there has been no decision on the agreement of February 17, 1944. Plaintiffs contend that that contract carries the title to plaintiffs and they were never divested of the title. The foregoing mistakes of the courts demonstrate that plaintiffs have been deprived of due process of law in violation of the state and federal Constitutions, Const. art. 1, § 13; U.S. Const. Amend. 14, and the law in vogue in England when the United States Constitution was adopted.

The allegations of the second cause of action are, in substance, as follows: Plaintiffs replead the allegations of the first cause of action. The refusal of defendants to issue a deed to plaintiffs and sign necessary papers in escrow was an attempt to seek unjust enrichment of $7,500, and to seize title to plaintiffs' property after defendants had received full payment of their equity in the property, and after full tender was offered. That constitutes unjust enrichment, which defendants are not entitled to under equity, or under price control agencies created to prevent profiteering. The acts of defendants are in violation of due process of law, and defendants are holding the title of the property in trust for plaintiffs.

The allegations of the third cause of action are, in substance, as follows: Plaintiffs replead the allegations of the first and second causes of action. Defendants obtained an order of court to oust plaintiffs and family from their property. Defendants, "for removing plaintiffs' personal property and not returning it," caused anxiety and irreparable psychological damage to minor children, and disrupted plaintiffs' business which was operated from the home.

The prayer of the amended complaint was that the court set aside, "as Void," the declaratory relief judgment, the quiet title judgment, and the order of the appellate court refusing to recall the remittitur; that the court declare all orders against plaintiffs null and void, restore possession of the property to plaintiffs, and award damages for loss of personal property, for loss of use of personal property, for psychological injury to children, and for damages to plaintiffs' business.

It appears from the amended complaint that the former actions referred to therein (declaratory relief and quiet title) pertained to the same real property transaction that is involved herein. In those actions, the decisions of the trial court were adverse to the plaintiffs herein, and those decisions were affirmed on appeal. Evarts v. Jones, 104 Cal.App.2d 109, 231 P.2d 74; Jones v. Evarts, 114 Cal.App.2d 496, 250 P.2d 671. In the present action, it seems that plaintiffs are seeking a review of rulings in the former trials and a readjudication of the controversy regarding the same real property transaction.

[1, 2] As the basis for setting aside the judgment in the declaratory relief action, plaintiffs allege in the amended complaint herein that the declaratory relief action was commenced, and that defendants' demurrer thereto was sustained. Such an allegation is of no significance. The ruling sustaining the demurrer was affirmed on appeal.

As the basis for setting aside the judgment in the quiet title action, plaintiffs allege in the amended complaint, as above shown, that: Their evidence in that action was not refuted and there was no foundation for the judgment. That the trial court erred in denying motions for a continuance, for issuance of a subpoena duces tecum, and for order setting aside a default. There was no determination on the merits regarding plaintiffs' rights under the contract of February 17, 1944 (the preliminary contract, or receipt for deposit, which recited that another contract would be made). The District Court of Appeal (in the quiet title action) erred in joining the appeals of Mr. and Mrs. Evarts, and erred in not reviewing a reporter's transcript, which transcript (as alleged in the amended complaint) did not arrive in that court in time to be used. The Supreme Court, in considering the petition for a hearing, erred in not considering the reporter's transcript, which transcript (as alleged in the amended complaint) had not been before the District Court of Appeal. A motion to recall remittitur was on the April calendar, but the motion was heard in March. By reason of such errors, the plaintiffs herein were denied due process of law, and the former judgments are void. "This action in equity" is brought for the purpose of obtaining a hearing of the whole matter on its merits.

The above-mentioned allegations to the effect that the evidence in the quiet title action was insufficient, and that the court erred in denying certain motions therein, relate to matters that were reviewed on appeal and determined adversely to the plaintiffs.

With reference to the allegations that there was no determination in the quiet title action regarding the contract of February 17, 1944, it is to be noted that the amended complaint herein shows that that contract or receipt stated that $50 was received as a deposit on the purchase price, and that contract expressly provided that plaintiffs would execute an agreement for the purchase of the property. The amended complaint also shows that an agreement for the purchase of the property was executed on August 1, 1944, and that said agreement of August 1 was a subject of the prior litigation. It is also to be noted that the amended complaint states that the effect of the February agreement was not discussed in any of the prior proceedings. That agreement was discussed in Evarts v. Jones, 104 Cal.App.2d 109, 231 P.2d 74, which was one of the former appeals involving these same parties and the same transaction. In that case it was said, 104 Cal.App.2d at page 110, 231 P.2d at page 75: "There is no allegation in the amended complaint that this agreement of February 17, 1944, the one which they seek specifically to enforce, was based upon an adequate consideration * * *." This court may take judicial notice of the records of this court in that case. See Hammell v. Britton, 19 Cal.2d 72, 75, 119 P.2d 333. It is apparent that the provisions of the February agreement or receipt were embodied in the later agreement of August 1, 1944, and that both agreements were considered in the former actions.

The allegations with reference to alleged errors on appeal pertained to appellate procedure. The two appeals which were joined were the appeals of Mr. and Mrs. Evarts in the quiet title action. It is obvious that no substantial right of plaintiffs was prejudiced by such joinder. As to the allegation that the reporter's transcript was not reviewed, the amended complaint shows that such transcript had not been filed. In Jones v. Evarts, 114 Cal.App.2d 496, at page 499, 250 P.2d 671, at page 672, wherein the consolidated appeals in the quiet title action were considered, it was said: "[T]he record on appeal is incomplete. It contains neither a copy of the complaint nor of the demurrer directed thereto. * * * There is no reporter's transcript of the evidence presented at the trial, and in the absence thereof, it must be assumed that such evidence was sufficient to support the findings of fact." It was also said therein (114 Cal. App.2d at page 499, 250 P.2d at page 672) that an appellate court will not consider statements in briefs which are made up of matters outside the record. Of course, there was no responsibility on the part of the reviewing court to require the filing of a reporter's transcript. With reference to the motion to recall the remittitur, it is obvious that no substantial right of plaintiffs was prejudiced by hearing the motion in March instead of hearing it in April.

"[T]here must be an end of litigation; and when parties have once submitted a matter, or have had the opportunity of submitting it, for investigation and determination, and when they have exhausted every means for reviewing such determination in the same proceeding, it must be regarded as final and conclusive, unless it can be shown that the jurisdiction of the court has been imposed upon, or that the prevailing party, by some extrinsic or collateral fraud, has prevented a fair submission of the controversy." Pico v. Cohn, 91 Cal. 129, 133, 25 P. 970, 971, 27 P. 537, 13 L.R.A. 336. The amended complaint does not show that the jurisdiction of the court was imposed upon or that the defendants, by fraud or otherwise, prevented a fair submission of the controversy.

It does not appear from the amended complaint that plaintiffs were denied due process of law, or that the declaratory relief judgment or the quiet title judgment was void.

The purported first cause of action does not allege facts sufficient to constitute a cause of action.

The second cause of action included the allegations of the first cause of action; and it also included additional allegations that the refusal of defendants to issue a deed and to sign escrow papers was an attempt to seek unjust enrichment of $7,500 and to seize title to plaintiffs' property after full payment of defendants' equity and full tender of payment; and "in so doing constitutes" unjust enrichment. The matter of alleged unjust enrichment is of no significance unless a cause of action for setting aside the former judgments is alleged. The statements hereinabove made regarding the first cause of action are applicable to this second cause of action, since the first cause of action is repleaded herein. Since the first cause of action does not allege a cause of action for setting aside those judgments, sufficient facts to state a cause of action are not alleged in this purported second cause of action.

[3] The purported third cause of action was for damages for loss of personal property, for loss of use of that property, for "psychological damage" to children, and for damage to business. Defendants demurred thereto on the grounds that no cause of action was stated, and that the purported cause of action was barred by the statute of limitations. There is no direct allegation that defendants or either of them caused loss of personal property or any damage. The allegation is "for removing plaintiffs personal property and not returning it to them, has caused anxiety and * * * damage to minor children; and disrupted plaintiffs Business * * *." Apparently the alleged loss of personal property occurred about April 15, 1952, when plaintiffs were evicted by virtue of a writ of possession. The complaint was filed on June 18, 1956. The period prescribed for the commencement of an action for taking or detaining chattels is three years. Code Civ.Proc. § 335, and § 338, subdiv. 3. The purported third cause of action was barred by the statute of limitations.

It does not appear that the appellants could have amended the amended complaint so that it would state a cause of action. They have not indicated that they could have made such an amendment. They have not discussed the matter of making an amendment. After a general demurrer to the complaint was sustained, appellants were permitted to amend. The court did not abuse its discretion in not allowing a further amendment.

[4, 5] Appellants contend that the court erred in refusing to set their motion for a new trial for hearing. The judgment was entered March 10, 1958. On March 20, 1958, appellants filed a notice of intention to move for a new trial. The court refused to set the motion for hearing on the ground that such a motion does not lie where a judgment of dismissal has been entered after sustaining a demurrer without leave to amend. A motion for a new trial is proper under such circumstances. Carney v. Simmonds, 49 Cal.2d 84, 91, 315 P.2d 305. The court should have set the motion for hearing and should have heard the motion. Even though the court did not set the motion for hearing, the motion was denied by operation of law 60 days after the filing of the notice of intention to move for a new trial. See Code Civ.Proc. § 660. A denial of such a motion by operation of law is reviewable on the appeal from the judgment. Free v. Furr, 140 Cal.App.2d 378, 386, 295 P.2d 134. In the Free case, just referred to, when plaintiff's motion for a new trial came on for hearing, defendants objected to the hearing of the motion on the ground that the time for ruling on it had expired. The objection to the hearing was sustained. On appeal therein it was held that the ruling was erroneous and, that since the 60-day period within which the motion must be determined or be deemed denied ran from the date of filing the notice of intention to move for a new trial, the court should have decided the motion on its merits. In that case the reviewing court, after indicating that the motion had been denied by operation of law, said (140 Cal.App.2d at page 386, 295 P.2d at page 139): "There is nothing which this court can now do to reinstate or revive the motion in the court below." In Clay v. Lagiss, 143 Cal.App.2d 441, 299 P.2d 1025, the trial court made an order striking, from the files, defendant's notice of motion for a new trial. Apparently the order was made

on the ground that defendant had failed to file a memorandum of points and authorities in support of the motion. In that case, the defendant argued that the failure to file a memorandum did not authorize striking the notice from the files. The court therein said (143 Cal.App.2d at page 451, 299 P.2d at page 1032): "That may well be but, as defendant concedes, the time within which the court had jurisdiction to determine the motion for a new trial has long since expired and the effect thereof is 'a denial of the motion without further order of the court' * * *." Upon that appeal, the court considered the points which defendant desired to present to the trial court on the motion for a new trial. In the present case, the time within which the trial court had jurisdiction to determine the motion for a new trial has long since expired, and there is nothing this court can do to reinstate the motion in the trial court. This court, however, on the appeal from the judgment, has reviewed the denial (by operation of law) of the motion for a new trial. The record on appeal herein includes the memorandum of points and authorities which was attached to appellants' notice of intention to move for a new trial. Those points and authorities are also included in appellants' briefs on appeal from the judgment. The principal question that would have been presented to the trial court on the motion for a new trial was, of course, the principal question that is presented on this appeal, namely, whether the amended complaint states a cause of action. In view of the conclusion herein that a cause of action was not stated, the failure to set the motion for a new trial for hearing was not reversible error.

[6, 7] The notice of appeal herein states that the plaintiffs appeal from the order sustaining demurrer without leave to amend. Such an order is not appealable. Lavine v. Jessup, 48 Cal.2d 611, 614, 311 P.2d 8. The notice of appeal also states that plaintiffs appeal from the order refusing to set "Notice for Intention to Move for a New Trial." Such an order is not appealable. It is reviewable on appeal from the judgment. See Code Civ.Proc. § 956.

The appeals from order sustaining demurrer without leave to amend and from order refusing to set motion for a new trial for hearing are dismissed. The judgment is affirmed.

SHINN, P. J., and VALLÉE, J., concur.

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169 Cal.App.2d Supp. 887

Cynthia Denice REED, etc., Plaintiff and Appellant,

v.

HOLLYWOOD PROFESSIONAL SCHOOL, et al., Defendants and Respondents.

C. A. 9703.

Appellate Department, Superior Court,
Los Angeles County, California.
April 13, 1959.

Action for damages for refusal of a private school to enroll minor Negro. The Municipal Court of Los Angeles District, Vernon W. Hunt, J., rendered judgment of nonsuit, and minor's guardian ad litem appealed. The Appellate Department of the Superior Court, County of Los Angeles, Huls, J., held that where school had no monopoly and legislature specifically declared public policy in regard to discrimination in particular locations which did not include private schools, public policy against racial discrimination did not apply.

Affirmed.

1. Civil Rights 🔑4

Under statutes relating to right of all citizens within state to full and equal accommodations in certain named places and all other places of public accommodation, expression "all other places" means all other places of like nature to those enumerated, and not all places. West's Ann.Civ.Code, §§ 51, 52.

See publication Words and Phrases, for other judicial constructions and definitions of "All Other Places".

2. Civil Rights 🔑4, 6

Private school is not place of "public accommodation" or amusement, nor is it "public place" of amusement or accommodation, within civil rights statutes. West's Ann.Civ.Code, §§ 51, 52.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Accommodation" and "Public Place".

3. Schools and School Districts 🔑151

Racial discrimination in public education is unconstitutional.

4. Schools and School Districts 🔑151

Schools organized pursuant to private trusts may not discriminate on basis of race if schools are operated and administered by public trustee.

5. Schools and School Districts 🔑8

In action for damages for refusal of private school to enroll minor Negro, wherein it was contended that discrimination of any kind was repugnant to policy of state, question whether minor could be denied admission because of race would have to be decided in part on distinction between public and private schools.

6. Schools and School Districts 🔑8

Where private school refused to enroll minor Negro because of her race, school had no monopoly, and legislature had specifically declared public policy in regard to discrimination in particular locations which did not include private schools, public policy against racial discrimination did not apply. West's Ann.Civ.Code, §§ 51, 52.

7. Constitutional Law 🔑70(3)

Where legislature specifically declared public policy in regard to racial discrimination in particular locations, it was for legislature to make additional enumerations, not for court.

8. Schools and School Districts 🔑8

Private schools should be entitled to contract or refuse to contract with students of schools' choice for whatever reason.

Carl A. Earles, Los Angeles, for appellant.

Veatch, Thomas & Carlson, Los Angeles, for respondents.

HULS, Judge.

Plaintiff, a five-year-old Negro girl, by her guardian ad litem, appeals from the order and judgment of nonsuit; she claimed damages for violation of her civil rights under the provisions of Civil Code secs. 51, 52, 53 and 54, because of defendant's refusal to enroll her in defendant's school by reason of the fact that she was a Negro, and that she was discriminated against solely because she was a member of that race. At the trial it was stipulated that defendant is and always has been a private school.

Plaintiff contends that a private school is within the meaning of the words "all other places of public accommodation or amusement" in Civil Code sec. 51, and that such denial creates a liability under the provisions of Civil Code secs. 51, 52, 53 and 54. Since sections 53 and 54 by their terms apply only to a person over the age of twenty-one years, they have no application here.

The evidence clearly shows that the owner of the defendant school told the guardian ad litem of the minor plaintiff that he could not admit Negroes, although a brochure from the school had been received by the guardian's wife, upon which she phoned the school for information.

Appellant contends further that the school is public in the sense that the state may regulate certain phases of it under the police power, involving a violation of civil rights because of race; further that the defendant school invites members of the public to attend and solely for financial support of the school. In view of the stipulation, these contentions are specious. It should be noted, also, that a system of common schools is required by the California Constitution by which a "free" school shall be kept up and supported by the legislature (Constitution Article IX, sec. 5). The lawful existence of private schools is recognized, among other things, by a special exemption in the compulsory education law. 44 Cal.Jur.2d 134, sec. 428; Education Code sec. 16624. Piper v. Big Pine School Dist., 1924, 193 Cal. 664, 674, 226 P. 926. By article IX, section 1, of the state constitution, the advantages and necessities of a universally educated people as a guarantee and means for the preservation of the rights and liberties of the people has been declared: "A general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people, *the Legislature* shall encourage by all suitable means the promotion of intellectual, scientific, moral and agricultural improvement." (Emphasis ours.) Piper v. Big Pine School Dist., supra, 193 Cal. at page 668, 226 P. at page 928.

The legislature has provided for a system of common schools (Education Code). The education of the children of the state is protected and safeguarded by a state board of education. Piper v. Big Pine School Dist., supra, 193 Cal. at page 669, 226 P. at page 928. "The enjoyment of these privileges are enforceable rights vouchsafed to all who have a legal right to attend the public schools which cannot be enjoyed as a matter of right by those who, from choice or compulsion, attend schools without the control, supervision and regulation of the education departments of the state." 193 Cal. at page 669, 226 P. at page 928.

The legislature, in our opinion, has not expressly provided for these safeguards of education to those attending the private schools in the state, who are "exempted" by Education Code sec. 16624 from attendance in the public schools. The only requirements are that such schools shall be taught in the English language, instruction in the several branches of study required in the public schools, the keeping of attendance records, the hours of attendance, and that the tutor or other person shall hold the proper valid state credential. (Education Code sec. 16624–16625). Roman Catholic Welfare Corp., etc. v. City of Piedmont, 1955, 45 Cal.2d 325, 333, 289 P. 2d 438, 441. "Parents have the right to send their children to private schools, rather than public ones. * * *" Roman Catholic Welfare Corp., etc. v. City of Piedmont, supra, 45 Cal.2d at page 330, 289 P.2d at page 441. People v. Turner, 1953, 121 Cal.App.2d Supp. 861, 865, 263 P.2d 685.

But beyond these legislative requirements and those upheld by our courts as just referred to, they have not gone. Therefore, the question is whether a private school is one of the "other places of public accommodation or amusement" within the meaning of Civil Code secs. 51 or 52.

The California cases cited by appellant were under our civil rights statutes, and those of other jurisdictions under similar statutes. The businesses referred to therein obviously were places of public accommodation or amusement similar to the expressly named places and of a similar kind of public accommodation or amusement.

[1] The settled rule of law is that the expression "all other places" means all other places of a like nature to those enumerated. Long v. Mountain View Cemetery Ass'n, 1955, 130 Cal.App.2d 328, 278 P.2d 945. While we have said that Civil Code sec. 51 "is to be given a liberal, not a strict, construction * * * this sweeping language [of the statute] does not cover 'all places', however." Lambert v. Mandel's of California, 1957, 156 Cal.App.2d Supp. 855, 856–857, 319 P.2d 469, 470, citing Long v. Mountain View Cemetery Ass'n, supra, and Coleman v. Middlestaff, 1957, 147 Cal.App. 2d Supp. 833, 834–835, 305 P.2d 1020. "The general intent and significance of the foregoing provisions are clear enough. The purpose, of course, is to compel a recognition of the equality of citizens in the right to the peculiar service afforded by these agencies for the accommodation and entertainment of the public." Stone v. Board of

Directors of City of Pasadena, 1941, 47 Cal. App.2d 749, 753, 118 P.2d 866, 868.

[2–4] In the court's opinion a private school is not a place of public accommodation or amusement, nor is it a public place of amusement or accommodation, within the meaning of Civil Code secs. 51 or 52. It is true that racial discrimination in public education is unconstitutional. Brown v. Board of Education of Topeka, 1954, 347 U.S. 483, 74 S.Ct. 686, 98 L.Ed. 873; Lucy v. Adams, 1955, 350 U.S. 1, 76 S.Ct. 33, 100 L.Ed. 3. See also (1959), 32 Ops.Atty. Gen. 264, 268. Rights of racial minorities have gradually been extended. James v. Marinship Corp., 1944, 25 Cal.2d 721, 155 P.2d 329, 160 A.L.R. 900 (discrimination by labor unions against negroes); Thompson v. Moore Drydock Co., 1946, 27 Cal.2d 595, 165 P.2d 901 (labor union); Williams v. International Brotherhood of Boilermakers, etc., 1946, 27 Cal.2d 586, 165 P.2d 903 (same); Perez v. Sharp, 1948, 32 Cal. 2d 711, 198 P.2d 17 (miscegenation); Banks v. Housing Authority, 1953, 120 Cal. App.2d 1, 260 P.2d 668, certiorari denied by U. S. Supreme Court, 347 U.S. 974, 74 S.Ct. 784, 98 L.Ed. 1114. In general the extension of such rights has been based upon the discrimination exercised in businesses such as public service corporations or serving a general public purpose or where the public accommodation or amusement was public property or was being used in the exercise of a public function. The civil rights statutes have not been applied in the case of private or semi-private uses. 9 Ops.Atty.Gen. 271, 272. It was early decided that a Negro was not denied any constitutional right by refusal of a private education institution to admit him, apparently on the ground that the constituional guarantees apply to state action rather than to private action. State ex rel. Clark v. Maryland Institute for Promotion of Mechanic Arts, 1898, 87 Md. 643, 41 A. 126; Booker v. Grand Rapids Medical College, 1909, 156 Mich. 95, 120 N.W. 589, 24 L.R.A.,N.S., 447; 10 Am.Jur. 910; Kirkpatrick v. Williams, 1949, 53 N.Mex. 477, 211 P.2d 506, 507; see 55 Am.Jur. 11, sec. 15; 10 Am. Jur. 909–910. Likewise in a review of state action the Supreme Court has held that it is invalid for courts to enforce restrictive covenants in deeds either by injunction or in actions for damages. Shelley v. Kraemer, 1948, 334 U.S. 1, 68 S.Ct. 836, 92 L.Ed. 1161; Barrows v. Jackson, 1953, 346 U.S. 249, 73 S.Ct. 1031, 97 L.Ed. 1586. Schools organized pursuant to private trusts may not discriminate on the basis of race if the schools are operated and administered by a public trustee, (Commonwealth of Pennsylvania v. Board of Directors of City Trusts of City of Philadelphia, 1957, 353 U.S. 230, 77 S.Ct. 806, 1 L.Ed.2d 792), because of the public character of the trusteeship.

People ex rel. Tinkoff v. Northwestern University, 1947, 333 Ill.App. 224, 77 N.E. 2d 345, held a private educational institution not to be in a business essentially public in its nature rendering the corporation so engaged subject to public control as a telegraph and telephone company or a virtually monopolistic warehouse, and stated that the admission of the relator rested in the discretion of the University, that he had no right to be admitted and that courts have refused to coerce private educational institutions in the exercise of lawful discretion. The case was not based on race, color or creed.

[5] Appellant claims that the problem here is not one of distinction between public and private schools but whether a Negro applicant to a private school may be denied admission because of race. Of course the latter is the ultimate question, but it must be decided in part on the distinction between a public and private school in view of appellant's contention that discrimination of any kind is repugnant to the public policy of the State of California.

To appellant's contention that any distinction or discrimination based upon race is repugnant and void under the constitution of the United States or of this state, this court cannot agree. While it is true that in James v. Marinship Corp., supra, 25 Cal.2d 721, 740, 155 P.2d 329, 340, the court referred to Civil Code secs. 51 and 52 as being merely declaratory of common law, and stated: "The analogy of the public service cases not only demonstrates a public policy against racial discrimination but also refutes defendants' contention that a statute is necessary to enforce such a policy where private rather than public action is involved", the only question decided by the court in the case was that when a labor union which has attained a monopoly of the labor supply through closed shop agreements, such a union, like a public service business, may not unreasonably discriminate against Negro workers for the sole reason that they are colored persons.

[6, 7] We do not believe that the doctrine of public policy established by James v. Marinship Corp., supra, or Thompson v. Moore Drydock Co., supra, 27 Cal.2d 595, 165 P.2d 901; Williams v. International Brotherhood of Boilermakers, etc. supra, 27 Cal.2d 586, 165 P.2d 903, applies to a matter of private relationship such as that here before us, since the defendant school has no monopoly and since the legislature has specifically declared the public policy of the state in regard to discrimination in particular locations and it is the office of the legislature and not of this court to make any additional enumerations which may be desirable. Coleman v. Middlestaff, supra, 147 Cal.App.2d Supp. 833, 305 P.2d 1020.

[8] In our opinion private schools should be entitled to contract or refuse to contract with students of their choice for whatever reason if such contract or refusal does not fall within the constitutional or statutory proscription against discrimination on the basis of race or color. We do not find any authority that such refusal does so. The judgment and order are affirmed.

BISHOP, P. J., and SWAIN, J., concur.

BISHOP, Presiding Judge.

The three judges, whose names appear above, are designated to participate in the decision of this appeal.

52 Cal.2d 125

George B. T. STURR, Petitioner,
v.
STATE BAR OF CALIFORNIA, Respondent.
L. A. 25274.

Supreme Court of California,
In Bank.
May 8, 1959.
Rehearing Denied June 3, 1959.

Proceeding by attorney to review recommendation of Board of Governors of State Bar that petitioner be suspended from practice of law for period of five years. The Supreme Court held that attorney's conduct warranted his removal from the practice of law.

Attorney disbarred.

1. Attorney and Client 🔑53(2)

In disciplinary proceeding against an attorney, evidence established that attorney had violated his oath and duties as an attorney and counselor at law, had committed acts involving moral turpitude and dishonesty, and had violated State Bar Rules of Professional Conduct forbidding the commingling of a client's money with that of a member of the bar and forbidding a member to communicate with a party represented by counsel upon subject of controversy in absence of and without consent of such counsel. West's Ann.Bus. & Prof.Code, § 6106; Rules of Professional Conduct, rules 9, 12, West's Ann.Bus. & Prof.Code following section 6076.

2. Attorney and Client 🔑57

In disciplinary proceeding against an attorney, findings of fact by local administrative committees and Board of Bar Governors are not binding on the Supreme Court, and the Supreme Court will weigh and pass upon sufficiency of evidence to sustain board's findings.

3. Attorney and Client 🔑57

Attorney who seeks review of Board of Bar Governors' recommendation in disciplinary proceeding against attorney has burden of showing that board's findings are not supported by evidence or that its recommendation is erroneous or unlawful.

4. Attorney and Client 🔑53(1)

Fact that those charged by law in first instance with duty of passing upon truth of accusations made against attorney in disciplinary proceeding resolved conflicts of evidence against him did not mean that attorney had not been given benefit of a presumption of innocence in the proceeding.

5. Attorney and Client 🔑57

Where, in disciplinary proceeding against attorney, those charged by law in first instance with duty of passing upon truth of accusations against attorney resolved conflicts in evidence against attorney, attorney had burden, upon review, of showing wherein decision of Board of Governors of State Bar was erroneous or unlawful.

6. Attorney and Client 🔑57

In proceeding by attorney to review recommendation of Board of Governors of State Bar in disciplinary proceeding against attorney, attorney failed to meet burden of showing wherein board's decision adverse to attorney was erroneous or unlawful.

7. Attorney and Client 🔑54

Where disciplinary proceeding against attorney became protracted by reason of nature of defense and legitimate opportunity to cross-examine state bar witnesses and to offer witnesses on attorney's behalf, but attorney was not prejudiced by length of time taken in disposing of matter, and part of delay was attributable to death of attorney's original counsel, there was not undue delay in the proceeding before local administrative committee of the State Bar.

8. Attorney and Client 🔑44(2)

Misappropriation of funds entrusted to an attorney at law is a gross violation of general morality and of professional ethics and, in addition, is likely to endanger public's confidence in the legal profession, and, therefore, it deserves severe punishment. West's Ann.Bus. & Prof.Code, § 6106; Rules of Professional Conduct, rule 9, West's Ann.Bus. & Prof.Code following section 6076.

9. Attorney and Client 🔑58

Attorney's conduct warranted his removal from the practice of law. West's Ann.Bus. & Prof.Code, § 6106; Rules of Professional Conduct, rules 9, 12, West's Ann.Bus. & Prof.Code following section 6076.

George B. T. Sturr, in pro. per., and George O. West, Los Angeles, for petitioner.

Garrett H. Elmore, San Francisco, and Francis M. Wheat, Los Angeles, for respondent.

PER CURIAM.

This is a proceeding to review the recommendation of the Board of Governors of The State Bar of California that petitioner be suspended from the practice of law for a period of five years. The Board of Governors found that petitioner (1) violated his oath and duties as an attorney and counselor at law, (2) committed acts involving moral turpitude and dishonesty within the meaning of section 6106 of the Business and Professions Code,[1] and (3) violated rules 9 and 12 of the Rules of Professional Conduct of The State Bar.[2]

Questions: First. *Did petitioner violate (1) his oath and duties as an attorney and counselor at law, (2) section 6106 of the Business and Professions Code, and (3) rules 9 and 12 of the Rules of Professional Conduct of The State Bar?*

[1] *Yes.* These rules are here applicable:

[2] 1. In a disciplinary proceeding against an attorney, findings of fact by local administrative committees and the Board of Bar Governors are not binding on the Supreme Court, which will weigh and pass upon the sufficiency of the evidence to sustain the findings of the board.

[3] 2. The burden is upon the petitioner seeking a review of the Board of Bar Governors' recommendation to show that its findings are not supported by the evidence or that its recommendation is erroneous or unlawful. Tonini v. State Bar, 46 Cal.2d 491, 492[1], [2], 297 P.2d 1; Clark v. State Bar, 39 Cal.2d 161, 165 [1], [2], 246 P.2d 1.

Applying the foregoing rules, the record in the instant proceeding discloses that petitioner was admitted to the practice of law in California on June 12, 1951, and is and at all times herein mentioned was a member of The State Bar.

In August 1953 petitioner was employed by Merle Persinger and L. O. Persinger, copartners engaged in the manufacture and sale of barbecue equipment, for the purpose of incorporating the business of the partnership. Pursuant thereto he recommended and undertook the incorporation of three corporations, Big Boy Manufacturing Company, Big Boy Barbecue Sales Company, and Big Boy Barbecue Export Company. He was placed on a retainer basis by the Big Boy Manufacturing Company from December 1953 until May 1955 at the rate of $250 per month.

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[1] Section 6106 of the Business and Professions Code reads, in part: "The commission of any act involving moral turpitude, dishonesty or corruption, whether the act is committed in the course of his relations as an attorney or otherwise, and whether the act is a felony or misdemeanor or not, constitutes a cause for disbarment or suspension."

[2] Rule 9 of the Rules of Professional Conduct is: "A member of the State Bar shall not commingle the money or other property of a client with his own; and he shall promptly report to the client the receipt by him of all money and other property belonging to such client. Unless the client otherwise directs in writing, he shall promptly deposit his client's funds in a bank or trust company, authorized to do business in the State of California, in a bank account separate from his own account and clearly designated as 'Clients' Funds Account' or 'Trust Funds Account' or words of similar import. Unless the client otherwise directs in writing, securities of a client in bearer form shall be kept by the attorney in a safe deposit box at a bank or trust company authorized to do business in the State of California, which safe deposit box shall be clearly designated as 'Clients' Account' or 'Trust Account' or words of similar import, and be separate from the attorney's own safe deposit box." 47 Cal.2d 10.

Rule 12 of the Rules of Professional Conduct is: "A member of the State Bar shall not communicate with a party represented by counsel upon a subject of controversy, in the absence and without the consent of such counsel. This rule shall not apply to communications with a public officer, board, committee or body." 33 Cal.2d 30.

He advised the Persingers that it would be necessary to have the real property and personal assets of the partnership appraised in order to incorporate the partnership and issue stock. On April 16, 1954, he engaged J. A. Mann and Ralph S. Bowdle to make an appraisal and informed his clients that the cost would be $300. The clients paid him this amount, which he placed in his personal bank account. Thereafter he informed his clients that the total cost for the appraisal would be $1,200, and they gave him an additional $300 toward payment thereof. At that time he stated to them that he would see that the remainder of the fee to Mann and Bowdle for their appraisal was paid. He then appropriated to his own use the $600 given to him by his clients for the appraisal fee. Later he paid $500 from his personal funds to Mr. Mann, using his personal check, which upon presentation was dishonored. Shortly thereafter it was again presented for payment by Mr. Mann and was honored. Without the knowledge or consent of his clients, petitioner retained for his personal use and benefit the remaining $100 given him for the specific purpose of paying the appraisal fee. Later, Big Boy Manufacturing Company was presented with bills for the services of the appraisers, totalling $1,150, and paid them an additional $650 on October 25, 1955.

On March 15, 1954, an action was instituted in the United States District Court by Robert C. Wian against Big Boy Manufacturing Company, in which the plaintiff sought to prevent petitioner's clients from using the words "Big Boy" in the conduct of their business. [9 Cir., 229 F.2d 154]. Petitioner stated to his clients that he was unfamiliar with this type of action and recommended the employment of Albert Lee Stephens, Jr., another attorney, to handle the defense of the action. Petitioner and Mr. Stephens agreed upon a proposed retainer fee of $5,000 to be paid by Big Boy Manufacturing Company, to be divided between them, one third to petitioner and two thirds to Mr. Stephens.

Petitioner informed his clients that the $5,000 would cover all costs and legal fees for handling the case through a decision by the trial court and that he would see that Mr. Stephens was paid his fee out of the $5,000. Subsequently they paid petitioner the following:

March 19, 1954	$2,000
March 30, 1954	250
April 26, 1954	1,000
July 12, 1954	1,565
August 25, 1954	500
Total	$5,315

The foregoing payments were made to petitioner for attorneys' fees in connection with the Wian case, except the $500 paid on August 25, 1954, which amount represented a deposit by the clients for additional costs for depositions and patent office searches requested by petitioner. He commingled in his personal bank account with his own funds $3,750 of the $5,315 paid to him by his clients, and he cashed the remaining check for $1,565. He converted and appropriated all the $5,315 to his own use and benefit without the knowledge or consent of his clients. No depositions were ever taken in the case, nor were patent office searches made while he was employed in connection with this matter. He did not disclose to Mr. Stephens that he had received the $5,315.

On August 9, 1954, petitioner paid $250 to Mr. Stephens, and on February 21, 1955, he paid him an additional $1,000.

On February 16, 1955, petitioner and Mr. Stephens agreed upon a total fee of $4,000 to be charged Big Boy Manufacturing Company for their services in handling the case through a decision in the trial court, of which amount Mr. Stephens was to receive $3,000 and petitioner $1,000. He failed to pay Mr. Stephens any portion of the $3,000 except the sum of $1,250 heretofore mentioned. He did not disclose to his clients that the total fee chargeable to them for services in handling the case through a decision in the trial court had been limited to $4,000.

After a decision in the trial court, it became evident that the plaintiff intended to appeal from the judgment, and petitioner advised his clients to contest the appeal. He and Mr. Stephens agreed upon a fee of $2,500 to be charged for services rendered on appeal, to be divided $2,000 to Mr. Stephens and $500 to petitioner. He represented to his clients that the $2,500 would cover all fees and expenses relative to the appeal.

On February 18, 1955, the clients paid petitioner $2,500 for the appeal fee and expenses. He deposited this sum in his personal bank account and commingled it with his own funds, all without the consent or knowledge of his clients. He did not disclose to Mr. Stephens that he had received the $2,500; neither did he pay any portion of it to him. On May 19, 1955, the clients were required to pay to Mr. Stephens, at his request, the sum of $1,750, being the unpaid balance of the agreed fee of $3,000 above described for handling the case through the decision in the trial court. Thereafter, at Mr. Stephens' request, the clients paid him an additional $2,000 for representing them on the appeal.

On November 6, 1953, the clients paid petitioner, at his request, $300 to be used by him for payment of fees for filing the articles of incorporation and for filing an application for a permit to issue stock of Big Boy Manufacturing Company. He deposited this sum in his personal bank account, commingled it with his own funds, and appropriated it to his own use without the knowledge or consent of his clients.

In June 1954 petitioner paid $183 from his own funds as a filing fee, franchise tax, and other related expenses.

On May 24, 1955, petitioner filed with the Commissioner of Corporations of the State of California applications for permits to issue shares of capital stock of the three corporations mentioned and paid the commissioner $187.50 for filing fees.

On August 16, 1954, at petitioner's request, his clients paid him $855, to be used as follows:

$100	fees for filing amended articles of incorporation
350	payment of franchise tax
5	certifying amended articles of incorporation
50	filing amended articles in the County of Los Angeles
350	fee for filing application for permit to issue additional authorized stock

On August 17, 1954, he converted the $855 to his own use without the knowledge or consent of his clients. On August 20, 1954, he paid the actual fee for filing the amended articles of incorporation of Big Boy Manufacturing Company in the amount of $22.50.

On August 15, 1954, petitioner recommended to his clients the formation of two separate corporations to manufacture barbecue equipment for Sears, Roebuck & Co. On September 1, 1954, his clients paid him, at his request, $855, to be used as follows:

$100	filing fee of corporate charters
355	payment of franchise tax
5	certification of articles of incorporation
50	filing fee, County of Los Angeles
350	fee for filing application for permit to issue stock

He deposited this sum in his personal bank account, commingled it with his own funds, and appropriated it to his own use and benefit without the knowledge or consent of his clients. At no time did he incur or pay any costs or expenses in connection with the formation of the two corporations last mentioned.

On August 25, 1954, petitioner received $340 from Big Boy Manufacturing Company in payment of a statement for costs in obtaining two trade-marks for his client.

He deposited this money in his personal bank account and converted it to his own use and benefit without the knowledge or consent of his client. He did not at any time incur any costs on behalf of his client for the purpose of obtaining trade-marks.

On September 27, 1954, petitioner received $355 from Big Boy Manufacturing Company for the purpose of paying filing fees and other related costs in connection with obtaining United States Letters Patent on a brazier flip grille and fees to patent attorneys engaged by him with his client's consent. He deposited this sum in his personal bank account, commingled it with his own funds, and converted it to his own use and benefit without the knowledge or consent of his client.

On or about August 17, 1955, petitioner paid $75 from his own funds to the patent attorneys to cover the cost of a patent search made by them at his request in October 1954. On January 7, 1957, he paid the attorneys $280 from his personal funds for services and filing fees incurred by them at his request with reference to the filing and processing of an application for United States Letters Patent on the brazier flip grille.

Petitioner admits that at various times his clients paid him sums of money to be used for specific purposes, which sums he did not deposit in a trust account, but instead deposited in his personal bank account. Petitioner maintained a trust account during this period of time.

In the early part of 1955 petitioner was engaged by John W. Houser to represent him in a divorce action brought by his wife, Doris L. Houser, in the Superior Court of Los Angeles County. He appeared with his client at a hearing for an order to show cause with reference to attorney's fees and costs in connection with the divorce action. It was agreed between the parties and through their attorneys that the residence property owned by the plaintiff and the defendant should be sold. Thereafter the property was sold, with the Johnston Escrow Company handling the sale, which resulted in an equity of $1,028.83 payable to the Housers. A check for this amount was issued by the escrow company on April 18, 1955, payable to John W. Houser and Doris L. Houser. This check was delivered to petitioner in April 1955 by his client, John W. Houser, with instructions to hold the same until the plaintiff should endorse it and thereafter to use the proceeds to pay federal and state income taxes due and payable for the year 1954 and certain other outstanding bills of the Housers.

Throughout all the proceedings in this matter, Doris L. Houser was represented by Donovan Ballenger, an attorney at law. Without the knowledge or consent of his client, Doris L. Houser or her attorney, petitioner on May 19, 1955, used the check to open a new personal bank account in his name and deposited it in said account. The endorsements of John W. Houser and Doris L. Houser on the reverse of the check were not made by them, or either of them. Petitioner converted the proceeds of this check to his own use and benefit without the knowledge or consent of his client or the plaintiff, Doris L. Houser.

On May 24, 1955, the interlocutory decree of divorce granted to Doris L. Houser in the above-mentioned action was entered in the register, which decree provided that after the plaintiff and the defendant had endorsed the check for $1,028.83, the proceeds were to be delivered to the plaintiff's attorney for payment of federal and state income taxes, with the remainder payable to the plaintiff. Petitioner had knowledge of this decree and its contents, but he did not advise Mr. Ballenger what had been done with the proceeds of the check.

On March 16, 1955, Mr. Houser delivered to petitioner $450 in cash, to be paid as follows: $160 to Doris L. Houser, representing payments ordered for her support pursuant to the interlocutory decree of divorce, and the remainder of $290 to Mr. Ballenger, her attorney, for his fees and court costs. Petitioner converted and appropriated the $450 to his own use without the knowledge or consent of his client, and he did not at any time make any payment to Mr. Ballenger.

In April and May 1955 while Doris L. Houser was represented by Mr. Ballenger, which fact was known to petitioner, he, without the consent of Mr. Ballenger, communicated with the plaintiff in person concerning matters involving the settlement of property and other matters related to the pending divorce action.

On May 25, 1955, petitioner prepared a document entitled Affidavit and Petition in Support of Motion to Set Aside Interlocutory Judgment in the Houser matter, which purported affidavit contained numerous false statements, known by petitioner to be false, to wit: that the defendant, John W. Houser, and his counsel were approached by the plaintiff and informed by her that she was no longer represented by Mr. Ballenger; that the plaintiff endorsed the check from Johnston Escrow Company in the sum of $1,028.83; that John W. Houser requested petitioner to cash the check for Mr. Houser's benefit; and that petitioner delivered to Mr. Houser $1,028 in cash. Thereafter petitioner caused the three-page affidavit to be attached to a fourth page containing the signature of John W. Houser and a jurat dated May 25, 1955, signed by petitioner as notary public. At the time Mr. Houser signed the fourth page, petitioner did not display to him the three pages containing the above-mentioned false statements.

It is apparent that the foregoing evidence supports the fact that petitioner violated (1) his oath and duties as an attorney and counselor at law, (2) section 6106 of the Business and Professions Code, and (3) rules 9 and 12 of the Rules of Professional Conduct of The State Bar.

Second. *Was petitioner given the benefit of a presumption of innocence in the proceeding?*

[4–6] *Yes.* Those charged by law in the first instance with the duty of passing upon the truth of the accusations against petitioner resolved the conflicts in the evidence against him. Therefore, on this review the burden is upon petitioner to show wherein the decision of the Board of Governors was erroneous or unlawful. Ring v. State Bar, 218 Cal. 747, 750 [2], 24 P.2d 821; Aydelotte v. State Bar of California, 209 Cal. 737, 740 [2], 290 P. 41. This burden he has not met.

Third. *Was there undue delay in the proceedings before the local administrative committee of The State Bar?*

[7] *No.* The record shows that petitioner, both personally and by his counsel, waived time to answer and that the second amended notice to show cause was filed with the consent of petitioner's counsel. The record further discloses that part of the delay was attributable to the death of petitioner's original counsel. By reason of the nature of the defense and the legitimate opportunity to cross-examine State Bar witnesses and to offer witnesses on petitioner's behalf, the proceeding became a protracted one. However, it does not appear that petitioner was in any way prejudiced by the length of time taken in disposing of the matter. Cf. Paonessa v. State Bar, 43 Cal.2d 222, 226, 272 P.2d 510.

Fourth. *What punishment should be imposed?*

The rules of The State Bar that petitioner violated were designed to prohibit unprofessional conduct. In the present proceeding the record discloses a callous and brazen indifference to the obligations of an attorney and a course of conduct of deliberate commingling and appropriation of clients' funds to petitioner's own use.

[8, 9] Misappropriation of funds entrusted to an attorney at law is a gross violation of general morality as well as professional ethics and, in addition, is likely to endanger the confidence of the public in the legal profession. It deserves severe punishment. In Mills v. State Bar, 6 Cal.2d 565, at page 567[3], 58 P.2d 1273, at page 1274, a case involving the misappropriation of clients' funds, this court said: "Whatever might be said in favor

of a milder punishment for single misdemeanors not involving deliberate moral turpitude, there is no doubt in our minds that any lawyer who is guilty of habitual misuse of the funds of his clients should be deprived of the license under which he is authorized to practice law, and by which he has been recommended to the public as a person worthy of trust." See also Narlian v. State Bar, 21 Cal.2d 876, 887 [5], 136 P.2d 553.

Under these circumstances petitioner should be removed from the practice of law.

It is therefore ordered that George B. T. Sturr be disbarred and that his name be stricken from the roll of attorneys of this state, the order to become effective 30 days after the filing of this opinion.

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52 Cal.2d 142

PEOPLE of the State of California, Respondent,

v.

Frank CAMODECA, Appellant.

Cr. 6412.

Supreme Court of California,
In Bank.
May 12, 1959.

Prosecution for attempt to commit grand theft and attempt to commit extortion. From adverse judgment of the Superior Court, Alameda County, S. Victor Wagler, J., the defendant appealed. The Supreme Court, Traynor, J., held that where defendant, who held a contract of sale and collected monthly payments on a bar, falsely represented to bar owner that Department of Alcoholic Beverage Control had certain charges on file against the bar and that those charges could be fixed and the license cleared if owner would give defendant $720 to pass on to certain persons and owner believed misrepresentations and attempted to raise the money and on a later meeting defendant stated that money had already been paid to officials by an unnamed person who would be unhappy if owner did not make prompt reimbursement, defendant's conduct in seeking to accomplish obtaining of money by false pretenses went well past stage of mere preparation and constituted unequivocal action done toward commission of crime of attempted grand theft.

Judgment affirmed.

Opinion, 331 P.2d 983, vacated.

1. Criminal Law 🔑**44**

In order to establish an attempt to commit a crime, it must appear that defendant had a specific intent to commit a crime and did a direct, unequivocal act toward that end, and there must be some appreciable fragment of the crime committed, and it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter, and preparation alone is not enough.

2. Larceny 🔑**66**

Evidence was sufficient to sustain conviction of attempted grand theft.

3. False Pretenses 🔑**21**

Where defendant, who held a contract of sale and collected monthly payments on a bar, falsely represented to bar owner that Department of Alcoholic Beverage Control had certain charges on file against bar and that those charges could be fixed and license cleared if owner would give defendant $720 to pass on to certain persons and owner believed misrepresentations and attempted to raise money and on a later meeting defendant stated that money had already been paid to officials by an unnamed person who would be unhappy if owner did not make prompt reimbursement, defendant's conduct in seeking to accomplish obtaining of money by false pretenses went well past stage of mere preparation and constituted unequivocal action done toward commission of a crime of attempted grand theft. West's Ann.Pen.Code, § 484.

4. False Pretenses ⚷21

In a prosecution for attempted grand theft by false pretenses, it is not necessary that defendant's intended victim be deceived by the falsity of the representations made to him. West's Ann.Pen.Code, § 484. People v. Werner, 16 Cal.2d 216, 105 P.2d 927 overruled.

5. Criminal Law ⚷44

When it is established that defendant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime.

6. Criminal Law ⚷26

Although law does not impose punishment for guilty intent alone, it does impose punishment when guilty intent is coupled with action that would result in a crime but for intervention of some fact or circumstance unknown to the defendant.

7. Threats ⚷7

Evidence was sufficient to support implied finding that defendant attempted to place owner of bar in fear of unlawful injury to his business or person if money was not paid to defendant and to sustain conviction of attempted extortion. West's Ann.Pen.Code, §§ 519, 524.

8. Criminal Law ⚷29

Whether a transaction is divisible and punishable under more than one statute must be resolved on the facts of each particular case. West's Ann.Pen.Code, § 654.

9. Criminal Law ⚷29

Where defendant first tried to get money from owner of bar by falsely representing that certain charges on file against his business could be fixed with Alcoholic Beverage Control Board, and defendant met with owner to collect bribe money, and after realizing that he was going to encounter difficulty in securing money, defendant attempted to extort money from owner by veiled threats of injury to his person or business, defendant could be convicted both for attempted grand theft and for attempted extortion. West's Ann. Pen.Code, §§ 484, 519, 524, 654.

Robert H. Kroninger, Oakland, for appellant.

Edmund G. Brown, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., John S. McInerny, Deputy Atty. Gen., J. F. Coakley, Dist. Atty., Alameda, and C. Zook F. Sutton, Deputy Dist. Atty., Oakland, for respondent.

TRAYNOR, Justice.

Defendant held a contract of sale and collected the monthly payments on a bar owned and operated by William L. Murphy. On June 15, 1957, Murphy discussed with defendant the possibility of removing the name of Murphy's "common-law wife" from the contract of sale and from the bar's beer and wine license. Defendant stated that this could be done but that it would require a "fix." He also told Murphy that the Department of Alcoholic Beverage Control had certain charges on file against the bar and that those charges could be fixed and the license cleared if Murphy would give defendant $720 to pass on to certain persons in Sacramento. There were no reported violations in fact, but Murphy believed the misrepresentations and attempted to raise the money. When he was unable to do so he brought the matter to the attention of the district attorney. A meeting between Murphy and defendant was arranged for June 18th, when defendant was to receive the money. By arrangement with Murphy, police officers were hidden near the place of the second meeting, and the conversation was recorded. On learning that Murphy was unable to raise the money, defendant stated that the money had already been paid to the officials in Sacramento by an unnamed man who would be "unhappy" if Murphy did not make prompt reimbursement. Defendant was then placed under arrest and charged with attempted grand theft.

The trial court, sitting without a jury, found defendant guilty of two counts, attempt to commit grand theft and attempt to commit extortion. The sentences were to run concurrently. Defendant appeals.

[1] "In order to establish an attempt, it must appear that the defendant had a specific intent to commit a crime and did a direct, unequivocal act toward that end. * * *" People v. Gallardo, 41 Cal.2d 57, 66, 257 P.2d 29, 35. "Preparation alone is not enough, there must be some appreciable fragment of the crime committed, [and] it must be in such progress that it will be consummated unless interrupted by circumstances independent of the will of the attempter * * *." People v. Buffum, 40 Cal.2d 709, 718, 256 P.2d 317, 321; see People v. Miller, 2 Cal.2d 527, 530, 42 P.2d 308, 98 A.L.R. 913; People v. Van Buskirk, 113 Cal.App.2d 789, 792–793, 249 P.2d 49; People v. Franquelin, 109 Cal.App.2d 777, 783, 241 P.2d 651.

[2, 3] The evidence in the present case is sufficient under the foregoing rules to sustain the conviction of attempted grand theft. Defendant's admissions to the police that he attempted to get the $720 from Murphy by falsely representing that he could get the violations "fixed" and that the money was to be for his own use, establish a specific intent to obtain money by false pretenses. See Pen.Code, § 484. His conduct in seeking to accomplish that objective went well past the stage of "mere preparation." See People v. Buffum, 40 Cal.2d 709, 718, 256 P.2d 317. After his meeting with Murphy and his threats to secure payment of the bribe money, the only further act necessary to consummate the crime of grand theft was actual receipt of the money. This conduct was unequivocal action done toward the commission of the crime (compare People v. Wallace, 78 Cal.App.2d 726, 742, 178 P.2d 771; People v. Hickman, 31 Cal.App.2d 4, 7–11, 87 P.2d 80; People v. Arberry, 13 Cal.App. 749, 757–758, 114 P. 411), and is clearly sufficient to sustain the conviction of attempted grand theft.

[4] Defendant contends, however, that his actions did not constitute an attempt to obtain money by false pretenses since his victim was not deceived by and did not rely on the misrepresentations. It is urged that although Murphy may have been deceived at the June 15th meeting, the direct ineffectual act necessary to constitute an attempt did not occur until June 18th, when defendant met Murphy to obtain the money. It is true that at the time Murphy was no longer deceived and that the element of lack of consent, necessary to the substantive crime of grand theft, was missing. Defendant invokes People v. Werner, 16 Cal.2d 216, 105 P.2d 927, for the proposition that to constitute an attempted grand theft the victim must be deceived by and must rely on the false representations of the defendant. In that case, the defendant and his wife represented to a certain McNeil, who was then awaiting trial on grand theft charges, that they could have the charges against him dismissed for a specified sum. McNeil disbelieved their representations and reported the matter to the police, who arranged to trap the defendant when the money was paid to him. McNeil delivered a package supposedly containing the money to the defendant's wife and she and the defendant were then arrested. This court reversed a conviction of attempted grand theft, stating as an alternative ground of decision: "We are satisfied that there cannot be a theft or an attempted theft of a person's property when voluntarily and without compulsion of any sort and uninfluenced by any false or fraudulent representations, he actively hands it over to the alleged thief for the purpose of apprehending him as a thief or as an attempted thief—however reprehensible the latter's intent may be—for under such circumstances the essential element of lack of consent is missing." 16 Cal.2d at page 225, 105 P.2d at page 933. Although there is other authority in this state to the contrary (People v. Wallace, 78 Cal.App.2d 726, 740–742, 178 P.2d 771; People v. Grossman, 28 Cal.App.2d 193, 204, 82 P.2d 76; see also People v. Lavine, 115 Cal.App.

289, 300, 1 P.2d 496), the Werner case supports defendant's position that deception of the intended victim and his reliance on the false representations are essential elements of the offense of attempted grand theft by false pretenses.

We are now convinced, however, that the Werner case is unsound in so holding. It failed to recognize the crucial distinction between the completed crime of false pretenses and an attempt to commit such a crime. The overwhelming weight of authority in this country (e. g., People v. Gardner, 144 N.Y. 119, 38 N.E. 1003, 28 L.R.A. 699; State v. Peterson, 109 Wash. 25, 186 P. 264, 8 A.L.R. 652; Williams v. State, 209 Miss. 902, 48 So.2d 598; State v. Phillips, 36 Mont. 112, 92 P. 299; Commonwealth v. Johnson, 312 Pa. 140, 167 A. 344, 89 A.L.R. 333), and in England (e. g., Regina v. Light, 11 Crim.App.R. 111; Regina v. Hensler, 11 Cox.Cr.Cas. 570; Regina v. Roebuck, 7 Cox.Cr.Cas. 126; see 89 A.L.R. 342) holds that in a prosecution for attempted grand theft by false pretenses it is not necessary that the defendant's intended victim be deceived by the falsity of the representations made to him (see also Perkins, Criminal Law 489–494; Wharton, Criminal Law and Procedure 354–355; Williams, Criminal Law 487–490; Miller, Criminal Law 97–101; Sayre, Criminal Attempts, 41 Harv.L.Rev. 821, 850–855; Keedy, Criminal Attempts at Common Law, 102 U.Penn.L.Rev. 464, 486–488).

[5, 6] One of the purposes of the criminal law is to protect society from those who intend to injure it. When it is established that the defendant intended to commit a specific crime and that in carrying out this intention he committed an act that caused harm or sufficient danger of harm, it is immaterial that for some collateral reason he could not complete the intended crime. Although the law does not impose punishment for guilty intent alone, it does impose punishment when guilty intent is coupled with action that would result in a crime but for the intervention of some fact or circumstance unknown to the defendant. See People v. Lee Kong, 95 Cal. 666, 668, 30 P. 800, 17 L.R.A. 626; People v. Grant, 105 Cal.App.2d 347, 355–357, 233 P.2d 660. In the present case there was not a legal but only a factual impossibility of consummating the intended offense, i. e., the intended victim was not deceived. People v. Werner, supra, 16 Cal.2d 216, 225, 105 P.2d 927, is overruled and People v. Schroeder, 132 Cal.App.2d 1, 6–8, 281 P.2d 297, is disapproved to the extent that they hold that deception of the intended victim and his reliance on the false representations are essential elements of the offense of attempted grand theft by false pretenses.

[7] Defendant's contention that the evidence is insufficient to support the conviction of attempted extortion is also without merit. Section 524 of the Penal Code provides that "every person who attempts, by means of any threat, such as is specified in section 519 of this code, to extort money or other property from another is punishable * * *." Section 519 provides, in part, that: "Fear, such as will constitute extortion, may be induced by a threat * * * to do an unlawful injury to the person or property of the individual threatened. * * *" The record shows that at the June 18th meeting defendant stated to Murphy that "the old man" had already paid the bribe to the officials in Sacramento on Murphy's behalf and that he would have to be reimbursed "or else." He warned: "[T]hat is something that you have to come up with. Otherwise you are going to * * * up your whole joint. You are going to jeopardize the whole place. You have got to raise the money somewhere, Bill, because that is one thing the old man won't stand for * * *. When you break your word with him you might as well fold that * * * joint." The inference is reasonable that defendant intended to secure money from Murphy by threatening to procure the revocation of his license or otherwise interfere with his business by unlawful means. The evidence supports the implied finding that defendant attempted to place Murphy in

fear of unlawful injury to his business or his person if the money was not paid to him, and thus sustains the conviction of attempted extortion. Compare People v. Hopkins, 105 Cal.App.2d 708, 709–710, 233 P.2d 948; People v. Franquelin, 109 Cal.App.2d 777, 783–784, 241 P.2d 651; see 21 Cal.Jur.2d 602, 603.

[8, 9] Defendant contends that the two convictions cannot stand because of the provision of section 654 of the Penal Code that "an act or omission which is made punishable in different ways by different provisions of this Code may be punished under either of such provisions, but in no case can it be punished under more than one; an acquittal or conviction and sentence under either one bars a prosecution for the same act or omission under any other. * * *" This section has been applied to prohibit the double punishment of an accused not only where he has committed but one "act" in the ordinary sense, but also "where a course of conduct violated more than one statute and the problem was whether it comprised a divisible transaction which could be punished under more than one statute within the meaning of section 654. Where the question is whether a transaction is divisible or indivisible, each case must be resolved on its facts." People v. Brown, 49 Cal.2d 577, 591, 320 P.2d 5, 14. The record in the present case discloses that defendant committed both the crime of attempted grand theft and the crime of attempted extortion and that his conviction for both crimes, with concurrent sentences, was proper. Defendant first tried to get $720 from Murphy by falsely representing to him that certain charges on file against his business could be "fixed" with the Alcoholic Beverage Control Board and he met with Murphy to collect the bribe money. This conduct constituted an attempted grand theft by false pretenses. Defendant also went further. After realizing that he was going to encounter difficulty in securing the $720 from Murphy, he attempted to extort the money from Murphy by veiled threats of injury to his person or his business. Since a "separate and distinct act [has] been established as the basis of each conviction * * *" People v. Knowles, 35 Cal.2d 175, 187, 217 P.2d 1, 8, the judgment on both counts was proper. See, In re Chapman, 43 Cal.2d 385, 388–391, 273 P.2d 817; People v. Slobodion, 31 Cal.2d 555, 561–563, 191 P.2d 1; People v. Goodman, 159 Cal.App.2d 54, 60–62, 323 P.2d 536.

The judgment is affirmed.

GIBSON, C. J., and SHENK, SCHAUER, SPENCE, McCOMB and PETERS, JJ., concur.

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52 Cal.2d 154

Romeo A. RODRIGUEZ et al.

v.

J. P. BARNETT, Appellant.

L. A. 25336.

Supreme Court of California,
In Bank.

May 19, 1959.

Purchasers' action for recovery of deposit, wherein vendor cross-complained for breach of contract. The Superior Court, Los Angeles County, A. Curtis Smith, J., rendered judgment for plaintiffs, and defendant appealed. The Supreme Court, Shenk, J., held that mere recitation, in realty contract, that right of vendor to retain deposit was in consideration for executing agreement, was insufficient to establish meaningful separate consideration, and that entire contract, properly construed, evinced no intent to give vendor right to retain deposit in consideration for option given to purchasers to withdraw if they found themselves dissatisfied with subdivision map.

Affirmed.

Opinion, 333 P.2d 407, vacated.

1. Appeal and Error ⚿110

Order denying motion for new trial was not appealable.

2. Contracts ⚿143

In construing contract, meaning of words used is to be determined from reading of entire contract.

3. Contracts ⚿153, 154

If contract is capable of two constructions, courts are bound to give it such interpretation as will make it lawful, operative, definite, reasonable and capable of being carried into effect, if that can be done without violating intention of parties. West's Ann.Civ.Code, §§ 1643, 3541.

4. Vendor and Purchaser ⚿334(1)

Mere recitation, in realty contract, that right of vendor to retain deposit was in consideration for executing agreement, was insufficient to establish meaningful separate consideration; and entire contract, properly construed, evinced no intent to give vendor right to retain deposit in consideration for option given to purchasers to withdraw if they found themselves dissatisfied with subdivision map. West's Ann.Civ.Code, §§ 1688, 1691.

5. Contracts ⚿10(5)

Realty agreement was not rendered illusory or lacking in mutuality of obligation because parties thereto inserted provision making purchasers' performance dependent on their satisfaction with subdivision map.

6. Appeal and Error ⚿544(2)

On appeal on judgment roll, no question arose as to sufficiency of evidence to support finding.

7. Vendor and Purchaser ⚿331

In purchasers' action for recovery of deposit, wherein vendor cross-complained for breach of contract, findings were sufficient to support conclusion of law that vendor take nothing by his cross complaint.

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Adelman & Schwartz and Milton M. Adelman, Beverly Hills, for appellant.

Wadsworth, Fraser & McClung and Charles E. McClung, Los Angeles, for respondents.

SHENK, Justice.

[1] The defendant[1] appeals from a judgment in favor of the plaintiffs for $1,500 and from an order denying his motion for new trial. This order is not appealable. The appeal was dismissed from the bench with an admonition from the Chief Justice to counsel and to members of the bar generally to cease appealing from such an obviously nonappealable order.

The $1,500 represents the deposit paid by the plaintiffs as purchasers pursuant to a written Agreement and Deposit Receipt executed by the parties covering the purchase of certain real property for subdivision purposes located in San Bernardino County. The plaintiffs contend that this agreement was rescinded and that the deposit should be returned to them. The defendant contends that the agreement provides that the $1,500 should be retained by him, in the event the plaintiffs did not complete the purchase, as consideration for the execution of the agreement; that the $1,500 was paid by the plaintiffs as consideration for the option given them in the agreement allowing them to withdraw if they could not obtain approval of a subdivision map which was agreeable to them, and that the notice of rescission does not comply with the requirements of section 1691 of the Civil Code. He alleges that if the amount of damages suffered by him as a result of the plaintiffs' withdrawal from the agreement was not limited to $1,500 by the express terms of the agreement, his actual damages would be $15,000.

The agreement was executed by the parties on March 16, 1956. It provides in pertinent part that the $1,500 was paid by the plaintiffs and received by the defendant "as deposit on the purchase" of the property therein described. It recites the bases upon which the total purchase price would be determined[2] and specifically states "It being understood that the * * * final subdivision map as approved by the necessary governmental bodies, shall be subject to the approval of the purchasers herein * * *." The agreement required that the plaintiffs furnish for the defendant's approval documentary evidence of seven specific items, namely: 1, approval of the subdivision by the necessary government agencies; 2, construction loan commitments; 3, permanent financing; 4, Veterans' Administration and F.H.A. approval of site; 5, acceptable financing; 6, improvement bond; and 7, recordation of the approved subdivision map. It there states: "All above items subject to approval of buyers, this agreement is contingent upon their approval." The next succeeding paragraph reads: "It is further understood that the purchasers herein shall have six months from date to comply with the above demand of the seller to furnish said items listed in the preceding paragraph, otherwise, at the option of the seller, the monies deposited herewith shall be forfeited and retained by the seller as consideration for executing this agreement." At the conclusion of the agreement it was provided as follows:

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[1] The parties will be referred to as plaintiffs and defendant.

"Should purchasers herein fail to pay the balance of said purchase price or complete said purchase as herein provided, the sum paid hereon may, at the option of the seller, be retained as consideration for the execution of this agreement.

"It is understood and agreed that this agreement contains the entire understanding between purchasers and seller, that all representations not set out herein are expressly waived by the purchasers.

"We agree to purchase the above described property on the terms and conditions herein stated."

On July 13, 1956, the plaintiffs served on the defendant the following Notice of Rescission:

"You are hereby notified that R. A. Rodriguez and Fred J. LaVigne hereby rescind the agreement of March 16, 1956, executed by the undersigned as Purchasers and yourself as Seller, on the following grounds:

"1. That the subdivision map as proposed by the City of Riverside, California, is unsatisfactory to the undersigned and the undersigned despite diligent efforts have been unable to obtain approval by proper governmental authorities of a subdivision map which is workable and economically feasible.

"2. That the agreement of March 16, 1956, is too indefinite and uncertain to admit of enforcement or to constitute a binding contract.

"3. That, in any event, you have failed to comply with the provisions of the agreement of March 16, 1956, and have abandoned the same.

"4. That the agreement is impossible to perform because of the failure of the City of Riverside, California, to approve the subdivision map.

"You are further notified that the condition and contingency upon which the agreement of March 16, 1956, is based, to wit, the approval by the undersigned of the subdivision map for the real property which is the subject of the agreement, has failed to occur. By reason of the foregoing, demand is hereby made upon you for the return of the sum of $1,500.00 deposited with you on March 16, 1956, by the undersigned."

Upon the refusal of the defendant to return the $1,500 the plaintiffs filed a complaint in the municipal court, framing the complaint on the common count, for money had and received. The defendant cross-complained, alleging that the plaintiffs had refused to comply with all of the terms of the agreement, and sought to recover damages in the sum of $15,000. The action was thereupon transferred to the superior court. The answer to the cross-complaint incorporated by reference the Agreement and Deposit Receipt. It set up various defenses, including impossibility of performance, failure of a condition precedent, and lack of mutuality, and alleged that notice of rescission had been served within a reasonable time after the ascertainment of the facts. The parties stipulated that the agreement and notice of rescission could be received in evidence, that the agreement had been executed and that the notice of rescission had been served.

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[2] $3000 per usable net acre, plus an additional $400 per lot after subdivision; lots to be a minimum of 6000 sq. ft. per lot or maximum of 9000 sq. ft. per lot.

The trial court found (finding XII) that it is true that the defendant was indebted to the plaintiffs in the sum of $1,500 for money had and received and that no part of this sum had been paid. It also construed the agreement, without regard to any of the parol evidence introduced at the trial, and specifically found that the agreement provided the obligation of the purchasers to complete the purchase was conditional upon their approval of the final subdivision map as approved by the City of Riverside; that their refusal to approve the subdivision map proposed by the city was reasonable; that upon the failure to approve by the city the plaintiffs were under no duty to proceed with the purchase according to the provisions of the written agreement; that within a reasonable time after the ascertainment of these facts the plaintiffs served a notice of rescission upon the defendant and a notice that they had not been able to secure the approval of the city of the subdivision map and a demand for the return of the $1,500; that it is not true that the plaintiffs had failed or refused to perform any of the terms of the written agreement. Judgment was entered for the plaintiffs in the sum of $1,500 plus interest and costs, and that the defendant should take nothing by reason of his cross-complaint. The appeal is on the judgment roll.

The defendant urges that the trial court construed the agreement in direct contravention to its plain meaning when it found and concluded that by the terms of the agreement the plaintiffs are entitled to a return of their deposit. He specifically relies on the provisions of the agreement which read: "Should purchasers herein fail to pay the balance of said purchase price or complete said purchase as herein provided, the sum paid hereon may, at the option of the seller, be retained as consideration for the execution of this agreement." and "It is further understood that the purchasers herein shall have six months from date to comply with the above demand of the seller to furnish said items listed * * * otherwise, at the option of the seller, the monies deposited herewith shall be forfeited and retained by the seller as consideration for executing this agreement."

[2, 3] It is well-settled law that in construing a contract the meaning of the words used is to be determined from a reading of the entire contract. Sunset Securities Co. v. Coward-McCann, Inc., 47 Cal.2d 907, 306 P.2d 777. If a contract is capable of two constructions courts are bound to give such an interpretation as will make it lawful, operative, definite, reasonable, and capable of being carried into effect, if that can be done without violating the intention of the parties. Civ.Code, §§ 1643, 3541; Robbins v. Pacific Eastern Corp., 8 Cal.2d 241, 65 P.2d 42.

[4] From an examination of this instrument as a whole, it clearly appears that the plaintiffs were given the right to withdraw from further performance if they found themselves dissatisfied with the subdivision map proposed by the governmental authorities. They were not given a right to withdraw at their own unrestricted pleasure. There is nothing in the retention provisions which indicates that the right to retain the deposit was given to the defendant as consideration for allowing the condition of disapproval on plaintiffs' performance or as a payment for an option to withdraw. This agreement was clearly a bilateral one, the consideration for which was the mutual promises of the parties. The $1,500 constituted a part performance of the plaintiffs' obligation under the agreement. The mere recitation that the right

of the seller to retain this deposit was in consideration for executing this agreement, is insufficient to establish meaningful separate consideration.

[5] The agreement was neither illusory nor lacking in mutuality of obligation merely because the parties thereto inserted a provision making the purchasers' performance dependent on their satisfaction with the subdivision map to be obtained by them. Contracts making the duty of performance of one of the parties conditional upon his "satisfaction" are upheld on the theory that the expression of dissatisfaction must be genuine and not arbitrary, and that an objective criterion,—good faith—controls the exercise of the right to determine satisfaction. Mattei v. Hopper, 51 Cal.2d 119, 330 P.2d 625; see Williston, Contracts (3d ed.), §§ 44, 105, 675a. "A promise conditional upon the promisor's satisfaction is not illusory since it means more than that the validity of the performance is to depend on the arbitrary choice of the promisor. His expression of dissatisfaction is not conclusive. That may show only that he has become dissatisfied with the contract; he must be dissatisfied with the performance, as a performance of the contract, and his dissatisfaction must be genuine." (Rest. Contracts (1932), § 265, comment a.) The finding and conclusion of law that the plaintiffs' refusal to approve the subdivision map was reasonable support the determination that the objective criterion of good faith was present.

The court found that the plaintiffs had not refused or failed to perform any of the terms of the written agreement. The finding is supported by the record. The plaintiffs' withdrawal was made pursuant to the express provisions of the agreement. It was therefore definitely implied in the agreement that the defendant consented in advance to such withdrawal. Rescission extinguishes a contract (Civ.Code, § 1688) and requires each party to return whatever he has received as consideration thereunder (Civ.Code, § 1691). As a matter of law the defendant would therefore be required to return the $1,500 deposit to the plaintiffs upon rescission.

[6] The defendant urges that the notice of rescission was not given within a reasonable time as required by section 1691 of the Civil Code.[3] There was an express finding that the plaintiffs served on the defendant a notice of rescission within a reasonable time after the ascertainment of the facts. This appeal is on the judgment roll. No question therefore arises as to the sufficiency of the evidence to support this finding.

[7] The defendant argues that it was reversible error for the court not to make findings on his cross-complaint. The cross-complaint pleaded the terms of the contract and asked for damages for breach. The findings construing the contract obviously relate directly to the issues raised by the cross-complaint and the answer thereto, and are sufficient to support the conclusion of law that the defendant take nothing by his cross-complaint.

The court found that it was not true that the plaintiffs failed or refused to perform any of the terms of the agreement. As there was no breach of contract it is not necessary to discuss the further contentions of the defendant with reference to the right of set-off or as to the effect of the retention provisions as liquidated damages.

The judgment is affirmed.

GIBSON, C. J., and TRAYNOR, SCHAUER, SPENCE, McCOMB and PETERS, JJ., concur.

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[3] "§ 1691. Rescission, when not effected by consent, can be accomplished only by the use, on the part of the party rescinding, of reasonable diligence to comply with the following rules:

"1. He must rescind promptly, upon discovering the facts which entitled him to rescind. * * *"

170 Cal.App.2d 337

Agnes WUELZER, Plaintiff and Appellant,
v.
CITY OF OAKLAND, a municipal corporation, Defendant,

Pacific Telephone and Telegraph Company, a corporation, Defendant and Respondent.
Civ. 18269.

District Court of Appeal, First District, Division 2, California.
May 13, 1959.

Action for injuries sustained by plaintiff when she fell while crossing street because of defect in pavement patch covering trench in which defendant had allegedly installed telephone conduit. The Superior Court, Alameda County, Chris B. Fox, J., rendered summary judgment for defendant, and plaintiff appealed. The District Court of Appeal, O'Donnell, J. pro tem., held that affidavit, wherein defendant's construction foreman stated that to his knowledge defendant had not dug trench that caused street defect and wherein it was recited that defendant's records showed no trench work done by it at intersection in question since 1927, was insufficient to support summary judgment for defendant.

Reversed.

1. Judgment ⚷181(4)

Issue to be determined on motion for summary judgment is whether facts are presented which give rise to triable issue; and when there is doubt as to propriety of motion, court should deny same. West's Ann. Code Civ.Proc. § 437c.

2. Judgment ⚷185.1(1)

In action for injuries sustained by plaintiff, when she fell while crossing street because of defect in pavement patch covering trench in which defendant had allegedly installed telephone conduit, wherein defendant supported its motion for summary judgment with affidavit reciting that its records showed no trench work done at intersection in question since 1927, even assuming that it was not necessary that records themselves be incorporated into affidavit, it was essential that affidavit affirmatively show that records to which it referred were competent. West's Ann.Code Civ.Proc. § 1953f.

3. Judgment ⚷185.3(21)

In action for injuries sustained by plaintiff when she fell while crossing street because of defect in pavement patch covering trench in which defendant had allegedly installed telephone conduit, affidavit, wherein defendant's construction foreman stated that to his knowledge defendant had not dug trench that caused street defect, and wherein it was recited that defendant's records showed no trench work done by it at intersection in question since 1927, was insufficient to support summary judgment for defendant. West's Ann.Code Civ.Proc. § 437c.

4. Judgment ⚷185.2(9)

Where defendant's evidence was insufficient to support its motion for summary judgment, summary judgment could not be ordered, even though opposing party had presented no counteraffidavits. West's Ann.Code Civ.Proc. § 437c.

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Lew M. Warden, Jr., Oakland, for appellant.

Donahue, Richards & Gallagher, Oakland, Pillsbury, Madison & Sutro, San Francisco, for respondent.

O'DONNELL, Justice pro tem.

This is an appeal by plaintiff from a summary judgment entered against her and in favor of respondent The Pacific Telephone and Telegraph Company pursuant to Section 437c of the Code of Civil Procedure.

The action is one for damages for personal injuries. Plaintiff alleges that while walking along a cross-walk at the intersection of Elwood Street and Grand Avenue in the City of Oakland she was caused to trip and fall by reason of the defective condition of the street pavement. She charges respondent telephone company, as well as defendant City of Oakland, with negligence in the creation and maintenance of the alleged defective condition. The defective condition consisted of an area of the cross-walk in which there were holes, pits and declivities of varying sizes. The record in the case discloses that the defective pavement was in a patched area that covered a portion of a trench in which existed a telephone conduit installed by respondent in 1927, and a fire alarm electrical system installed by the City of Oakland in 1925. It further appears that the patch is anywhere from 2 to 20 years old.

After issue was joined respondent moved for a summary judgment. In support of its motion respondent submitted the affidavit of John Leslie Arps, its supervising construction foreman. In his affidavit Mr. Arps states that he is in charge of the department that maintains the complete records of respondent which relate to its conduit systems, utility cuts, installations and repair and maintenance work in the East Bay Metropolitan area; that such records include all such information and data relating to the area of Elwood Street and Grand Avenue; that he has worked for respondent in his present capacity since 1956; that he has examined all of said records relative to this conduit system; that these records show that respondent had done no work on the trench in question since 1927; and that to his knowledge respondent did not dig the trench which created the street defect. The records of respondent referred to were not attached to the affidavit nor in any other manner made a part thereof.

[1-4] The question presented for decision on this appeal is the sufficiency of the Arps affidavit to support the summary judgment.

A motion for summary judgment is provided for by Section 437c, Code of Civil Procedure. The pertinent portion of that section reads as follows: "The affidavit or affidavits in support of the motion must contain facts sufficient to entitle plaintiff or defendant to a judgment in the action, and the facts stated therein shall be within the personal knowledge of the affiant, and shall be set forth with particularity, and each affidavit shall show affirmatively that affiant, if sworn as a witness, can testify competently thereto." The issue to be determined by the trial court in consideration of a motion under this section is whether or not any facts are presented which give rise to a triable issue and not to pass upon or determine the issue itself, that is, the true facts in the case. Eagle Oil & Refining Co. v. Prentice, 19 Cal.2d 553, 122 P.2d 264. And 19 Cal. 2d at page 556, 122 P.2d at page 265 of the cited case the court says: "If that were not true controversial issues of fact would be tried upon affidavits by the court and not a jury." Further on the same page: "The procedure is drastic and should be used with caution in order that it may not become a substitute for existing methods in the determination of issues of fact." "For these reasons," the court continues, "the affidavits of the moving party * * * should be strictly construed and those of his opponent liberally construed." And, as observed in Travelers Indemnity Co. v. McIntosh, 112 Cal.App.2d 177, 182, 245 P.2d 1065, 1068, "when there is a doubt as to the propriety of the motion, courts should, without hesitancy, deny the same."

We shall comment first on the averment of the affidavit referred to above which states that "to affiant's knowledge" respondent did not dig the trench that caused the street defect. It seems obvious that affiant meant only to say that, so far as his knowledge *goes,* respondent did not dig the trench in question. Respondent does not contend otherwise; that is to say, respondent does not contend that the affiant is averring that he knows of his own knowledge that for a period of twenty years respondent did no trench work in the area in question.

The statement in the affidavit that the respondent's records show no trench work done by respondent at the intersection in question since 1927 does not constitute a denial that no such work was in fact done by respondent. Affiant does not aver that no such work could have been done without a record thereof having been made by respondent. Appellant contends that the affidavit is further defective in that the records to which it refers are not attached to, or otherwise made a part of, the affidavit, citing Low v. Woodward Oil Co., Ltd., 133 Cal.App.2d 116, 283 P.2d 720, and Family Service Agency of Santa Barbara v. Ames, 166 Cal.App.2d 344, 333 P.2d 142. We need not pass on that contention, for even assuming that it is not necessary that the records themselves be incorporated in the affidavit, yet it is essential that the affidavit affirmatively show that the records to which it refers are competent. In People v. Doble, 203 Cal. 510, 515, 265 P. 184, 187, it is said: "It is manifestly error to admit in evidence, under section 1855, subdivision 5, of the Code of Civil Procedure, a summary of books where the books themselves are not shown to be admissible in evidence." Section 1953f of the Code of Civil Procedure provides: "A record of an act, condition or event, shall, in so far as relevant, be competent evidence if the custodian or other qualified witness testifies to its identity and the mode of its preparation, and if it was made in the regular course of business, at or near the time of the act, condition or event, and if, in the opinion of the court, the sources of information, method and time of preparation were such as to justify its admission." The affidavit does not even attempt to show the mode of preparation of the records of respondent nor under what circumstances they are made and kept. The affidavit must, of course, fall if the foundation upon which it is based is incompetent.

The deposition of Mr. Arps was introduced into evidence at the hearing of the motion. It is unnecessary to detail the testimony contained therein. It is enough to say that it is deficient in the same respects as is his affidavit.

In view of the insufficiency of respondent's evidence to support its motion, the summary judgment must be reversed. Summary judgment cannot be ordered under such circumstances even though the opposing party has presented no counter-affidavits. Gardenswartz v. Equitable Life Assur. Soc., 23 Cal.App.Supp.2d 745, 68 P.2d 322; Family Service Agency of Santa Barbara v. Ames, supra, 166 Cal.App.2d 344, 333 P.2d 142.

In view of the foregoing conclusions it is unnecessary to consider other arguments advanced by appellant for reversal of the judgment.

The judgment is reversed.

DOOLING, Acting P. J., and DRAPER, J., concur.

169 Cal.App.2d 717

Paul S. TOENNIGES and Ruth A. Toenniges, Husband and Wife, Plaintiffs and Respondents,

v.

Forrest GRIFFITH and Mrs. Forrest Griffith, Husband and Wife; Crawford Bryant and Mrs. Crawford Bryant, Husband and Wife; et al., Defendants,

Forrest Griffeth and Eva E. Griffeth, Appellants.

Civ. 23396.

District Court of Appeal, Second District,
Division 1, California.
May 18, 1959.

Action for an injunction and damages. The Superior Court, Los Angeles County, Virgil M. Airola, J., entered judgment, enjoining defendants from obstructing or interfering with use of an easement and way of necessity and an order denying motion for new trial, and defendants appealed. The District Court of Appeal, 338 P.2d 230, affirmed the judgment and dismissed attempted appeal from order. On petition for rehearing and motion to augment the record, the District Court of Appeal held that failure of substituted attorney for appellants to ascertain the state of the record when he took over from attorneys, who had tried case and had filed notice of appeal and notice to prepare clerk's transcript, did not constitute excusable neglect or good cause to grant motion to augment the record.

Petition for rehearing and motion to augment the record denied.

1. Appeal and Error ⚿654

Even where matter sought to be added to record on appeal is proper or proposed correction of record is warranted, neither augmentation nor correction is a matter of right, and may be denied for inexcusable neglect in preparing record, delay in presenting application, or for other reasons.

2. Appeal and Error ⚿654

Failure of substituted attorney for appellants to ascertain the state of the record when he took over from attorneys, who had tried case and had filed notice of appeal and notice to prepare clerk's transcript, did not constitute excusable neglect or good cause to grant appellants' motion to augment the record on appeal by bringing up reporter's transcript.

3. Easements ⚿61(9)

Judgment enjoining defendants from obstructing or interfering with use of an easement and way of necessity was supported by the record on appeal.

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Henry C. Rohr, Los Angeles, for appellants.

Paul Major, Van Nuys, for respondents.

PER CURIAM.

Counsel for appellants has filed a petition for a rehearing and has filed therewith a motion to augment the record.

With reference to the motion to augment the record, it is urged that "[i]t was in the contemplation of both the appellant and respondent that the reporter's transcript was part of the record before this * * * Court." Further, it is pointed out that the attorneys who represented the appellants in the trial court filed the notice of appeal and the notice to prepare the clerk's transcript; that the present counsel, who was substituted into the case to represent the appellants on the appeal, did not check or read the notice of appeal and request for record, and first learned that the reporter's transcript was not before this Court and that the appeal in effect was one on the judgment roll when he read the opinion of this Court.

[1] Appellants correctly recognize "that they are not entitled as a matter of right to the granting of * * * motion to augment the record." In Russi v. Bank of America, 69 Cal.App.2d 100, at page 102, 158 P.2d 252, 253, in referring to Rule 12 of Rules on Appeal, it was said: "Its meaning and purpose are clear. Parties are encouraged to bring up only relevant matters on appeal and occasionally it will develop that there has been omitted from the record some paper, exhibit or portion of the oral proceedings. In such case it is desirable and proper upon a showing that the omitted material was relevant and that its omission was excusable, to bring it up in order that the appeal might be determined on an adequate record. But as has been correctly said: 'Even where the matter sought to be added is proper, or the proposed correction is warranted, neither augmentation nor correction is a matter of right; they both may be denied for inexcusable neglect in preparing the record, for delay in presenting the application, or for other reasons. The new rule does not deal expressly with this aspect of the question and the discretion of the court to deny the application still remains. Hence the augmentation procedure is not to be regarded as a cure-all, nor as an assurance that negligent preparation of the record will entail no harmful results.' See 17 So.Cal.L.Rev. 130. There is nothing in rule 12 which can justify the appellant's contention that he may at his pleasure change his judgment roll form of appeal to one which includes a reporter's transcript.

"Nor is Rule 5(f) of any assistance to appellant. That rule provides that when the appellant elects to appeal on the judgment roll alone the respondent may not require the inclusion of oral proceedings except when necessary to prevent a miscarriage of justice. That section protects the respondent against any unfairness in the appellant's limitation of the form of record."

This case was set for oral argument before this Court for March 24, 1959. On March 19, 1959, the clerk of the court received from counsel a written stipulation which in effect set forth that the case would be submitted without argument or any further presentation. The Court then directed the clerk to communicate with, and inform counsel in effect that the Court desired to have counsel present for the oral argument, even though the stipulation had been filed to the effect that the cause would be submitted without argument. The members of the Court had in mind to discuss with counsel for both sides, in open court, the status of the record before the Court and other matters having to do with the law and the facts of the case. Counsel for appellants replied that it was his custom to go to the desert at that particular season of the year, and that therefore he would not be present at the oral proceedings. The Court thereafter disposed of the case on the record which was lodged before it.

[2] Counsel for appellants now indicates that he should be given some relief because of his failure to have the reporter's transcript before us. It is clear that one of the reasons for the absence of the complete record, if such was desired in the first instance, was counsel's failure to ascertain the state of the record when he took over from the attorneys who tried the case in the trial court. Such a state of facts does not appear to us to constitute excusable neglect, or good cause to grant the motion.

With reference to the grounds for a rehearing, counsel states in effect that an injustice would be done to the appellants if the rehearing be not granted.

[3] We are convinced, from a reading of the entire record before us, which includes copious references to the reporter's transcript that the trial court properly determined the cause, and the judgment was properly affirmed.

The petition for a rehearing is denied and the motion to augment the record is denied.

170 Cal.App.2d 368

Dorace E. SCARBERY and June Scarbery, Plaintiffs and Appellants,

v.

BILL PATCH LAND AND WATER CO., et al., Defendants and Respondents.

Civ. 5899.

District Court of Appeal, Fourth District, California.

May 14, 1959.

Action was brought for judgment declaring that all rights of defendants arising out of a "lease and option to buy" had been terminated and cancelled by reason of failure of defendants to perform conditions and covenants to be performed by them, and to quiet title. The Superior Court, San Diego County, William A. Glenn, J., entered an "interlocutory decree" adverse to plaintiffs, and an order modifying it, and an order overruling objections to defendants' purported compliance therewith, and the plaintiffs appealed. The District Court of Appeal, Mussell, J., held that where Superior Court in its conclusions specifically provided for entry of an "interlocutory decree" quieting plaintiffs' title to property involved, under certain circumstances, and provided for further hearing to determine amount of restitution, if any, to be made by plaintiffs, and to determine and adjudicate all rights, duties, and obligations of parties arising out of their agreement, and further judicial action on part of Superior Court was necessary to determine finally the rights of the parties in view of question which arose as to compliance by parties with terms of agreement and the "interlocutory decree," the appeal would be dismissed on ground there was no final judgment.

Appeal dismissed.

1. Judgment ⚿217

Under California procedure there is ordinarily only one final judgment in an action.

2. Appeal and Error ⚿80(1, 3)

Where no issue is left for future consideration except fact of compliance or noncompliance with terms of first decree, that decree is "final," and appeal may be taken therefrom, but where anything further in nature of judicial action on part of trial court is essential to final determination of rights of parties, decree is "interlocutory."

See publication Words and Phrases, for other judicial constructions and definitions of "Final" and "Interlocutory".

3. Appeal and Error ⚿66

An appeal does not lie from an interlocutory or intermediate order unless it be designated by statute as one of those from which an appeal may be taken.

4. Appeal and Error ⚿80(3)

If order is in its nature such as to be subject, before enforcement or execution, to further action of the court, either by decree or later order, the order is not "final" and review must be sought by appeal from decree or order subsequently entered.

5. Judgment ⚿217

A judgment is "final" when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.

6. Appeal and Error ⚿78(1)

Though title of decree does not determine whether it is a final judgment, from which an appeal will lie, the title does in some measure indicate the intention of the trial court.

7. Appeal and Error ⚿80(3)

Where, in action for judgment declaring that all rights of defendants arising out of lease and option to purchase had been terminated and cancelled by reason of their failure to perform conditions and covenants, and to quiet title, Superior Court specifically provided for entry of an "interlocutory decree" quieting plaintiffs' title to property involved, under certain circumstances, and provided for further hearing to determine amount of restitution, if any, to be made by plaintiffs, and to determine and adjudicate all rights, duties, and obligations of parties arising out of their agreement, and further judicial action on part of Superior Court was necessary to determine rights of parties finally in view of question which had arisen as to compliance by parties with terms of agreement and decree, plaintiffs' appeal from "interlocutory decree," order modifying it, and order overruling objections to defendants' purported compliance would be dismissed because there was no "final" judgment.

◆

Charles E. Burch, Jr., and John B. Gregory, San Diego, for appellants.

Swing, Scharnikow & Staniforth, C. H. Scharnikow, and Douglas R. Woodworth, San Diego, for respondents.

MUSSELL, Justice.

This is an action for declaratory relief, to quiet title, and for a judgment declaring that all rights of the defendants arising out of a "lease and option to buy" have been terminated and canceled by reason of their failure to perform the conditions and covenants therein to be performed by them. (The corporate and individual defendants are hereinafter referred to as "defendant".)

The trial court found that the purpose of the "lease and option to buy" was to ultimately effect the sale and transfer by the plaintiffs to the defendant of ranch property in San Diego county. The court further found that plaintiffs had fully performed the agreement on their part and that defendant in its performance of said agreement had paid to and for the benefit of plaintiffs certain sums of money, had conveyed certain real property to them, and had performed certain other acts in accordance with the agreement; that the defendant had defaulted in the performance of the agreement in some respects but that defendant's defaults were not wilful; that defendant had tendered payment of all delinquencies and that plaintiffs had refused to accept such payments. The court concluded that the defendant was entitled to relief from default; that it should be allowed an opportunity to perform the agreement by depositing in escrow all sums remaining unpaid and certain expenses, plus reasonable attorney's fees; that a judgment should be entered providing, among other things, "that in the event of the failure of defendant to deposit said sums of money within said period of time, or such further time as the Court may in good cause show and allow, the Court may, upon application of plaintiffs, enter an interlocutory decree herein quieting plaintiffs' title to said real property and providing for a further hearing to determine the amount of restitution, if any, to be made by plaintiffs to defendant, and to determine and adjudicate all rights, duties and obligations of the parties to this action with relation to or arising from said agreement, and the Court expressly reserves jurisdiction to hear further evidence on such issues and to make and file further Findings of Fact and Conclusions of Law and to enter appropriate judgment thereon."

An interlocutory judgment and decree was entered in which it was decreed, in part, that defendant deposit certain sums and documents in escrow and "That in the event of the failure of the defendant to deposit said sums of money within said period of forty-five (45) days hereinbefore specified, or such further time as the Court for good cause may allow, a final decree shall be entered herein quieting plaintiffs' title to said real property, which said judgment shall adjudge the amount of restitution, if any, to be made by plaintiffs to defendant, and shall determine and adjudicate all rights, duties and obligations of the parties to this action with relation to or arising from said agreement of February 26, 1955."

Defendant deposited certain funds and documents in escrow and gave notice thereof to plaintiffs, who then filed objections to defendant's compliance with the provisions of the judgment. These objections were heard by the court and were overruled. Plaintiffs then appealed from the interlocutory judgment, the order modifying it, and the order overruling the objections to defendant's purported compliance with said judgment.

On January 30, 1959, the defendant Bill Patch Land and Water Company filed in this court a notice of motion to dismiss the appeal on the ground that the interlocutory judgment and decree appealed from is not an appealable judgment. The ruling on this motion was deferred to be considered with the appeal and, after oral argument, the motion and appeal were submitted for decision.

We have concluded that the motion to dismiss the appeal should be granted and it therefore will be unnecessary to pass upon the other points raised on the appeal.

[1, 2] Under California procedure there is ordinarily only one final judgment in an action. Sjoberg v. Hastorf, 33 Cal.2d 116, 118, 199 P.2d 668. In Meehan v. Hopps, 45 Cal.2d 213, 217, 288 P.2d 267, 270, it was held that "It has been correctly stated that the general test for determining whether the judgment is final is 'that where no issue is left for future consideration except the fact of compliance or noncompliance with the terms of the first decree, that decree is final, but where anything further in the nature of judicial action on the part of the court is essential to a final determination of the rights of the parties, the decree is interlocutory.'" (Citing cases.) In Solorza v. Park Water Co., 94 Cal.App. 2d 818, 821, 211 P.2d 891, it is said that an interlocutory decree is distinguished from a

final decree in that it is not a final and conclusive determination of the rights of the parties, but may be changed or modified as the law and evidence require except in partition or divorce cases.

[3–5] In Ulrey v. Gillett, 147 Cal.App. 2d 621, 623, 305 P.2d 611, it was held that an appeal does not lie from an interlocutory or intermediate order unless it be designated by statute as one of those from which an appeal may be taken; that if an order be in its nature such as to be subject, before enforcement or execution, to further action of the court, either by decree or later order, the order complained of is not final and review must be sought by appeal from the decree or order subsequently entered; and that a judgment is final when it terminates the litigation between the parties on the merits of the case and leaves nothing to be done but to enforce by execution what has been determined.

[6] From the interlocutory decree, herein examined in the light of the rules announced in the foregoing decisions, it appears that further judicial action is required on the part of the trial court to finally determine the rights of the parties. The trial court in its conclusions specifically provided for the entry of an interlocutory decree quieting plaintiffs' title to the property involved, under certain circumstances, and provided for further hearing to determine the amount of restitution, if any, to be made by plaintiffs, and to determine and adjudicate all rights, duties and obligations of the parties arising out of their agreement. The decree was designated "Interlocutory Judgment and Decree" and while the title of the decree does not determine whether it is a final judgment, it does in some measure indicate the intention of the court. The decree provides that the defendant is relieved from default and is permitted to perform said agreement upon certain terms and conditions thereinafter enumerated, including the deposit in an escrow of bank cashier's checks or certified checks for the payment of taxes on the property involved; the payment on the balance of a deed of trust, the exact amount to be ascertained and determined from said bank; payment to the estate of Elizabeth Mykrantz on the balance owing on a deed of trust, the exact amount to be confirmed by and with the executor of said estate; payment to plaintiffs of the sum of $28,000, with interest, on a promissory note secured by a deed of trust; payment to plaintiffs of attorney's fees fixed at $14,600; appraiser's fees amounting to $2,250; and costs and expenses. The decree further provided that upon deposit of said sums by defendant, plaintiffs should execute and deliver into said escrow a good and sufficient deed to the property involved, together with other documents there enumerated. It was further provided in said decree that in the event of the failure of said defendants to make said deposits *"a final decree shall be entered herein quieting plaintiffs' title to said real property, which judgment shall adjudge the amount of restitution, if any, to be made by plaintiffs to defendant and shall determine and adjudicate all rights, duties and obligations of the parties to this action with relation to or arising from said agreement of February 26, 1955.* (Italics ours.) Provision was also made for occupancy of the premises by plaintiffs and defendant for a period of six months.

[7] The record indicates that defendant attempted to comply with the terms of the decree and that the plaintiffs are attempting to appeal from an order overruling the objections to defendant's compliance therewith. Further judicial action on the part of the court is necessary to finally determine the rights of the parties in view of the question which has arisen as to the compliance by the parties with the terms of the agreement and the decree, and the trial court's specific decree that a final judgment be entered determining the ultimate rights of the parties under the agreement involved.

The appeal is dismissed.

GRIFFIN, P. J., and SHEPARD, J., concur.

Van M. GRIFFITH, Plaintiff and Appellant,

v.

DEPARTMENT OF PUBLIC WORKS of the State of California, Frank B. Durkee, Chester H. Warlow, James A. Guthrie, Charles T. Leigh, F. Walter Sandelin, Robert E. McClure, and H. S. Chase, as Members of and constituting the California Highway Commission of the State of California, Frank B. Durkee, Director of Public Works of the State of California, City of Los Angeles, a Municipal Corporation; Everett G. Burkhalter, Earl D. Baker, Robert M. Wilkinson, Harold A. Henry, Rosalind Weyman, L. E. Timberlake, Don A. Allen, Gordon R. Hahn, Edward R. Roybal, Charles Navarro, Harold Harby, Harriett Davenport, Ernest E. Debs, John C. Holland, John S. Gibson, Jr., are members of and constitute the Council of the City of Los Angeles, Defendants and Respondents. *

Civ. 23568.

District Court of Appeal, Second District, Division 1, California.

May 4, 1959.

Rehearing Denied June 2, 1959.

Hearing Granted July 1, 1959.

Action by an owner of a remainder interest in property used as a public park to enjoin the defendants from diversion for use as a freeway of park property in violation of a trust upon which the property was held. Judgment granting a defendants motion for summary judgment in the Superior Court of Los Angeles County, Paul Nourse, J., and the plaintiff appeals. The District Court of Appeal, Fourt, J., held that the issue of sufficiency of the pleadings was not in issue because of a prior judgment and that questions of material facts were presented, requiring the denial of the defendants' motion for summary judgment.

Judgment reversed.

See also 141 Cal.App.2d 376, 296 P.2d 838.

1. Courts 🔑99(2)

In action by owner of remainder interest in park property to enjoin diversion of the park in violation of trust purposes for use as a freeway, issue of the sufficiency of plaintiff's pleadings to state a cause of action should not have been relitigated, where sufficiency of the pleadings to state a cause of action had been established as law of the case in a prior suit. West's Ann. Code Civ.Proc. § 1240.

2. Judgment 🔑185.1(4), 185.2(7)

On motion for summary judgment, facts alleged in the affidavits of the party against whom the motion is made must be accepted as true, and such affidavits to be sufficient need not necessarily be composed wholly of strictly evidentiary facts. West's Ann.Code Civ.Proc. § 437c.

3. Judgment 🔑185(6)

A summary judgment is proper only if affidavits in support of a movant would be sufficient to sustain a judgment in his favor, and his opponent does not by affidavit show such facts as may be deemed, by the judge hearing the motion, sufficient to present a triable issue of fact. West's Ann.Code Civ.Proc. § 437c.

4. Judgment 🔑181(4)

Summary judgment statute was not intended as a substitute for existing methods in the trial of issues of fact, and if there is any doubt as to the propriety of the motion, the courts should deny it. West's Ann.Code Civ.Proc. § 437c.

5. Judgment 🔑185.3(17)

In action by owner of remainder interest in park property to enjoin diversion of the park in violation of trust purposes for use as a freeway, affidavits were sufficient to raise genuine issue of material facts requiring the denial of defendants' motion for summary judgment. West's Ann.Code Civ.Proc. § 437c; West's Ann. Streets & High.Code, § 2000 et seq.

6. Declaratory Judgment 🔑218
Injunction 🔑22

In action by owner of remainder interest in park property to enjoin diversion of the park in violation of trust purposes for use as a freeway, injunction should not have been denied on the ground that the injunction against the virtually completed freeway would be useless, and that a declaration with respect thereto would be moot on the ground that the freeway had already been built.

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* Opinion vacated 345 P.2d 469.

Arthur E. Briggs, Los Angeles, for appellant.

George C. Hadley, George W. Miley, Charles E. Spencer, Jr., Los Angeles, for respondents Department of Public Works and Highway Commission.

Roger Arnebergh, Burke Jones, Claude E. Hilker, Los Angeles, for respondents City of Los Angeles and City Council.

FOURT, Justice.

This is an appeal from a summary judgment for respondents. The original complaint was filed by appellant on April 22, 1955, in his capacity as a resident, citizen, and taxpayer of the City of Los Angeles, and as the owner of a contingent remainder interest in real property known as "Griffith Park;" part of which was granted to the City of Los Angeles by Griffith Jenkins Griffith and Mary Agnes Christina Griffith for use as a public park only, and part of which was acquired by the City of Los Angeles from the estate of Griffith Jenkins Griffith "for park and playground purposes." In his complaint, appellant sought to enjoin the respondents, acting as state and city officials, all working in conjunction with each other, from the diversion of approximately 206 acres of Griffith Park in violation of the trust upon which said property was held by the City of Los Angeles, from the use to which it was dedicated, and to enjoin the use thereof as a public highway, commonly known as a freeway. In a second cause of action, appellant sought declaratory relief as to whether respondents may construct a freeway over park property in violation of the terms of the grant and without the consent and permission of the Board of Recreation and Park Commissioners of the City of Los Angeles.

The order ruling on the motions for summary judgment is set forth hereinafter in its entirety:

"The motions for Summary Judgment of defendants, Department of Public Works of the State of California, Frank B. Durkee, Chester H. Warlow, James A. Guthrie, Charles T. Leigh, F. Walter Sandelin, Robert E. McClure and H. S. Chase, are granted.

"The motions for Summary Judgment of the defendant City of Los Angeles and the defendants named as Members of its City Council, are granted as to the first cause of action set forth in the complaint; and they are denied as to the second cause of action if the plaintiff desires to and shall within fifteen (15) days file an amended and supplemental complaint for declaratory relief. If such amended and supplemental complaint be not filed on or before September 16, 1957, the said motions for Summary Judgment are granted as to the second cause of action.

"The reasons for the foregoing rule are: It appears from the affidavits and the file in People of the State of California v. City of Los Angeles, Superior Court File No. 643,327, which is incorporated in the affidavits by reference that the State has taken possession of all of the subject property, and has duly completed or partially completed thereon the freeway in question. The right of the plaintiff to an award for the taking of the property as against the State is something that must be determined in the condemnation action. The State does not claim under the deed from plaintiff's predecessor in interest and there is no reason to declare the rights of the State and the plaintiff under the deed. An injunction against erecting the freeway would now be useless and plaintiff makes no showing whatsoever as to any right to relief in this action as against the Board of Public Works or its officers or the other state officers named.

"As to the first cause of action, the affidavits do not show any basis to enjoin the State from the construction of the freeway on the subject property as it does not show that the City has the power to construct, or contemplates the construction of, a freeway. Insofar as the allegation that there is collusion between the State and the City to permit the State to construct the freeway is concerned, that is a matter that would not now give any basis for an injunction, and the affidavits make it clear that the plaintiff does not have any cause of action for equitable relief other than a declaratory judgment.

"As the second cause of action is now framed, it is clear that it would be useless to make a declaration of rights in accordance with the present complaint and the prayer, inasmuch as the taking of the property and erection of the freeway by the State is an accomplished fact. The affidavits and the file bearing Superior Court No. 643,327 make it clear, however, that there is an actual controversy existing between the plaintiff and the defendant City as to whether or not the taking of the property by the State resulted in a reversion of the property taken from the plaintiff, with the consequence that the plaintiff would be entitled to all sums awarded in the condemnation action for the taking. Also, the controversy as to whether or not the act of the City in not contesting the right of the State to take the property, that is, not forcing the State to prove before an actual taking that the use of the property for a highway was a more necessary public use than its use as a park, resulted in a breach of the trust under which the City held the property, and a consequent reversion of the whole of the property deeded by plaintiff's predecessor in interest to the City or a reversion of that portion taken. These questions could not be litigated in the condemnation action, particularly as to whether or not there was a reversion as to all or part of the property taken.

"The evidence before me shows that there is a real question whether or not the City has in good faith contested the right of the State to take, and that there is a real quesion involved as to the effect of the taking.

"I think the attorneys for the State are subject to criticism in representing to Judge A. Curtis Smith, in the action of People of the State of California v. City of Los Angeles, Superior Court File No. 643,327, that under Section 1240 of the Code of Civil Procedure the taking of a property for a state highway was deemed to be a more necessary public use than was being made of the property by the City. This representation was made by deleting from the quotation of Section 1240 of the Code of Civil Procedure the phrase which provides that taking of property for a state highway is a more necessary use only in cases where the public use theretofore made was by an 'individual, firm, or private corporation.' Where a municipality is the first taker the question of which use is the more necessary use is a question of fact and not of law.

"The clerk will enter this Order."

No amended and supplemental complaint was filed, and the summary judgment was thereafter filed on October 10, 1957.

In this appeal it is contended as follows:

"1. This summary judgment by denying declaratory relief is reversible error.

"2. The trial court committed error and exceeded its jurisdiction on motion for summary judgment, in adjudicating the sufficiency of plaintiff's pleading.

"3. The trial court erred by adjudicating the merits of the case inasmuch as it appears from the affidavits that there are material facts in issue.

"4. Whether the taking of the park property for state highway purposes is a more necessary public use than that for park purposes is a question of fact and not of law.

"5. Whether the designation of location of the state highway within the park boundaries was arbitrary, in bad faith, or an abuse of discretion by the State Highway Commission, is a question of material fact.

"6. Whether there was unlawful collusion between the Los Angeles City Council and the State Highway Commission is an issue of material fact.

"7. Whether the acts committed by the Los Angeles City Council for and in behalf of the City of Los Angeles were such as to constitute violation of the trust established by the deed of gift of Griffith Park involves an issue of fact which cannot be determined on a motion for summary judgment.

"8. Whether plaintiff, as heir of the donors of Griffith Park and entitled to reversion of the determinable fee, may exercise that right upon the taking of the park lands for state highway purposes, depends upon the issues of fact not determinable by a summary judgment and he is entitled to a trial of those issues on the merits of the case.

"9. The law of this case that the complaint is sufficient on both causes of action was established on the former appeal and binding on the trial court and in subsequent proceedings on undetermined issues as far as the same facts and legal principles are concerned, and the summary judgment herein appealed from is substantially in conflict therewith."

Appellant contends that the finding as to the sufficiency of appellant's pleadings to state a cause of action, having been established as the law of the case in Griffith v. Department of Public Works, 141 Cal. App.2d 376, 296 P.2d 838, was binding upon this court. Griffith v. Department of Public Works, supra, involved an appeal from a judgment dismissing said complaint after demurrers, both general and special, had been sustained without leave to amend. In reversing the judgment of dismissal with instructions to overrule the demurrers, to allow respondents a reasonable time to file their answers, if so advised, and to proceed to a trial on the merits, it was stated by this court (141 Cal.App.2d at page 379, 296 P.2d at page 841): "Plaintiff's complaint, in legal effect, alleges both 'collusion', and *'ultra vires'* on the part of the defendants, which, as noted by the trial court are proper grounds for an action by a taxpayer. Assuming, as must be done, that the plaintiff is able to substantiate the truth of these allegations, it would appear that, occupying the dual status of taxpayer and one having a contingent remainder or reversionary interest in the property involved, plaintiff is a proper person to bring the present action. And, considering the complaint on its face, standing alone, without regard to various extraneous matters which seem to have crept into the case, it appears that plaintiff has stated a cause of action which should only be determined after a plenary trial of the issues. In such a situation, it will not suffice to decide the issues, summarily upon a hearing of the respondents' demurrers.

"A survey of the trial court's memorandum seems to indicate that the ruling sustaining the demurrers and dismissing the action is predicated not alone upon the language used in the complaint, *but upon a consideration of various matters of fact and law which would be proper issues upon a trial of the merits.*" (Emphasis added.)

It was also stated (141 Cal.App.2d at page 380, 296 P.2d at page 842): "Whether the proposed freeway is a 'more necessary public use than' that of the park use for which the Griffith grant was intended, raises but another material question which should not be summarily disposed of."

Further, with reference to Section 103.5 of the Streets and Highways Code, it was stated (141 Cal.App.2d at page 381, 296 P. 2d at page 842), "The question of constitutionality is not directly presented on this appeal, but should the broad terms of this statute be held unconstitutional as conferring unlimited power on the commission, or for any other reason, then it may be questioned whether the position taken by respondents in the present controversy, is warranted in law."

It was thereafter stated (141 Cal.App. 2d at page 381, 296 P.2d at page 842): "If the plaintiff can establish the truth of the allegations made, which amount to charges of collusion and conspiracy on the part of city and state officers to divert dedicated park property to freeway use, in violation of the original grant and of the City Charter, and the other allegations, a case has been made out which would seem to justify the relief prayed for. Moreover, the plaintiff will then be entitled, under the complaint, to a declaratory judgment definitely confirming, refuting, limiting or interpreting, as the evidence requires, the nature and extent of rights and obligations arising out of the original grant, and the defendants' alleged right to divert the use of the Griffith Park property."

[1] In view of the foregoing, we must agree with appellant that the issue of the sufficiency of appellant's pleadings to state a cause of action should not have been relitigated in the trial court. See, Eagle Oil & Refining Co. v. Prentice, 19 Cal.2d 553, 561, 122 P.2d 264; Penziner v. West American Finance Co., 10 Cal.2d 160, 169, 74 P.2d 252; Hard v. Hollywood Turf Club, 134 Cal.App.2d 174, 178–179, 285 P.2d 321; City of Los Angeles v. Los Angeles Bldg., etc., Council, 109 Cal.App.2d 81, 84, 240 P.2d 16.

As was stated to be the situation in Desny v. Wilder, 46 Cal.2d 715, at pages 725 and 726, 299 P.2d 257, 261, "* * * the contentions of the parties are largely related, directly or indirectly, to the significance and sufficiency of the evidence, and as all evidential contentions must be resolved in the light of the rules governing summary judgment proceedings it is desirable, before undertaking discussion of the principal problems, to indicate the pertinent rules concerning summary judgments.

[2, 3] "The Law of Summary Judgments. Motions for summary judgment are provided for in section 437c of the Code of Civil Procedure. The principles to be observed in proceeding under that section are stated as follows in Eagle Oil & Refining Co. v. Prentice (1942), 19 Cal.2d 533, 555–556, 122 P.2d 264: The issue to be determined by the trial court in ruling upon a motion for summary judgment is whether or not the party opposing the motion 'has presented any facts which give rise to a triable issue or defense, and not to pass upon or determine the issue itself, that is, the true facts in the case. [Citations.] * * * [T]*he better rule is that the facts alleged in the affidavits of the party against whom the motion is made must be accepted as true, and that such affidavits to be sufficient need not necessarily be composed wholly of strictly evidentiary facts.* [Citation.]' (See also Gardner v. Jonathan Club (1950), 35 Cal.2d 343, 347, 217 P.2d 961; Hardy v. Hardy (1943), 23 Cal.2d 244, 245, 143 P.2d 701; Walsh v. Walsh (1941), 18 Cal.2d 439, 441, 116 P.2d 62.) A summary judgment is proper only if the affidavits in support of the moving party 'would be sufficient to sustain judgment in his favor, and * * * [his opponent] does not "by affidavit or affidavits * * * show such facts as may be deemed by the judge hearing the motion sufficient to present a triable issue of fact." [Citations.]' (Coyne v. Krempels (1950), 36 Cal.2d 257, 261, 223 P.2d 244.) In other words, the affidavits are to be construed with all intendments in favor of the party opposing the motion—here, plaintiff." (Emphasis added.)

[4] In Whaley v. Fowler, 152 Cal.App.2d 379, at page 384, 313 P.2d 97, 100, it was stated: "'The summary judgment statute was not intended nor can it be used as a substitute for existing methods in the trial of issues of fact.' If there is any 'doubt as to the propriety of the motion, courts should, without hesitancy, deny the same.' Travelers Indemnity Co. v. McIntosh, 112 Cal.App.2d 177, 182, 245 P.2d 1065; see also Werner v. Sargeant, 121 Cal.App.2d 833, 837, 264 P.2d 217."

In Severini v. Massae, 140 Cal.App.2d 567, at page 571, 295 P.2d 472, 474, the extent of the discretion to be exercised in ruling on motions for summary judgment was commented on as follows: "While section 437c does use the language 'in the discretion of the court,' it must necessarily mean a legal discretion, and *where*, as here, *it appeared that there were triable issues, there was no room for the exercise of any discretion, but rather it became the duty of the court to deny the motion.*" (Emphasis added.)

With the above rules in mind, we have carefully reviewed the affidavits on file herein to determine whether or not there exist issuable questions of fact, or any issuable question of fact, without attempting to resolve such fact issue or issues.

[5] The trial court recognized the taking of the property and the erection of the freeway to be accomplished facts, and it appears to have based its order upon the uselessness of an injunction, rather than upon the non-existence of issuable facts because in the opinion it is specifically pointed out, "The evidence before me shows that there is a real question whether or not the City has in good faith contested the right of the State to take, and that there is a real question involved as to the effect of the taking. * * * Where a municipality is the first taker the question of which use is the more necessary use is a question of fact and not of law."

Accepting the facts alleged in the affidavits filed by appellant in opposition to the motions for summary judgment to be true, as is proper in ruling on motions for summary judgment, it is not necessary in this appeal to discuss all of the factual issues which have been shown to exist. The status of Riverside Drive as a park road or a state highway or a freeway is one example of such a factual issue. The affidavit of Van M. Griffith clearly states "that said Riverside Drive originated as a park road in said Griffith Park, * * * that no easement at any time has been granted or authorized by any legally constituted body, commission, officer or agency of the City of Los Angeles authorized to change the status of said Riverside Drive from a park road in said Griffith Park, and that said grantors have not nor has any reversioner or remainderman under said grant deed of gift to the City of Los Angeles given consent to the making and constituting said Riverside Drive within Griffith Park a city street, state highway or state freeway." In the affidavit of Van M. Griffith supplementing his previous affidavit the following statement is made: "* * * said City Council did, on August 24, 1954, pass and adopt a resolution recommending that Riverside Drive in Griffith Park be placed on a high priority as said state highway; * * *." In sharp contrast to the statement of Van M. Griffith concerning the lack of consent to the making and constituting of Riverside Drive into a city street, state highway or state freeway is the following statement in a letter dated April 21, 1954 from P. O. Harding, Assistant State Highway Engineer of the State of California to the Board of Recreation and Park Commissioners of the City of Los Angeles, which letter is attached to the affidavit of George Hjelte as Exhibit 1 thereof: "Regarding the development of this particular highway, this freeway route, which follows the routing shown on the City Engineer's Metropolitan Freeway Plan and the Metropolitan Freeway Plan as developed by the Los Angeles County Regional Planning Commission, was added to the State Highway System by the Legislature in 1947." Also in sharp contrast is the following statement in a letter dated February 3, 1955, from Frank B. Durkee, Director of Public Works of the State of California, to the Department of Recreation and Parks of the City of Los Angeles, which letter is attached to the affidavit of Mrs. Harold C. Morton as Exhibit "E" thereof, "The location for this section of freeway actually had been chosen by the City of Los Angeles prior to the enactment of the Collier-Burns Highway Act of 1947 [Streets and Highways Code, § 2000 et seq.], at which time the State Legislature added this section of highway to the State Highway System, placing the obligation for its construction on the State."

Clearly the status of Riverside Drive is material to a determination of the factual issue as to whether the taking of park property for state highway purposes constituted a "more necessary public use" of said property than its use for park purposes. Also bearing on this issue is a letter dated November 16, 1955 from Norris Poulson, Mayor of the City of Los Angeles, to Frank B. Durkee, Director of Public Works of the State of California which letter is attached to the affidavit of Mrs. Harold C. Morton as Exhibit "P" thereof. Said letter contains many statements which we are obliged to accept as true, including the following: "In closing I want to again emphasize the importance of this unique park to the citizens of this community. *It has its own water system. It is obviously a place of refuge in time of emergency. Civilian defense activities in this area could well rely greatly upon the use of this park under possible circumstances.* It is and has been the playground of millions, and *you propose to take it, not because it is the only way to construct the Golden State Freeway, but simply because you have determined to go through it rather than give consideration to an obviously available route of largely vacant land on the other side of the river.*" (Emphasis added.)

A factual dispute is also established as to whether the exercise of authority by various state and city officials constituted an abuse of discretion or was arbitrary or in bad faith by letters attached as exhibits to the affidavits of George Hjelte and Mrs. Harold C. Morton. Specific reference is made to the following, as examples only:

Excerpt from a letter attached to the affidavit of George Hjelte as Exhibit 1 thereof, dated April 21, 1954 from P. O. Harding, Assistant State Engineer of the State of California to the Board of Recreation and Park Commissioners of the City of Los Angeles: "Under date of December 2, 1952, the City Council formally notified the Division of Highways and the California Highway Commission that formal hearings by the Highway Commission would not be required. The California Highway Commission adopted and declared a freeway that portion of Route 4 and 161 as described above, on December 17, 1952."

Excerpt from a letter attached to the affidavit of Mrs. Harold C. Morton as Exhibit "E" thereof, dated February 3, 1955, from Frank B. Durkee, Director of Public Works of the State of California, to the Department of Recreation and Parks of the City of Los Angeles: "The City Council by official action has repeatedly urged the State to officially adopt this freeway and enter into a freeway agreement with the City at the earliest opportunity, to permit start of construction operations."

Excerpt from a straight telegram attached to the affidavit of Mrs. Harold C. Morton as Exhibit "L" thereof, dated October 21, 1955, from Chelso A. Maghetti, Secretary of the California Highway Commission to Larry Norman, President, Los Angeles Recreation and Park Commission: "The California Highway Commission has considered your renewed request by telegram, dated October 18, 1955, to reopen the subject of the route of Golden State Freeway as adopted by the Highway Commission in December, 1952. The action adopting the route was taken nearly three years ago. It was done at the urging and with the approval of elected representatives of City of Los Angeles. * * * In view of the history of this project, and the urgent necessity of getting this freeway in use to relieve traffic at the earliest possible date, the Commission feels that no public purpose would be served by further argument respecting the question of location which, from both a practical and legal standpoint, must be considered as settled."

The above are merely some instances of factual disputes which should be resolved only after a plenary trial of the issues. Notwithstanding the above and other statements in the affidavits opposing the motions for summary judgment, it is argued on behalf of respondents denominating themselves "State defendants" that "there was to be *no irreparable damage to property rights* without court action." In answer to this contention, the order of the trial court set forth hereinabove clearly states that there are questions involving property rights which could not be litigated in the condemnation action. Said respondents also contend that appellant has the "opportunity in the eminent domain action" (People of the State of California v. City of Los Angeles, Superior Court File No. 643,327) "to present the defense of lack of power so to divert the park use to freeway [State highway] use." Even if this were a correct statement, and we are not stating that it is, the mere fact that appellant might have an opportunity to present a defense in another action does not mean that he cannot have it litigated in an action filed by him prior thereto in which he has stated a cause of action.

In making our determination in this proceeding, we reiterate that we are bound to regard the statements in the affidavits opposing the motions for summary judgment as true. Attached to the affidavit of Ruth Knight as Exhibit 2 thereof is a letter dated November 18, 1954, from the Board of Recreation and Park Commissioners of the City of Los Angeles to the City Council of the City of Los Angeles, which contains the following statement: "On April 30, 1954, the Board requested an opinion of the City Attorney as to whether the action of the State Highway Commission in adopting a route for a freeway is final and irrevocable, to which he replied on July 9, 1954, that it was final and irrevocable, *'but such a route may be changed at any time even after the freeway has been built.'*" (Emphasis added.)

[6] In view of the above statements, we cannot regard the injunction as requested by the complaint herein against the erection of the virtually completed freeway to be "useless," as respondents City of Los Angeles and the individually named members of its Council represent it to be. Similarly, we cannot agree with the contention of respondents denominating themselves "State defendants" that "a declaration of whether the Freeway *may* be built on the park lands is moot because the Freeway has been already built."

In Griffith v. Department of Public Works, supra, 141 Cal.App.2d 376, 296 P.2d 838, it was established that appellant was a proper person to bring the present action and that the complaint stated a cause of action. Under the rules set forth hereinabove concerning summary judgments, we are obliged to determine that issuable questions of fact exist, and that the action should be tried on its merits.

The judgment is reversed.

WHITE, P. J., and LILLIE, J., concur.

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170 Cal.App.2d 325

Carroll J. BENDER, Plaintiff, Cross-Defendant and Respondent,

v.

Yvonne BENDER, Defendant, Cross-Complainant and Appellant.

Civ. 9395.

District Court of Appeal, Third District, California.

May 12, 1959.

Rehearing Denied June 9, 1959.

Divorced husband filed notice of motion in Superior Court for Merced County, which had awarded him a divorce, to modify custodial order to permit him to take daughter to the Philippine Islands, and divorced wife filed a notice of motion for change of venue to the City and County of San Francisco, on ground of convenience of witnesses, and supported the motion by affidavits setting forth names and addresses of 13 proposed witnesses with a statement of matters to which each witness would testify, and she also noticed a motion that custody order be modified to grant her full custody of the daughter. The Superior Court, Merced County, Gregory P. Maushart, J., entered orders denying change of venue, modifying custodial decree on motion of divorced husband, and denying motion of divorced wife for change of custody, and she appealed. The District Court of Appeal, Van Dyke, P. J., held that the Superior Court had jurisdiction of divorced wife's motion for change of venue and was under duty to pass on that motion on the merits, because affidavits made at least a prima facie case in favor of granting the motion, and that Superior Court erred in holding that it had no jurisdiction to pass on the merits of such motion.

Orders reversed.

1. Divorce ⚷303(3)

Where divorced husband filed notice of motion in Superior Court, which had granted him a divorce, to modify custodial order to permit him to take daughter to Philippine Islands, and divorced wife filed notice of motion for change of venue, on ground of convenience of witnesses, and supported motion by affidavits setting forth names and addresses of 13 proposed witnesses with statement of matters to which each witness would testify, and she filed motion that custody order be modified to grant her full custody of daughter, Superior Court had jurisdiction to pass on merits of motion for change of venue, because affidavits made at least a prima facie case for granting of motion, and it erred in denying such motion, on ground that it had no jurisdiction to grant change of venue.

2. Divorce ⚷303(3)

Where divorced husband filed notice of motion in Superior Court, which had granted him a divorce, to modify custodial order to permit him to take daughter to Philippine Islands, and divorced wife filed notice of motion for change of venue, on ground of convenience of witnesses, and supported motion by affidavits setting forth names and addresses of 13 proposed witnesses with statement of matters to which each witness would testify, and she filed motion that custody order be modified to grant her full custody of daughter, result of wrongful refusal of Superior Court to pass on merits of motion for change of venue was that Superior Court was without jurisdiction to grant or deny divorced husband's motion for change of custodial decree.

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Clyde B. Dalton, San Francisco, A. Marquez Bautista, San Francisco, of counsel, for appellant.

Lee Alex MacNicol, Merced, for respondent.

VAN DYKE, Presiding Justice.

Defendant and cross-complainant appeals from orders denying a change of venue, modifying an existing custodial decree granted in an action for divorce and denying her motion for a change of custody.

In 1949 the Superior Court for Merced County granted respondent herein an interlocutory decree of divorce from appellant, but awarded the custody of the then four-year-old daughter of the parties to her mother, appellant herein. In 1954 the court modified the custodial provisions of the divorce decree by awarding to respondent the custody and control of his daughter, subject to the condition that she be placed in a boarding school in the vicinity of San Francisco, with each of the parties having the right to have the child on alternate week ends and holidays, and for one-half of the summer vacations. In May of 1957, respondent, who is a Major in the United States Air Force, filed a notice of motion to further modify the custodial order by permitting him to take the girl to the Philippine Islands, where he had been assigned to a tour of duty. Appellant herein filed a notice of motion for a change of venue to the City and County of San Francisco, where she was living with her present husband. The ground of the motion was convenience of witnesses and the motion was supported by affidavits setting forth the names and addresses of thirteen proposed witnesses with a statement of the matters to which each witness would testify. Appellant filed and noticed a second motion that the existing custody order be so modified as to grant to her full custody of the child. All three motions came on for hearing on the same day, the court hearing appellant's motion for change of venue first in order. The court denied appellant's motion for change of venue and then immediately proceeded to hear the other two motions. At the close of the hearing, the court granted respondent's motion to modify the existing custodial order by permitting him to take the child with him to the Philippine Islands and there to maintain her for a period of not exceeding eighteen months. The court denied appellant's motion that the custody of the child be given to her.

[1, 2] We feel compelled to reverse the order of the court denying appellant's motion for change of venue for the reason that it appears clearly from the record that

the trial court did not hear that motion upon the merits thereof, but, on the contrary, denied it upon the ground that it had no jurisdiction to grant the change. In this the court erred. Cooney v. Cooney, 25 Cal. 2d 202, 207, 153 P.2d 334. The result is that the order denying change of venue must be reversed. The court had jurisdiction and, therefore, was under a duty to pass upon that motion on the merits since the affidavits of appellant made at least a prima facie case in favor of granting the motion. The court could not, by holding without reason that it had no jurisdiction to pass upon the merits, divest itself of jurisdiction and evade the duty of hearing and determining the motion. Temple v. Superior Court, 70 Cal. 211, 11 P. 699; Sampsell v. Superior Court, 32 Cal.2d 763, 770, 197 P.2d 739; Robinson v. Superior Court, 35 Cal.2d 379, 383, 218 P.2d 10. A further result from the refusal of the trial court to pass upon the merits of the motion for change is that it was without jurisdiction, until that motion had been passed upon, to grant or deny the motion of respondent for change of the custodial decree. Stutsman v. Stutsman, 79 Cal.App. 2d 81, 84–85, 178 P.2d 769. From that opinion we quote the following:

> "In Beard v. Superior Court, 39 Cal. App.2d 284, 102 P.2d 1087, it was held as the established law of California, prior to the amendment of section 396b of the Code of Civil Procedure, that the filing of a motion for change of place of trial suspends the power of the trial court to act upon any other question until the motion has been determined. * * * [Citing Nolan v. McDuffie, 125 Cal. 334, 58 P. 4, and other cases.]" [178 P.2d 771.]

For the reasons given, the orders denying appellant's motion for change of venue, granting respondent's motion for a modification of the custodial decree, and denying appellant's motion for a change of custody are reversed.

PEEK and SCHOTTKY, JJ., concur.

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170 Cal.App.2d 341

PEOPLE of State of California, Plaintiff and Respondent,
v.
Donald ASKEW, Defendant and Appellant.
Cr. 2926.

District Court of Appeal, Third District, California.
May 13, 1959.

Prosecution for grand theft. From adverse judgment of the Superior Court, Yolo County, Arthur C. Huston, Jr., J., the defendant appealed. The District Court of Appeal, Peek, J., held that the evidence was sufficient to sustain the conviction.

Judgment affirmed.

Larceny ⚿65

Evidence was sufficient to sustain conviction for grand theft.

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Morton Friedman, Sacramento, for appellant.

Stanley Mosk, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

PEEK, Justice.

This is an appeal from a judgment of conviction of the crime of grand theft. The sole contention made by the defendant on appeal is that the evidence does not support the judgment.

The record shows that on the afternoon of Friday, June 20, 1958, defendant, Elijah Griffin (the complainant), and his cousin, Roy Griffin, drove from Woodland to Sacramento where Elijah cashed two checks totaling approximately $430. The three men then went to a bar where Elijah bought at least two rounds of drinks for the three. At that time the defendant stated he was without funds and sold a purse to Elijah for two dollars. The defendant left shortly thereafter and did not rejoin the Griffins until about 9 p. m. Prior to the three leaving Sacramento for their return to Woodland, Elijah ascertained that he had approximately $438 in his wallet, after which he replaced it in his left hip pocket but did not button the flap. On the return trip they ran out of gas. While Roy was gone in search of a service station, Elijah and defendant remained in the car. Elijah slept for some 15 to 20 minutes and was awakened upon Roy's return. The trip was then resumed, and upon arriving in Woodland they stopped at the Sportsmen's Club. Roy departed again, leaving Elijah and the defendant alone in the car. During all of this time defendant remained in the back seat. Shortly after Roy had entered the bar, the defendant came in and said to him: "You better go see about your cousin because I think he has been robbed." Roy and defendant then went back to the car, and in answer to Roy's inquiry, Elijah replied, "I haven't been robbed."

The three men then proceeded to the labor camp where they lived, and after leaving defendant at the quarters which he and Roy occupied, Roy and Elijah went on to the latter's home. It was then that Elijah discovered that his wallet was missing. He accused Roy, but he denied taking it. The following morning Elijah found his empty wallet on the floor of the car. Four days later defendant deposited $100 in his bank account and made a cash deposit of $100 on a car. There was further evidence that prior to the theft defendant's bank account showed a balance of one dollar. There was also evidence that just prior to the theft Roy had given defendant some money as well as some groceries. Evidence was introduced of equivocal statements concerning the theft and the money which were made by the defendant to a neighbor. The neighbor also testified that on the following day the defendant had a roll of bills in his possession. Also the day following the alleged theft the defendant was seen buying a fifth of whiskey which he paid for with a $20-bill. The deposit made on the car was also in $20-bills. When arrested the defendant had a woman in the car with him, and the car was packed with clothing and cooking utensils. The defendant, when queried by police officers concerning the money replied merely to the effect that he just had it, and he denied that he had taken it from Elijah. However he did state he had not worked for more than two months. He further stated that when apprehended he was on his way to visit a sister in Redding, and denied that his sister had ever given him money. However he told a neighbor that he was buying the car with money which the sister had sent to him.

Viewing the evidence as we must in light of the often repeated rule (see People v. Newland, 15 Cal.2d 678, 104 P.2d 778), we must conclude that the judgment of conviction is supported by the evidence.

The judgment is affirmed.

VAN DYKE, P. J., and SCHOTTKY, J., concur.

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170 Cal.App.2d 484

Sylvia May WYNN, Plaintiff and Respondent,

v.

Hugh V. WYNN, Defendant and Appellant.

Civ. 5700.

District Court of Appeal, Fourth District, California.

May 19, 1959.

Rehearing Denied June 12, 1959.

Hearing Denied July 15, 1959.

Divorce action. The Superior Court, Tulare County, Robert K. Meyers, J., rendered judgment granting plaintiff a divorce, providing for custody and support of minor child, and determining disputed property rights, and defendant appealed. The District Court of Appeal, Shepard, J., held that the evidence supported finding that realty owned by husband individually at time of marriage, but thereafter transferred to husband and wife, as owners in joint tenancy, was, in fact, held in joint tenancy by the parties.

Judgment affirmed.

1. Husband and Wife ⚷=14(3)

Formal transfer of tracts of realty, owned individually by husband and wife respectively at time of marriage, to husband and wife, as owners in joint tenancy, created a presumption that legal title to such property was in the parties as joint tenants in accordance with plain language of deeds by which such transfer was made.

2. Husband and Wife ⚷=14(3)

In divorce action, evidence supported findings that parcels of realty, owned by husband individually at time of marriage but thereafter transferred to husband and wife, as owners in joint tenancy, were, in fact, held in joint tenancy by the parties.

3. Appeal and Error ⚷=1011(1)

Where the evidence is conflicting, reviewing court will not disturb findings of trial court.

4. Appeal and Error ⚷=901

Where appellant contends that the evidence is insufficient to support court's findings, appellant has the burden of pointing out in specific detail the evidence upon which he depends.

5. Divorce ⚷=285

On appeal from portion of divorce judgment determining community status of cattle, record failed to show how trial court, in absence of detailed accounting, could have identified, traced or reached a satisfactory conclusion as to what or how much of commingled income from farming and cattle-raising operations was attributable to or used for which of the chattels involved in such operations.

6. Husband and Wife ⚷=248½, 262(1)

Property held by one spouse before marriage is his separate property and is presumed to remain separate property.

7. Husband and Wife ⚷=249

The mere commingling of funds does not necessarily make them community property unless such funds cannot be traced.

8. Husband and Wife ⚷=257

The income of separate property remains the property of the person owning such property.

9. Husband and Wife ⚷=255

Transmutation of separate property into other identifiable and traceable forms does not change separate property to community property.

10. Husband and Wife ⚷=262(1)

All property acquired by purchase after marriage is presumed to be community property. West's Ann.Civ.Code, § 164.

11. Husband and Wife ⚷=262(2)

Burden of proving that property acquired after marriage is separate property rests upon the party making such assertion.

12. Husband and Wife ⚷=14(3), 249

Court will endeavor to construe intent of husband and wife with respect to separate, community, or joint tenancy character of property by what the parties did and said.

13. Divorce ⚷=285
Husband and Wife ⚷=264

In divorce action, finding that cattle purchased during marriage, at least to some extent, from funds derived from joint tenancy or community property, or from current operational loans in which wife participated and in which her credit was involved, constituted community property, was supported by substantial evidence and would not be disturbed by reviewing court, where record did not disclose how trial court, in absence of detailed accounting, could have identified, traced or reached a satisfactory conclusion as to what or how much of commingled funds of husband and wife were attributable to or used for purchase of cattle.

Lopez & Hyde, Bernard A. Brennan, Fresno, for appellant.

McCormick, Moock & McCormick, Visalia, for respondent.

SHEPARD, Justice.

This is an action for divorce. Judgment was rendered for plaintiff for divorce providing for the custody and support of the minor child, defining disputed property rights, and allocating community property. Defendant appeals but confines and limits, by his brief, his objections to that portion of the decree which adjudges three parcels of real property to be held in joint tenancy by the parties, and to that portion of the decree declaring certain cattle to be community property.

The parties were married 17 December 1949, and separated 9 November 1956. At the time of marriage defendant was the owner of four parcels of real property; a herd of cattle numbering 32 head, plus certain farm machinery and implements; and other minor items of personal property. Plaintiff was the owner of one parcel of real property and certain items of personal property not in dispute. Defendant owed at the time of marriage about $12,700, mostly secured by the real property. At the time of the divorce he owed $26,639.76, $16,542 of which was secured by real property and $10,097.76 partially secured by chattel mortgages.

In 1953, defendant caused parcels 1, 2 and 3 of the realty described in his complaint to be transferred into the names of plaintiff and defendant, as owners in joint tenancy. In the same year plaintiff caused the parcel of realty owned by her to be transferred into the names of plaintiff and defendant, as owners in joint tenancy. Apparently, all transfers were made after discussions between the parties, and both parties were advised by an official of the bank with whom they were dealing as to the results of joint tenancy ownership. The fourth parcel owned by defendant had been purchased shortly before marriage with a small down payment; it was found by the court in its decree to be community property; and no objection or point is made of that in this appeal.

Defendant contends that he did not, at the time of the transfers into joint tenancy ownership, understand that such transfer divested him of the separate character of his ownership in that property; that the transfers were made solely for convenience in the financing; and that he intended and believed that it would remain as separate property.

[1, 2] While it is true that the record contains evidence which might be construed to support that conclusion it is also true that there was evidence that both of the parties had had explained to them the basic elements and effect of a transfer into joint tenancy; that the parties discussed this between themselves; and that it was intended to unite the family affairs into a stronger financial unit. The formal transfer into joint tenancy by itself created a presumption that the legal title to the property was in the parties as joint tenants, in accordance with the plain language of the deeds. Chamberlain v. Chamberlain, 2 Cal.App.2d 684, 687, 38 P.2d 790; Sandrini v. Ambrosetti, 111 Cal.App.2d 439, 449 [4], 244 P.2d 742. The evidence does support the court's findings.

[3] In Re Estate of Bristol, 23 Cal.2d 221, 223 [2], 143 P.2d 689, 690, the court quite clearly explains that when the evidence is conflicting this court will not disturb the trial court's findings, using the following language:

> " 'In reviewing the evidence * * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if possible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any substantial evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deduced from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' "

[4, 5] The defendant's second contention is that the evidence is insufficient to support the court's finding that all of the cattle except the breeding bull are community

property. There is evidence that prior to marriage the defendant asked plaintiff to become his partner, to help him manage, plan, increase the family loan potential and unite all family forces into a profitable unit. Plaintiff assisted in all phases of the farming and cattle operations, including the operation of farm machinery, surveys, chopping and picking cotton, supervision of work crews, milking cows, tending cattle, and nursing sick calves. Money was borrowed partly on her credit to buy hay for the cattle and to finance current operational debts for the farm and cattle. Defendant stated that he never did anything without consulting plaintiff. Defendant spent one-third to one-half his time in the cattle business. The cattle were originally milk stock, but by constant turnover of purchase and sale were converted into a beef herd. There was an annual turnover in cattle of from $2,300 to $2,800. All of the milk cows were sold. The herd was largely fed from produce raised on joint tenancy property or community property after 1953. The farm machinery was from time to time traded in and the cash differences supplied out of farm income from joint tenancy or common property. Defendant used farm machinery for outside income in substantial amounts by hiring to other farmers. All of the stock now on hand, except the Hereford bull, (found by the court to be defendant's property) were purchased during the marriage relationship. This is substantially true of the farm machinery and implements. Much of the farm income was from lands rented and worked during the marriage relationship. There was only one bank account, into which all income was deposited and all money was paid. During all of this time the defendant was paying substantial amounts for the support of a former wife and their children. The purchases of cattle were made, at least to some extent, from funds derived from joint tenancy or community property, or from current operational loans in which plaintiff participated and in which her credit was involved. Appellant in his brief deals largely in generalities. The burden is upon the appellant to point out in specific detail the evidence upon which he depends. However, this court has been at pains to read the entire voluminous record and we are unable to discover therefrom how the trial court, short of an exhaustive detailed accounting, (which was not furnished) could have identified, traced or reached a satisfactory conclusion as to what or how much of the commingled funds were attributable to or used for which of the properties. The extensive use of the time of both parties during marriage on the cattle, the constant purchase and sale from community funds, the uniform practice of consulting plaintiff on all transactions and of having her join in all financing are elements which the court apparently took into consideration in its final judgment, and were supportive of its reasoning.

[6–11] While it is true that property held by one spouse before marriage is his separate property and is presumed to remain separate property (Holmes v. Grange Fraternal Fire Ins. Ass'n, 102 Cal.App.2d 911, 917 [2], 228 P.2d 889); that the mere commingling of funds does not necessarily make them community property unless the funds cannot be traced (In re Estate of Lissner, 27 Cal.App.2d 570, 574 [2], 81 P.2d 448); that the income of separate property remains the property of the spouse owning such property (In re Estate of Pepper, 158 Cal. 619, 624, 112 P. 62, 31 L.R.A.,N.S., 1092) and transmutations of separate property into other identifiable and traceable forms do not change separate property to community property (Garten v. Garten, 140 Cal.App.2d 489, 493 [6], 295 P.2d 23), it is also true that all property acquired by purchase after marriage is presumed to be community property (Civil Code, Sec. 164; In re Estate of Brenneman, 157 Cal.App.2d 474, 480 [3] 321 P.2d 86), and the burden of proving that property acquired after marriage is separate property is on the party making that assertion. Thomasset v. Thomasset, 122 Cal.App.2d 116, 123 [3], 264 P.2d 626.

[12, 13] As in all cases of this kind, it is evident that the trial court endeavored

to construe the intent of the parties, with respect to the separate community or joint tenancy character of the property, by what the parties did and said. Socol v. King, 36 Cal.2d 342, 346 [2], 223 P.2d 627. From the record before us, it appears that there is substantial evidentiary support for the position taken by the trial court in holding that the cattle, excepting the bull, are community property.

The judgment is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

Hearing denied; SCHAUER, J., dissenting.

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170 Cal.App.2d 424

Harold STUCKMAN and Hazel Stuckman, both individually and as husband and wife, Plaintiffs and Appellants,

v.

C. G. WOODHULL, Defendant and Respondent.

Civ. 23703.

District Court of Appeal, Second District, Division 2, California.

May 18, 1959.

Malpractice action, wherein plaintiffs urged, in avoidance of bar of statute of limitations, that present action was a substantial continuance of prior action, which had been dismissed for want of prosecution, and that running of statute should be held to have been suspended for period intervening between commencement of two actions. The Superior Court of Los Angeles County, Leon T. David, J., entered judgment for defendant, pursuant to an order sustaining without leave to amend a demurrer to the complaint, and plaintiffs appealed. The District Court of Appeal, Ashburn, J., held that even though causes of action and parties were identical, second action could not be considered a substantial continuance of former since plaintiffs' failure to procure trial on merits in first action had been due to their own neglect.

Affirmed.

1. Appeal and Error 🔑105

Judgment of dismissal for failure to prosecute was appealable. West's Ann. Code Civ.Proc. § 581, subd. 3.

2. Limitation of Actions 🔑130(5)

Even though causes of action and parties were identical, second action could not be considered a substantial continuance of former, so as to suspend running of statute of limitations for period intervening between commencement of two actions, where plaintiffs' failure to procure trial on merits in first action was due to their own neglect and such action was dismissed for want of prosecution. West's Ann. Code Civ.Proc. § 340, subd. 3.

3. Limitation of Actions 🔑201

In malpractice action, wherein plaintiffs urged, in avoidance of bar of statute of limitations, that present action was a substantial continuance of prior action, which had been dismissed for want of prosecution, and that running of statute should be held to have been suspended for period intervening between commencement of two actions, court could not go outside record in determining whether presiding judge, in first action, had erred in denying motion for continuance. West's Ann.Rules on Appeal, rule 13.

4. Continuance 🔑19

A litigant who voluntarily and unnecessarily absents himself from trial against advice of his attorney is not entitled to continuance.

Manuel Seligman, Los Angeles, for appellants.

A. Stewart Maddox, Jr., Beverly Hills, Henry E. Kappler, Los Angeles, for respondent.

ASHBURN, Justice.

Appeal from judgment for defendant entered pursuant to an order sustaining without leave to amend a demurrer to plaintiffs' complaint. The action is one for malpractice, alleged to have occurred in August, 1954, the facts being known immediately to plaintiffs. The instant complaint was filed on February 13, 1957. The demurrer, which was sustained without leave, relied upon subdivision 3 of § 340, Code of Civil Procedure, which establishes the applicable limitation of one year. 38 Cal.Jur.2d, § 91, p. 708.

To escape that limitation appellants' counsel has incorporated in the instant record (in a manner warranting our taking cognizance of same) the proceedings in a former suit upon the same cause of action which resulted in a judgment of dismissal pursuant to § 581, subdivision 3, Code of Civil Procedure. Reliance is placed upon Bollinger v. National Fire Ins. Co., 25 Cal. 2d 399, 154 P.2d 399, and the argument is that the former action was defeated by a technicality, the present one is a substantial continuance of the former, and, it having been commenced promptly, the statute was suspended for the period intervening between the commencement of the two actions.

The facts are these: On June 16, 1955, plaintiffs sued defendant physician in Los Angeles County for damages for malpractice occurring in August, 1954, when, as it was alleged, defendant, who had undertaken to act as plaintiff Harold Stuckman's physician, abandoned the case at a critical time and on August 10, 1954, refused to treat the plaintiff any further. Plaintiff had to obtain other medical and surgical aid, undergo two operations in August and September, 1954, as a result of which things plaintiffs claimed a large amount of damages. Defendant answered on July 8, 1955, and the case came on for trial on October 2, 1956. A motion for continuance was made on behalf of plaintiffs and denied by the presiding judge; the cause was transferred to another judge for trial and then re-transferred to the presiding judge. The minutes of that department say: "Plaintiff's motion for continuance is denied. Cause is transferred to Department 28 for trial. Later, cause is retransferred from Dept. 28 to Dept. One. Counsel for plaintiffs stating that plaintiffs were absent from the jurisdiction on vacation notwithstanding his advice that they appear for trial this date, and that plaintiffs had no admissible evidence to offer, whereupon defendant moves the court for judgment of dismissal under the provisions of Section 581, sub(3) C.C.P., said motion is granted by the court, and the defendant, C. G. Woodhull, is given judgment for his costs of suit herein against the plaintiffs Harold Stuckman and Hazel Stuckman, in the sum of $——. Let execution issue hereon."

[1-4] This judgment of dismissal was appealable (Southern Pac. R. R. Co. v. Willett, 216 Cal. 387, 14 P.2d 526), but no appeal was taken. However, it is not contended by respondent upon this appeal that this dismissal is res judicata. His counsel relies upon the statute of limitations and denies the applicability of the Bollinger case, supra, to the facts here presented. Unless that case compels an adoption of appellants' views the judgment is clearly correct, for two and one-half years had intervened between the commission of the alleged malpractice and the filing of the present action.

Bollinger, supra, was an action upon a fire insurance policy which provided that any loss should be payable 30 days after the amount thereof was ascertained by agreement or appraisement; also that any action on the policy must be brought within 15 months after occurrence of the fire. The amount having been fixed by agreement the insurer denied liability and plaintiff forthwith brought suit before the lapse of 30 days. The trial court granted a nonsuit and plaintiff promptly filed a new action in another court upon the same claim. By that time the 15 months' period of limitation had expired and the problem presented was whether the new action was barred. The Supreme Court held it was not. The ruling is succinctly explained in the later case of Neff v. New York Life Ins. Co., 30 Cal.2d 165, 174, 180 P.2d 900, 906, 171 A.L.R. 563, as follows: "[P]laintiff brought timely action on an insurance policy but through error of the trial court a nonsuit was entered against him, and his new action filed in another court would have been commenced well within the shortened limitations period provided by the insurance contract had it not been for the insurer's procurement of a number of continuances which delayed the parties in reaching trial on the first action—a peculiar sequence of events deemed to be of controlling importance in suspending the running of the statute of limitations and relieving plaintiff from suffering a 'technical forfeiture' of his insurance rights." At page 175, of 30 Cal.2d, at page 906 of 180 P.2d, the court further said: "But 'statutes of limitations are vital to the welfare of society * * * they promote respose [sic] by giving security and stability to human affairs * * * they stimulate to activity and punish negligence.'"

In Tannhauser v. Adams, 31 Cal.2d 169, 187 P.2d 716, 721, 5 A.L.R.2d 1015, it was contended in a quiet title action that the statute of limitation prescribed for an attack upon a tax deed should not be applied because the suit was one on the equity side. In rejecting this argument the court said, concerning the Bollinger case, supra: "The doctrine announced by this court in Bollinger v. National Fire Ins. Co. (1944), 25 Cal.2d 399, 406–411, 154 P.2d 399, that in an action which 'is in reality a continuance of the earlier action (commenced in time) involving the same parties, facts, and causes of action, and was promptly filed after entry of the judgment on the nonsuit, plaintiff should not be deprived of a trial on the merits * * *' and the running of the statute will be 'suspended,' is not applicable here. In the Bollinger case the opinion states that plaintiff (at page 410 of 25 Cal.2d, at page 405 of 154 P.2d) 'brought his [first] action * * * in good time and *diligently pursued it*' (italics added) but 'through error of the trial court (in the first action) was not allowed to proceed to trial.' Here the two actions do involve 'the same parties, facts (except those occurring subsequent to filing of the first action), and cause of action,' but there the similarity ends. The first action brought by this plaintiff was not diligently pursued; it was dismissed for want of prosecution; plaintiff failed to secure a trial on the merits in that action not because of error of the court but because of his own (or his then attorney's) neglect." 31 Cal.2d at pages 177–178, 187 P.2d at page 721.

In the instant situation it appears that the causes of action and parties are identical in the two cases but, as in Tannhauser, supra, the first action was not diligently pursued and plaintiffs' failure to procure a trial on the merits was due to their own neglect.

In urging error in the ruling of the presiding judge[1] which denied a continuance, counsel goes outside the record, an area into which we cannot follow. Rule 13 of Rules on Appeal; Gantner v. Gantner, 39 Cal.2d 272, 277–278, 246 P.2d 923; Altman v. Poole, 151 Cal.App.2d 589, 593, 312 P.2d 6; Bobier v. Baugh, 114 Cal.App. 647, 649, 300 P. 473; 3 Cal.Jur.2d, § 261, p. 782 We have before us only the showing of the minutes to the effect that counsel represented "that plaintiffs were absent from the jurisdiction on vacation notwithstanding his advice that they appear for trial this date, and that plaintiffs had no admissible evidence to offer." The allegation of the present complaint "that when the case came up for trial plaintiffs were required to leave the City and County of Los Angeles for reasons of health" does not assert or imply that any such showing as to health was presented to the presiding judge. Manifestly, a litigant who voluntarily and unnecessarily absents himself from the trial against the advice of his attorney is not entitled to a continuance, nor does his situation present an equity comparable to those which controlled the ruling in the Bollinger case. The complaint before us is devoid of any showing of inequitable conduct on the part of defendant.

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[1] The correctness of the ruling in the first action was canvassed in the Bollinger case, supra, as an incident to determination of where the equities lay with respect to application of the statute of limitations.

The complaint at bar carries no suggestion that a cause of action exists in favor of the plaintiff wife. There was no error in sustaining the demurrer without leave as to both plaintiffs.

Judgment affirmed.

FOX, P. J., concurs.

HERNDON, J., does not participate in this case.

PEOPLE of the State of California, Plaintiff and Respondent,
v.
Raymond Dwight JACKSON, Defendant and Appellant.*
Cr. 2930.

District Court of Appeal, Third District, California.
May 14, 1959.
Hearing Granted July 8, 1959.

Defendant was convicted in the Superior Court, Trinity County, C. A. Paulsen, J., for assault with a deadly weapon, and he appealed. The Third District Court of Appeal, Van Dyke, P. J., held that the evidence supported the verdict.

Affirmed.

1. Assault and Battery 🔑92

Conviction for assault with a deadly weapon was sustained by evidence. West's Ann.Pen.Code, § 12021.

2. Assault and Battery 🔑78

Indictment and Information 🔑114

Information charging assault with a deadly weapon was not subject to claimed infirmities (1) of being faulty in that it did not specify or describe deadly weapon with which defendant was charged with having assaulted victim, or (2) of failing to sufficiently identify two prior convictions of felony, which defendant admitted. West's Ann.Pen.Code, § 12021.

Edwin B. Polhemus, Elk Grove, for appellant.

Stanley Mosk, Atty. Gen., by Doris H. Maier, Deputy Atty. Gen., for respondent.

VAN DYKE, Presiding Justice.

Defendant and appellant herein was charged by information with the crime of assault with a deadly weapon. By a second count he was charged with a violation of Penal Code, Section 12021, possession of a firearm capable of being concealed upon the person by one who had been previously convicted of a felony. The information also charged two prior felony convictions, one for robbery and one for assault with a deadly weapon. Appellant admitted the priors. The cause was tried to a jury upon appellant's plea of not guilty as to both counts. The jury returned verdicts of guilty as to both counts and after denial of probation appellant was sentenced to imprisonment for the term prescribed by law as to Count I. The court dismissed Count II. Appellant has appealed from the judgment of conviction.

At the request of appellant, this court appointed counsel to represent him herein and after examination of the record counsel so appointed has advised the court that his study has not revealed error. In addition this court has made its own examination of the record and likewise has failed to find error. However, appellant has briefed his appeal to the court in pro. per.

On July 6, 1958, one Jesus Camarillo, and his wife, Cecilia, lived in a trailer on property owned by a Mrs. Carmen Coan. Appellant was living at the Coan residence. During the afternoon of that day Mrs. Coan, the appellant, and Mr. and Mrs. Camarillo had eaten dinner together and the party had consumed a quantity of beer, although it appears that no one was intoxicated. During the afternoon and evening appellant appeared to be in good humor, but after he had been told by Mrs. Coan that her son John was coming home in a few days appellant's attitude and demeanor changed. He became belligerent, and Mrs. Coan refused to sleep in her home. It was then arranged that Camarillo would sleep in his car and his wife and Mrs. Coan would sleep in the trailer. Appellant remained in Mrs. Coan's house.

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* Opinion vacated 346 P.2d 389.

After Camarillo had gone to sleep in the automobile, appellant approached the car on several occasions and tried to open the doors. He then went over to the trailer, opened the front door, and inquired if Mrs. Coan was there. He appeared angry. Mrs. Camarillo called to her husband who left the automobile and came over to the trailer. An argument ensued, whereupon appellant struck Camarillo over the head with a handkerchief-covered gun which he had in his hand. Camarillo fell against the trailer house. The two continued to fight until they fell backwards off the porch. During the scuffle, appellant dropped the gun. Camarillo succeeded in obtaining a piece of pipe, with which he struck appellant. Appellant ran and Camarillo ran after him, caught him and prevented him from leaving. The police were called and appellant was placed under arrest.

The foregoing recital of facts, under the prevailing rule on appeal, is stated in the light most favorable to the prosecution. In all essentials appellant, who took the stand in his own behalf, contradicted the People's evidence, but it is apparent that the evidence introduced against him is sufficient to sustain the verdict of the jury.

[1, 2] Appellant argues that he was denied due process of law; that the evidence is insufficient to support the verdict; that the jury did not follow the instruction that appellant must have been proved guilty beyond a reasonable doubt; that the information was faulty in that it did not specify or describe the deadly weapon with which he was charged with having assaulted Camarillo; that the two prior convictions of felony which he admitted were not sufficiently identified in the information; and that he did not have a fair trial because certain witnesses, notably Mrs. Coan, were not called. It is unnecessary to discuss these assignments of error since it is apparent that the record and the law support none of them.

For the reasons given, the judgment appealed from is affirmed.

SCHOTTKY and PEEK, JJ., concur.

170 Cal.App.2d 489

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Victor Leighton GOULD, Jr., Defendant and Appellant.

Cr. 1417.

District Court of Appeal, Fourth District, California.

May 19, 1959.

Prosecution for burglary. From the judgment of the Superior Court, San Diego County, John A. Hewicker, J., the defendant appealed. The District Court of Appeal, Mussell, J., held that prosecutor's remarks to jury to the effect that testimony of police officers, in reference to admission made by defendant, was direct evidence and not circumstantial evidence, but that they were to take the law as given by the court, did not amount to prejudicial misconduct on the part of the prosecutor, and that prosecutor's action in seeking testimony from arresting officer as to dangerous drugs found and trial court's failure to strike the officer's answer, did not amount to prejudicial error where defense counsel in cross-examination introduced testimony not called for in the question asked by the prosecutor.

Judgment affirmed.

1. Criminal Law ⚿409

Testimony of a witness that defendant had admitted guilt would be direct evidence that an admission or confession was made by the defendant, but circumstantial evidence of the truth of what was admitted. West's Ann.Code Civ.Proc. §§ 1831, 1832.

2. Criminal Law ⚿1171(3)

Where prosecutor in reference to admission made by the defendant remarked to the jury "this isn't a circumstantial evidence case * * * You have got direct evidence. What could be less circumstantial than a man's statement to another man that he had the intent to do this or not?" but prosecutor told the jury to take the law from the court, in absence of indication that the remarks were not made in good faith there was no prejudicial misconduct.

3. Searches and Seizures ⚿3(1)

Where defendant, charged with burglary, had stated that he was locked out of his automobile in order to get a screwdriver to pry open a cigarette machine and police officer testified that when they went to the automobile defendant did not use his keys to unlock it, that the automobile was not locked, and that the officer opened the door, and defendant did not say anything to him about his automobile having been locked, the officer was justified in examining the automobile.

4. Criminal Law ⚿1137(5), 1171(1)

Where police officer in response to question asked by prosecutor as to whether he had occasion to search automobile of defendant, charged with burglary, testified that he found an assortment of pills and dangerous drugs in defendant's automobile, and defendant's counsel conducted a lengthy cross-examination of the officer introducing testimony not called for in the question asked by the prosecutor, there was no prejudicial error on part of prosecutor in asking the question or in trial court's failure to strike the answer.

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George R. McClenahan, San Diego, for appellant.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., and Jack K. Weber, Deputy Atty. Gen., for respondent.

MUSSELL, Justice.

Appellant was charged with the crime of burglary (Pen.Code, sec. 459) in that on or about March 13, 1958, he did wilfully enter a building known as a wash room of a trailer park in Palm City, San Diego county, with intent then and there and therein unlawfully and feloniously to commit theft. He entered a plea of not guilty and a trial by jury resulted in a verdict finding him guilty of burglary as charged in the information and fixing the degree of the crime as burglary in the second degree. Appellant was committed to the psychopathic ward for advisory psychopathic proceedings and report to the court and further hearing was ordered for July 15, 1958. On October 10, 1958, the trial court, after having read and considered the probation and other reports, arraigned appellant for judgment and ordered that he be punished by imprisonment in the state prison at Chino, California.

Appellant appeals from the judgment of conviction, claiming prejudicial misconduct on the part of the district attorney and error of the court in failing to admonish the jury to disregard certain testimony and statements of the district attorney. It is not the contention of the appellant that the evidence is insufficient to support the verdict.

On March 13, 1958, shortly after midnight, appellant was arrested by a police officer in the wash room of the Palm City Trailer Park in Palm City, San Diego county. The wash room contained a washing machine, a drier, a soft drink machine, a cigarette machine, and a public telephone, book and receptacle. At the time the officer entered the room there were no lights on, the door of the cigarette machine (which contained a coin box) was pried open and clothespins had been slipped behind it. The appellant was standing over the drier and a screw driver and a pair of pliers were lying on top of it. The officer asked appellant "whose these were", (meaning the pliers and screw driver) and he said, "Mine." When asked what he was doing there, appellant replied, "I live here and my wife sent me down to light the pilot light in the drier." Later, appellant stated to the officer that he came to see what he could get out of the machines and that he entered the wash room to see if he could get something. When questioned at the city jail on March 14th, appellant stated he had financial problems with his wife; that he was having trouble making ends meet and was trying to figure out how to get some money; that he had thought of committing a theft on that day and was going to drive around and try to find a place to commit a theft; that he went to the trailer court to use the rest room, found it locked, entered the wash room, saw the cigarette machine, decided to open it, procured a screw driver from a lady who had just driven into the court, and then started to pry open the machine.

Mrs. Ann Marie Larson, who lived at the trailer park with her husband and little girl, testified that she came home from work at about 12:20 a. m. on the morning of March 13, 1958; that she parked her car in front of their trailer and when she got out of it, the appellant approached her and asked her for a "good hefty" screw driver and stated he had locked himself out of his car; that she asked appellant where his car was located and he said "about four or five trailers down", pointing to the east; that she then waited in her trailer for about five minutes, went to the wash room to get a package of cigarettes and see "where the appellant was trying to get into his car"; that when she entered the wash room it was dark but she saw a person standing by the cigarette machine; that she got her cigarettes and that the machine seemed to work all right; that she then returned to her trailer and called the owner of the trailer park, who phoned the police.

Appellant claims that the prosecutor's remarks to the jury concerning circumstantial evidence were prejudicially erroneous. The record shows in this connection that the prosecutor, in arguing to the jury relative to the force of appellant's admission to police officers and their testimony, said:

> "The defendant has denied making certain statements to the police department when he was up here on the stand under oath and two police officers or three police officers have stated under oath that he made those statements and that is about what it boils down to. I think these other factors are important, but this isn't a circumstantial evidence case, as Mr. McClenahan would lead you to believe. You have got direct evidence. What could be less circumstantial than a man's statement to another man that he had the intent to do this or not? * * * You take the law from the court, ladies and gentlemen, but that is not circumstantial evidence."

[1, 2] Under sections 1831 and 1832 of the Code of Civil Procedure the testimony of a witness that defendant admitted guilt would seem to be direct evidence that an admission or confession was made by the defendant, but circumstantial evidence of the truth of what was admitted. People v. Koenig, 29 Cal.2d 87, 91, 173 P.2d 1. In the instant case it is by no means clear as to whether the prosecutor was referring to the fact that admissions were made or to the truth of what was admitted. There is no indication that the remark was not made in good faith and the prosecutor told the jury to take the law from the court. In Davis v. Franson, 141 Cal.App.2d 263, 271, 296 P.2d 600, it is said that a lawyer is not guilty of misconduct merely because he is wrong as to the law, and that to constitute misconduct in urging a proposition of law, counsel must do so in bad faith. Moreover, the trial court in its instructions herein correctly defined direct and circumstantial

evidence and told the jury it was his duty to instruct as to the law applicable to the case and that it was the duty of the jurors to follow the law as stated by the court. Under the circumstances, there was no prejudicial misconduct shown on the part of the prosecutor in the remarks made.

[3, 4] Appellant further argues that there was prejudicial error in admitting testimony concerning appellant's possession of dangerous drugs. The evidence shows that the appellant parked his car a short distance from the wash room and that he stated to Mrs. Larson that he wanted a screw driver because he had locked himself out of his car. However, a police officer testified that he took the keys to the car from appellant's right-hand pocket when they went to his (appellant's) car and that appellant did not use his keys to unlock it; that the car was not locked and that he (the officer) opened the door, leaned through, and then opened door on the other side and that appellant did not say anything about his car having been locked. These circumstances justified the examination of the car by the officer. When the officer was being questioned by the prosecutor at the trial he was asked if he had occasion to search the car and "what was found, if anything". He replied, "various assortment of pills, dangerous drugs". One of the jurors then said, "I didn't hear that last part." The officer then said, "I said an assortment of pills and dangerous drugs were found in the car." Counsel for appellant then made a motion to strike and this motion was denied by the court. Appellant's counsel claims that this testimony had a highly prejudicial effect on his client. However, the record shows that appellant's counsel conducted a lengthy cross-examination of the witness as to the quantity and exact nature of the pills and dangerous drugs found in the car. He sought information from the officer as to when appellant had obtained the pills and asked the witness to read a list containing the numbers and names of the various pills as shown on the officer's arrest report. He asked the witness to relate what appellant had said relative to the circumstances under which he had obtained these pills, thus introducing testimony not called for in the question asked by the prosecutor. The conduct of the district attorney was limited to what was found in the car and he did not pursue the subject. The record shows that appellant drove to the scene of the crime in his car and parked it near the wash room; that he told Mrs. Larson his car was locked and he needed a screw driver to pry open the window. The screw driver and a pair of pliers were found in the wash room and appellant admitted prying open the cigarette machine. Under these circumstances there was no prejudicial error on the part of the prosecutor in asking the criticized question or in the trial court's failure to strike out the answer thereto.

Judgment affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

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170 Cal.App.2d 373

Vesta M. STEWART, Plaintiff and Appellant,

v.

Peter (Pony) Baronagan MIRANDA et al., Defendants.

William John Van Iderstine, San Jose City Lines, a corporation, Defendants and Respondents.

Civ. 18240.

District Court of Appeal, First District, Division 2, California.

May 15, 1959.

Action for injuries sustained by passenger on defendants' bus when it collided with automobile. The Superior Court, Santa Clara County, Raymond G. Callaghan, J., rendered judgment for defendants, after granting their motion for nonsuit, and plaintiff appealed. The District Court of Appeal, Draper, J., held that evidence was sufficient to take plaintiff's case to jury.

Reversed.

1. Trial ⚿165, 384

Rule, that in passing upon motion for nonsuit court must assume that all relevant evidence in favor of plaintiff is true and must resolve all reasonable inferences and doubts in favor of plaintiff and that it is only when such tests show lack of element essential to plaintiff's case that nonsuit may properly be granted, applies whether the trial is to court or to jury.

2. Carriers ⚿320(21)

In action for injuries sustained by passenger on defendants' bus when it collided with automobile, evidence was sufficient to take plaintiff's case to jury. West's Ann. Civ.Code, § 2185.

3. Trial ⚿384

On motion for nonsuit, trial court was not authorized to weigh evidence.

◆

Campbell, Custer, Warburton & Britton, Alfred B. Britton, Jr., San Jose, for respondents.

Johnson, Thorne, Speed & Bamford, San Jose, for appellant.

DRAPER, Justice.

This personal injury action was tried to the court sitting without a jury. Defendants' motion for nonsuit was granted, and plaintiff appeals from the ensuing judgment.

Plaintiff was a passenger upon a bus owned by defendant corporation and driven by the individual defendant. In a previous trial to a jury, verdict and judgment were in favor of plaintiff against the present defendants and also against one Miranda, driver of an automobile which collided with the bus. Motion of the bus company and driver for new trial was granted. This appeal arises from the retrial. The original judgment against Miranda has long since become final.

When she first entered the bus, plaintiff took a seat. Later the bus became crowded. As the bus neared her destination, plaintiff stood up to give her seat to an elderly passenger standing in the aisle and, she says, partly to enable her to see where the bus was in relation to the stop she desired. While she was standing, the bus and Miranda's car collided, the bus stopped abruptly, and plaintiff fell, sustaining the injury for which she sues.

[1] In passing upon a motion for nonsuit, the court must assume that all relevant evidence in favor of the plaintiff is true, and must resolve all reasonable inferences and doubts in favor of plaintiff. See cases cited in 16 Cal.Jur.2d 208–218, Dismissal, etc., §§ 45–50. It is only when this test shows the lack of an element essential to plaintiff's case that nonsuit may properly be granted. This rule applies whether the trial is to the court or a jury. The argument against application of the rule in nonjury cases was well and persuasively stated in a recent case (Lasry v. Lederman, 147 Cal.App.2d 480, 488–490, 305 P.2d 663), in which the District Court of Appeal reluctantly reversed judgment upon nonsuit in a nonjury case. Hearing was denied by the Supreme Court without a dissenting vote. It follows that the present judgment can be sustained only if the record shows no evidence and warrants no inference that defendants were negligent or that their negligence, if so shown, was a proximate cause of plaintiff's injury.

[2, 3] But the testimony of the witness Miranda, driver of the car which collided with the bus, is enough to require denial of the motion for nonsuit. Miranda had but little understanding of the English language. His testimony is conflicting and at

times confusing. However, giving weight only to those portions favorable to plaintiff, as the nonsuit rule requires, this evidence gives room for the inference that defendants' negligence proximately contributed to the collision and to the resulting abrupt stop which caused plaintiff's fall. Miranda's negligence has been finally determined. But this is by no means a determination that his negligence was the sole cause of the collision. The negligence of two drivers may concur in proximately causing accident and injury. Taylor v. Luxor Cab Co., 112 Cal.App.2d 46, 246 P.2d 45.

The parties argue the applicability of the code provision (Civ.Code, § 2185) which at the time of this accident required a common carrier to provide each passenger with a seat. Defendants argue that violation of this section constitutes only "a condition in the order of causation by which her injury was brought about" and not a proximate cause. Sweet v. Los Angeles Railway Co., 79 Cal.App.2d 195, 200, 179 P.2d 824, 828. Their reliance upon Sweet is misplaced. In that case the trial court had found, on all the evidence, that the negligence of an automobile driver who turned in front of the bus on which plaintiff was a passenger was the sole cause of plaintiff's injury. That finding resolved conflicts in the evidence. On the motion for nonsuit in the case at bar, the trial court was not authorized to weigh the evidence.

We are well aware that if the trial court had reached the point of weighing the evidence it could have found for defendants. Then the question would be only whether there was substantial evidence to support the finding. Such evidence clearly exists. But here a nonsuit was granted. At that stage the court could not weigh the evidence, but was compelled to accept all evidence favorable to plaintiff. In light of that rule, order granting nonsuit was improper.

Judgment reversed.

KAUFMAN, P. J., and DOOLING, J., concur.

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170 Cal.App.2d 333

Chester FRAZEE, Petitioner and Appellant,

v.

CIVIL SERVICE BOARD OF CITY OF OAKLAND, Wayne Thompson, individually and as City Manager of the City of Oakland, Wyman Vernon, individually and as Chief of Police of the City of Oakland, and City of Oakland, Respondents.

Civ. 18257.

District Court of Appeal, First District, Division 2, California.

May 13, 1959.

Hearing Denied July 8, 1959.

Proceeding for a writ of mandate to compel the reinstatement of the petitioner, a police officer of the City of Oakland. From an adverse order in the Superior Court, Alameda County, Donald K. Quayle, J., the petitioner appealed. The District Court of Appeal, O'Donnell, J. pro tem., held that where officer was accused by a citizen of attempting to commit a felony and the chief of police ordered the officer to submit to a lie detector test, refusal of the officer to comply with the order justified his discharge from the force notwithstanding that such tests are not admissible in evidence in the courts of the state.

Judgment affirmed.

1. Appeal and Error ⚷901

Where appeal was taken on the judgment roll only, error, if any, must affirmatively appear from the face of the judgment roll before a reversal could be ordered.

2. Evidence ⚷150

Lie detector tests are not admissible in evidence since they do not have enough reliability to justify the admission of expert testimony based on their results, though they are not completely without value.

3. Evidence ⚷5(2)

It is well recognized that polygraph tests are commonly used by law enforcement agencies in the investigation and detection of crime and that they have some value in such investigation.

4. Municipal Corporations ⚿185(1)

Where officer was accused by a citizen of attempting to commit a felony and the chief of police ordered the officer to submit to a lie detector test, refusal of the officer to comply with the order justified his discharge from the force, notwithstanding that such tests are not admissible in evidence in the courts of the state.

◆

Robert H. Kroninger, Oakland, for appellant.

John W. Collier, City Atty., Mark B. Shragge, Deputy City Atty., Oakland, for respondents.

O'DONNELL, Justice pro tem.

[1] This is an appeal by petitioner from a judgment denying a peremptory writ of mandate to compel his reinstatement as a police officer of the City of Oakland. The appeal is taken on the judgment roll only. Error, if any, therefore must affirmatively appear from the face of the judgment roll before a reversal can be ordered. Utz v. Aureguy, 109 Cal.App.2d 803, 241 P.2d 639.

Appellant had, at the time of the incident out of which this proceeding arose, been a police officer of the City of Oakland with full and permanent civil service status for a period of approximately 10 years. On November 1, 1956, appellant was accused by a citizen of attempting to commit a felony. In connection with the investigation of the charge respondent Chief of Police ordered appellant to submit to a polygraph, or "lie detector," test. Appellant refused to comply with the order. He was thereupon discharged from the Police Force. Appellant had previously violated several other rules of the Police Department. Although it was the cumulation of all these violations that resulted in his discharge, we are here concerned only with the question of whether the last violation, that is, his refusal to submit to the test, constituted a valid ground for dismissal.

Appellant appealed to respondent Civil Service Board. That body, after a hearing, affirmed the order of discharge. The present mandamus proceeding ensued. The trial court, in findings that followed substantially those of the Board, found that the order of the Chief of Police directing appellant to submit to a polygraph examination was not an unreasonable order, and that appellant was, in violation of the provisions of the City Charter of the City of Oakland, guilty of misconduct, conduct unbecoming an officer, and insubordination in refusing to comply with the Chief's order. Judgment was thereupon entered that the writ of mandate be discharged.

It is appellant's contention that the order of the Chief of Police that he, appellant, submit to a polygraph test was arbitrary and unreasonable and that therefore his resulting discharge from the Police Department was unwarranted. He bases this contention on the following two grounds: 1) that since the results of polygraph tests are inadmissible in evidence, to submit to one would be an idle act, and that therefore the Chief acted arbitrarily and unreasonably in requiring appellant to take such a test; 2) that it is improper for a Chief of Police to compel a police officer to participate in the investigation of a charge in which the officer is himself implicated.

[2, 3] Appellant's assertion that the results of polygraph tests are not admissible in evidence in the courts of this state is correct. "Lie detector tests do not as yet have enough reliability to justify the admission of expert testimony based on their results." People v. Carter, 48 Cal.2d 737, 752, 312 P.2d 665, 674. However, it does not follow that such tests are completely without value. It is well recognized that polygraph tests are commonly used by law enforcement agencies in the investigation and detection of crime, and that they have some value in such investigation. McCain v. Sheridan, 160 Cal.App.2d 174, 177, 324 P.2d 923. Such tests can serve "to guide police investigators in their hypotheses." 3 Wigmore on Evidence (3d ed.) § 999, p. 646. This being so, it cannot fairly be said that a criminal investigator acts unreason-

ably or capriciously when he seeks to make use of a polygraph test in pursuing the investigation of a crime. In considering the factual situation presented in the case at bar we must bear in mind the all-important concept of the peculiar and delicate position police officers hold in society. In treating of that concept Mr. Justice Spence, speaking for this court in Christal v. Police Commission, 33 Cal.App.2d 564, 567–568, 92 P.2d 416, 419, said:

> "* * * Such officers are the guardians of the peace and security of the community, and the efficiency of our whole system, designed for the purpose of maintaining law and order, depends upon the extent to which such officers perform their duties and are faithful to the trust reposed in them. Among the duties of police officers are those of preventing the commission of crime, of assisting in its detection, and of disclosing all information known to them which may lead to the apprehension and punishment of those who have transgressed our laws. When police officers acquire knowledge of facts which will tend to incriminate any person, it is their duty to disclose such facts to their superiors and to testify freely concerning such facts when called upon to do so before any duly constituted court or grand jury. It is for the performance of these duties that police officers are commissioned and paid by the community, and it is a violation of said duties for any police officer to refuse to disclose pertinent facts within his knowledge even though such disclosure may show, or tend to show, that he himself has engaged in criminal activities." [1]

Circumstances can, of course, be conceived of wherein a superior's order that a subordinate officer submit to a polygraph test would be unreasonable, or wherein the subordinate might have some legitimate reason for refusing to submit to the test. However, there is nothing that appears on the face of the record in the case before us that suggests that the Chief acted arbitrarily, capriciously or unreasonably in requiring the test, nor that suggests any valid excuse for petitioner, as a sworn officer of the law, to refuse to submit to the test.

Appellant cites the case of Garvin v. Chambers, 195 Cal. 212, 232 P. 696. That case is readily distinguishable from the case at bar. In that case Garvin, a police officer, was charged with the commission of a crime. He was thereupon suspended from his position as a police officer. During the period of his suspension his superior officer demanded that he, Garvin, give an oral statement relative to the charge against him. Garvin refused to do so unless his attorney was present. Garvin was discharged for disobedience of the order. The order of discharge was held invalid on the ground that "while the order of indefinite suspension was in force, Garvin's status as a policeman was suspended to the extent that he could not be called upon to do police duty, nor be held amenable for a failure to do such duty." (195 Cal. at page 224, 232 P. at page 701.) And on page 225 of 195 Cal., on page 701 of 232 P.: "It was but natural that Garvin should deal at arm's length with the chief, who, during the period of suspension, was acting not as Garvin's superior officer but as his prosecutor." In the case at bar appellant was never under suspension.

[4] Based on the scant record before us we conclude that it does not affirmatively appear therefrom that the Chief of Police acted arbitrarily, capriciously or unreasonably in ordering appellant to submit to a polygraph test, nor does it affirmatively appear therefrom that appellant had any

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[1] It should be noted that petitioner does not place his refusal to submit to the test on the ground that it might have resulted in his making self-incriminating statements. With respect to a public employee's invocation of the privilege against self-incrimination as constituting grounds for his discharge see the Christal case and Slochower v. Board of Education, 350 U.S. 551, 76 S.Ct. 637, 100 L.Ed. 692; Board of Education, etc. v. Mass, 47 Cal.2d 494, 304 P.2d 1015; and Annotation, 44 A.L.R.2d 789.

valid excuse or justification for refusing to take the test. His refusal therefore constituted a proper basis for his discharge from the Police Force.

The judgment is affirmed.

DOOLING, Acting P. J., and DRAPER, J., concur.

Hearing denied; GIBSON, C. J., and SCHAUER, J., dissenting.

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170 Cal.App.2d 169

Harold SODERLING and Lorella Soderling, Plaintiffs and Respondents,

v.

Charles H. TOMLIN and Hazel S. Tomlin, Defendants and Appellants.

Civ. 9557.

District Court of Appeal, Third District, California.

May 5, 1959.

Hearing Denied July 1, 1959.

Purchaser-optionees brought action against owner-optionors to cancel and rescind a land purchase option agreement, on ground that purchaser-optionees were induced to enter into the agreement by material misrepresentations made by the owner-optionors. The Superior Court, Mendocino County, Benjamin C. Jones, J., entered judgment in favor of the purchaser-optionees, and the owner-optionors appealed. The District Court of Appeal, Peek, J., held that evidence sustained finding that there were material misrepresentations, which were known by owner-optionors to be false at time owner-optionors made the misrepresentations, and that the purchaser-optionees justifiably relied on such misrepresentations to their detriment, and that under such circumstances the Superior Court properly granted rescission and cancellation of the agreement.

Judgment affirmed.

1. Vendor and Purchaser 🔑44

In action by purchaser-optionees against owner-optionors to cancel and rescind a land purchase option agreement, on ground of material misrepresentations by owner-optionors, evidence sustained finding that there were material misrepresentations, which were known by owner-optionors to be false at time they were made, and that purchaser-optionees justifiably relied on such misrepresentations to their detriment.

2. Vendor and Purchaser 🔑18(1)

Where it was properly found under evidence that owner-optionors knowingly made material misrepresentations to induce purchaser-optionees to enter into land purchase option agreement, and that purchaser-optionees justifiably relied on such misrepresentations to their detriment, trial court properly granted rescission and cancellation of the agreement in action by purchaser-optionees.

3. Appeal and Error 🔑931(1)

District Court of Appeal on appeal is bound by those inferences which support the judgment.

4. Vendor and Purchaser 🔑18(4)

Purchaser-optionees were entitled to retain possession of ranch following notice by purchaser-optionees of rescission of land purchase option agreement, on ground of misrepresentations by owner-optionors, for so long as owner-optionors refused to return to purchaser-optionees consideration paid by purchaser-optionees for the option agreement, but such right was conditioned on payment of reasonable rental by purchaser-optionees.

5. Vendor and Purchaser 🔑18(4)

Acceptance by purchaser-optionees of benefits consistent with payment of reasonable rental by purchaser-optionees to owner-optionors after rescission of land purchase option agreement would not necessarily be inconsistent with a rescission by purchaser-optionees of the option.

6. Vendor and Purchaser 🔑18(4)

Where purchaser-optionees gave notice to owner-optionors of rescission of land purchase option agreement, on ground of misrepresentations by owner-optionors, in May of 1957, and purchaser-optionees accepted payment of $250 for hunting privileges in October of 1957, but there was evidence that when purchaser-optionees took possession on July 15, 1956 the owner-optionors represented that payment for hunting rights was due immediately, and it thereafter developed that payment was not due until following October, and that therefore purchaser-optionees were denied hunting rentals for three months, it could not be said as a matter of law that purchaser-optionees waived their right to rescind the agreement, on ground that they accepted benefits under the agreement after notice of rescission.

7. Vendor and Purchaser ⚷18(4)

In action by purchaser-optionees against owner-optionors to cancel and rescind a land purchase option agreement, on ground of material misrepresentations by owner-optionors, evidence sustained trial court's finding that reasonable rental value, which was to be deducted from amount recoverable by purchaser-optionees, was only $3,000 a year.

8. Vendor and Purchaser ⚷18(4)

In action by purchaser-optionees against owner-optionors to cancel and rescind a land purchase option agreement, on ground of material misrepresentations by owner-optionors, trial court properly made amount of judgment in favor of the purchaser-optionees a lien against ranch.

9. Vendor and Purchaser ⚷18(4)

In action by purchaser-optionees against owner-optionors to cancel and rescind a land purchase option agreement, on ground of material misrepresentations by owner-optionors, trial court properly included in judgment in favor of the purchaser-optionees recovery for improvements which purchaser-optionees made and for taxes paid by them.

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Kasch & Cook, Ukiah, for appellants.

Burke & Rawles, Ukiah, for respondents.

PEEK, Justice.

This is an appeal by the defendants from a judgment cancelling and rescinding a land purchase option agreement entered into between plaintiffs as the purchaser-optionees and defendants as the owner-optionors. The judgment ordered plaintiffs to deliver up possession of the premises; ordered that defendants return the consideration paid for the option, plus the value of certain improvements and tax payments made by the plaintiffs, less the reasonable rental value of the property for the period of their occupancy; and declared the amount due plaintiffs to be a lien upon the property.

The option agreement which was entered into on June 23, 1956, provided that in consideration of the sum of $10,000 the plaintiffs were to have physical possession of the ranch, farm equipment and furnishings during the period of the option beginning July 15, 1956, and continuing for a period of one year; and that at any time during said period, plaintiffs had the option of purchasing said property for the sum of $95,000.

When viewed in the light most favorable to the plaintiffs-respondents, the record shows that defendants were the owners of a ranch located in Potter Valley, Mendocino County. Prior to the execution of the option, plaintiff Harold Soderling inspected the ranch in the company of defendant Charles H. Tomlin. Tomlin pointed out the boundary line of the property as running along a certain fence line on the west side of a creek and represented that a certain gravel bar was entirely included within the boundary. It was further represented by Tomlin that the gravel bar was the only source of gravel in the Potter Valley area and the revenue therefrom was approximately $1,500 to $2,500 a year. He further represented that the only encumbrance on the property was a $35,000-mortgage. But contrary to defendant's representations, the description of the property by metes and bounds did not include all of the gravel bar, and the boundary did not run along the fence on the west side of the creek. The evidence further shows that there were some three other sources of gravel in the Potter Valley area, and that there was a Farm Home Administration chattel mortgage of $8,000 as an encumbrance upon the ranch equipment in addition to the $35,000-mortgage.

Both Mr. and Mrs. Soderling testified that they would not have signed the option agreement had they known the true facts.

The defendants contend that there can be no claim of intentional or negligent misrepresentation in that they honestly believed that the boundary line was as represented, and that said line as described was an agreed boundary line with the adjacent owners, the Cardozas. Any argument in this regard is but an attempt to reargue the facts on appeal, since the finding of the trial court that the representation as to the line was false and that defendants knew it to be false was amply supported by evidence that prior to the time the representations were made there had been a dispute between the defendants and the Cardozas concerning the ownership of a part of the gravel bar. Additionally Mrs. Cardoza denied that there was an agreement concerning the boundary line.

Defendants further contend that the representation concerning the mortgages cannot support a finding of fraud since, in any event, they would have been obligated to pay the chattel mortgage held by the Farm Home Administration in order to furnish clear title to plaintiffs should they exercise the option. This is but an argument to the materiality of the misrepresentation rather than the fact of misrepresentation.

[1, 2] As above stated, the facts support the finding that there were material misrepresentations which were known by defendants to be false at the time they were made, and that the plaintiffs justifiably relied upon such representations to their detriment. Under such circumstances the trial court properly granted rescission and cancellation of the instrument. See Lobdell v. Miller, 114 Cal.App.2d 328, 336, 250 P.2d 357.

[3] Defendants next contend that plaintiffs waived their right to rescind by accepting benefits under the option agreement and subsequent to the notice of rescission. See Neet v. Holmes, 25 Cal.2d 447, 459, 154 P.2d 854. In their brief defendants set forth certain transactions which, it is claimed, occurred after the notice of rescission. As to the transactions relating to the sales of gravel and the harvesting, sale and use of hay, we find nothing in the record to compel the inference that such transactions took place subsequent to the rescission so as to constitute a waiver as a matter of law. This court is, of course, bound by those inferences which support the judgment. Petersen v. Murphy, 59 Cal.App.2d 528, 139 P.2d 49.

[4–6] However it does appear that one of the transactions did take place following the notice of rescission. In this regard it appears that plaintiffs accepted a payment of $250 for hunting privileges in October of 1957 and that the notice of rescission was served in May of that same year. However plaintiff Harold Soderling testified that upon taking possession on July 15, 1956, defendants represented that payment for hunting rights was due immediately. It thereafter developed that payment was not due until the following October, and hence plaintiffs were denied hunting rentals for three months. Thus the payment which was accepted was for the four months commencing October 22, 1957, would have encompassed a period of time including the time of trial of the action. However plaintiffs were entitled to retain possession of the ranch following the notice of rescission for so long as defendants refused to return the consideration paid for the option agreement. Of course the right was conditioned upon payment of a reasonable rental by plaintiffs. The acceptance of benefits consistent with the payment of a reasonable rental would not necessarily be inconsistent with a rescission of the option. Under such circumstances it cannot be said as a matter of law that plaintiffs waived their right to rescind. As the court held in Neet v. Holmes, supra, 25 Cal.2d at page

459, 154 P.2d at page 860: "Waiver is rarely established as a matter of law, but an intent contrary to apparent acts must be disclosed." Again, in French v. Freeman, 191 Cal. 579, 590, 217 P. 515, 519, it was stated: "The question of waiver or nonwaiver was one of fact for the trial court to pass upon, and the acts or conduct which defendant claims constituted said waiver were the evidence to be considered in determining the ultimate fact of waiver or nonwaiver. * * * Whether or not a person has ratified a voidable contract, or elected to affirm it rather than to rescind it, depends primarily upon his intention, and this is shown by his declarations, his acts, or his conduct which are matters of fact. The question is therefore a question of fact for the determination of the jury."

[7] We find no merit in defendants' further contention that there is no substantial evidence in the record to support the finding of the court that the reasonable rental value of the ranch was $3,000 per year. The plaintiffs testified that such was the reasonable rental value, and there was further testimony that a larger ranch in the same area was rented for $4,000 per year.

[8, 9] The defendants' remaining contentions, (1) that plaintiffs were not entitled to remain in possession of the ranch after notice of rescission, (2) that it was error for the court to make the amount of the judgment a lien against the ranch, and (3) that the amount of damages is incorrect in that the court allowed recovery for improvements which plaintiffs made to the real property and equipment and for certain taxes which were also paid by them, are also without merit.

It has been held that a defrauded vendee is entitled to retain possession of property following rescission. Kent v. Clark, 20 Cal. 2d 779, 785, 128 P.2d 868, 142 A.L.R. 576. Also he is entitled to a lien for the amount of purchase money paid and the expenditures made upon the property, including taxes. Montgomery v. Meyerstein, 186 Cal. 459, 464, 199 P. 800. Likewise improvements made to realty and chattels, as well as taxes paid, are proper subjects for consequential damages in a rescission action. Lobdell v. Miller, supra, 114 Cal.App.2d at page 343, 250 P.2d at page 367.

Defendants' argument that the cases above cited are not in point, since they do not deal with option agreements, ignores the fact that the agreement in the present proceeding included more than the bare option, and under the terms thereof plaintiffs were induced to make the expenditures and improvements; hence they became proper items of damage.

The judgment is affirmed.

VAN DYKE, P. J., and WARNE, J. pro tem., concur.

170 Cal.App.2d 358

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Marian GRIFFIN, Defendant and Respondent.

Cr. 1403.

District Court of Appeal, Fourth District, California.

May 13, 1959.

Former deputy clerk of municipal court appealed from conviction of embezzlement in Superior Court of San Diego County, John A. Hewicker, J. The District Court of Appeal, Shepard, J., held that evidence supported conviction for embezzlement of money received from third parties as bail for other persons charged with traffic offenses and that clerk was public officer who received public moneys within statutes relating to embezzlement and bail.

Affirmed.

1. Criminal Law 🔑1159(3)

On appeal of former deputy clerk of municipal court from conviction for embezzlement of public money, District Court of Appeal could not reweigh evidence to resolve conflicts therein in favor of clerk. West's Ann.Pen.Code, § 424.

2. Criminal Law 🔑1159(6)

In criminal prosecutions, right to draw proper inferences from evidence is function of the jury, reviewing court is not permitted to substitute its findings of ultimate fact for that reached by jury as long as jurors' conclusions do not do violence to reason, and circumstantial evidence may be as convincing in its force and as conclusive as testimony of witnesses to overt act.

3. Criminal Law 🔑1144(13)

On appeal from conviction of crime, reviewing court must assume in favor of verdict existence of every fact which jury could have reasonably deduced from evidence, and then determine whether such facts are sufficient to support verdict.

4. Embezzlement 🔑44(1)

Evidence supported conviction of former deputy clerk of municipal court for embezzlement of money she received from third parties as bail for other persons charged with traffic offenses. West's Ann. Pen.Code, §§ 424, 426.

5. Embezzlement 🔑6, 21

Former deputy clerk of municipal court who received money of third parties as bail for other persons charged with traffic offenses was "public officer" who received "public moneys" within statutes relating to embezzlement and bail. West's Ann. Pen.Code, §§ 424, 426, 1297; West's Ann. Vehicle Code, § 739.

See publication Words and Phrases, for other judicial constructions and definitions of "Public Money" and "Public Officer".

◆

Thomas Whelan, San Diego, for appellant.

Stanley Mosk, Atty. Gen., Clarence A. Linn, Chief Asst. Atty. Gen., Arlo E. Smith, Doris H. Maier and Raymond M. Momboisse, Deputy Attys. Gen., James Don Keller, Dist. Atty., Robert Thomas, Deputy Dist. Atty., San Diego, for respondent.

SHEPARD, Justice.

Defendant was indicted, tried and convicted on three counts of embezzlement of public money and sentenced to state prison. She appeals from the final judgment of conviction and from the order denying her motion for new trial.

[1–3] Defendant's first contention is that the evidence was insufficient to justify the verdict. The rule is well settled that when a cause reaches this court on appeal on the ground of insufficiency of the evidence to support the findings of the trial court " 'we may not reweigh the evidence or resolve conflicts therein in favor of the defendant. The credibility of the witnesses and the weight to be given their testimony are committed exclusively to the trier of fact.' People v. Flummerfelt, 153 Cal.App. 2d 104, 106 [2], 313 P.2d 912, 913. 'The right to draw proper inferences from the evidence is a function of the jury; and as long as its conclusions do not do violence to reason, an appellate court is not permitted to substitute its findings of the ultimate fact for that reached by the constitutional as well as the statutory arbiter thereof. Circumstantial evidence may be as convincing in its force and as conclusive as the testimony of witnesses to an overt act.' People v. Perkins, 8 Cal. 2d 502, 511, 66 P.2d 631, 635. ' "We must assume in favor of the verdict the existence of every fact which the jury could have reasonably deduced from the evidence, and then determine whether such facts are sufficient to support the verdict." ' People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778, 780." People v. Hopper, 168 Cal.App. 2d 406, 336 P.2d 28, 29.

[4] Reviewing the evidence in the light of these rules, the very voluminous tran-

script reveals that during the time the charged embezzlements are alleged to have occurred the defendant was a deputy clerk of the municipal court, El Cajon Judicial District of San Diego County; that among her duties was that of keeping books for said court and of receiving and handling the money records and the moneys themselves for said court; that she signed the official receipt for the money referred to in Counts 1 and 3 of the indictment and wrote but failed to sign the official receipt for the money referred to in Count 2 of the indictment; that all official receipt books of her court were under her control, she designated the receipt book to be used each day, she kept account of the sequence of receipt numbers and recorded the receipt numbers on the "Analysis of Cash Receipts" and "Cash Collection Report"; that several of these official receipt books under her control were on audit found to be missing; that individual deposit receipts missing out of these missing receipt books total 272; that 147 case files were missing and all of the missing case files were within the numbers encompassed by the missing receipt books; that in each case of the 147 missing case files the docket entries reflected no money received; that the "Analysis of Cash Receipts" and the "Cash Collection Report" kept by her likewise failed to reflect the receipt of any money in any of the 147 missing case files; that no case files had been lost prior to her employment and none were lost after her retirement; that, contrary to orders, she often arrived at the court early and opened the mail without the presence of the other deputy clerk; that through a surprise audit of her accounts a cash shortage was discovered and in her attempt to explain the shortage she made material conflicting and untrue statements; and that in addition to the cases charged in the three counts of the indictment the prosecution were able to prove several other cases of the receipt by her of bail deposits that were never recorded nor accounted for, all of which were among the 147 missing case files. Different phases of the foregoing were supported in great detail by other officials of the court, by auditors and by lay persons who had paid moneys to her on traffic cases. In our opinion, the evidence was amply sufficient to justify the verdict.

[5] Defendant's second contention is that the moneys referred to in each of the three counts are not public moneys within the meaning of Penal Code, Section 424. Defendant argues that because there had been no formal decree of forfeiture the money had not become "public moneys". She argues further that in each case the money was deposited as bail by a person other than the one charged with a traffic violation; that since Vehicle Code, Section 739 did not, at the time bail was received, authorize the deposit of bail by a third party the deposited money must necessarily have been received under the provisions of Penal Code, Sections 1295 to 1297, inclusive; that under Penal Code, Section 1297 money so deposited as bail remains the property of the third party depositing same; that under the ruling of the Supreme Court in Rodman v. Superior Court, 13 Cal.2d 262, 89 P.2d 109, such money cannot be applied in satisfaction of a fine against the defendant if the defendant properly appeared before the court; and that, therefore, such money as defendant is accused of embezzling is not public money and should be treated as money in the hands of a receiver of private funds. Defendant further argues that a receiver of private funds is not a public officer, and in case of embezzlement of such funds the receiver must be prosecuted under Penal Code, Section 504 and not under Penal Code, Section 424. People v. Showalter, 126 Cal.App. 665, 14 P.2d 1034. Defendant further points out that charges are not interchangeable under said Sections 424 and 505. People v. Westlake, 124 Cal. 452, 57 P. 465.

The effect of the decision in Rodman v. Superior Court, supra, is only that bail deposited by a third person is to guarantee the proper appearance of the defendant in answer to the charge on which bail is posted, and that if the defendant does, in fact, properly appear in answer to such pending charge the bail cannot be applied in payment of the fine. The case of People v. Showalter, supra [126 Cal.App. 665, 14 P.2d 1035] holds only that a Receiver appointed by the court is not a public officer within the meaning of Penal Code, Section 424 "Since it is apparent that a receiver appointed in an ordinary civil action has nothing to do with the 'revenue and property of the state,' but that his duties and activities are necessarily confined to an administration of the business affairs of private individuals, * * * a receiver is not a public officer, nor engaged in the handling of 'public moneys.' "

We think defendant's contention is without merit. Penal Code Section 424, as to the portion with which we are here concerned reads as follows:

> "Each officer of this state, or of any county, city, town, or district of this state, and every other person charged with the receipt, safekeeping, transfer, or disbursement of public moneys, who either:—
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> "1. Without authority of law, appropriates the same, or any portion thereof, to his own use, or to the use of another; or,
>
> "2. Loans the same or any portion thereof; makes any profit out of, or uses the same for any purpose not authorized by law; or,
>
> * * * * * *
>
> "7. Willfully omits or refuses to pay over to any officer or person authorized by law to receive the same any money received by him under any duty imposed by law so to pay over the same;"

Penal Code, Section 426 reads as follows:

> " 'Public Moneys,' As Used In The Preceding Section, Defined.
>
> The phrase 'public moneys,' as used in the two preceding sections, includes all bonds and evidence of indebtedness, and all moneys belonging to the State, or any city, county, town, or district therein, and all moneys, bonds, and evidences of indebtedness received or held by State, county, district, city, or town officers in their official capacity."

In Bennett v. Superior Court, 131 Cal.App.2d 841, 281 P.2d 285, it was held that the clerk of a judicial district court is a public officer within the meaning of Penal Code, Section 424, and that deposits received by such clerk are public moneys received by her in her official capacity as such public officer, and we agree with the reasoning and decision in that case. In our opinion, the defendant in this case was, as a clerk of the municipal court, a public officer within the meaning of Penal Code, Section 424 and the money, subject of the charges in this case, was received by her in her official capacity. The official character in which moneys are received or held is the proper criterion of whether or not they are "public moneys" under said Section 424. Ultimate ownership is not a proper criterion. People v. Crosby, 141 Cal.App.2d 172, 175(1), 296 P.2d 438.

We are convinced from a review of the very columinous record that the trial was fair, that the rights of the defendant were properly protected by an astute and alert attorney as well as by the court itself, and that the evidence was ample to sustain the verdict of the jury.

The judgment and the order denying a new trial are affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

170 Cal.App.2d 129

R. E. LEWIS and Vera M. Lewis, Plaintiffs, Cross-Defendants and Respondents,
v.
E. E. FIRESTONE and Olive Firestone, Defendants, Cross-Complainants and Appellants,

Irving S. Kravitz, Edith Z. Kravitz and Hardy W. Wallen, Defendants and Appellants,

Harry Rogers and Eleanor A. Rogers, Defendants, Cross-Defendants and Respondents.

Civ. 5663.

District Court of Appeal, Fourth District, California.
May 4, 1959.

Action by makers who were compelled to pay a note, for contribution from other joint and several makers of note. The Superior Court, Kern County, Norman F. Main, J., entered judgment for plaintiff makers and an appeal was taken. The District Court of Appeal, Griffin, J., held that evidence sustained finding that note was a personal note of the joint and several makers to secure a loan, and was not a joint venture loan on the part of the makers' joint venture business, but constituted an individual transaction to raise funds later used in the joint venture.

Judgment affirmed in part.

1. Joint Adventures 🔑1.15

In action by makers who were compelled to pay a note, for contribution from other joint and several makers of the note, evidence sustained finding that note was a personal note of the joint and several makers to secure a loan, and was not a joint venture loan on the part of the makers' joint venture business, but constituted an individual transaction to raise funds later used in the joint venture.

2. Partnership 🔑108

One partner cannot sue another upon a demand arising out of partnership transactions, in the absence of a settlement of the accounts, but such rule does not apply where the transaction is not a partnership matter.

3. Appeal and Error 🔑440

Clerical errors in trial court's records may be corrected by the trial court, even though an appeal has been taken and is pending.

4. Appeal and Error 🔑1071(6)

Where, by error or inadvertence in findings signed prior to appeal, no finding was actually made in reference to certain issues, but, subsequent to appeal, court made an order correcting the signed findings nunc pro tunc, no prejudicial error would be deemed to have occurred as a result of court's original failure to find on such facts.

5. Trial 🔑397(6)

In action by makers who were compelled to pay a note, for contribution from other joint and several makers of the note, wherein defendants filed a cross complaint for termination of a joint venture, distribution of assets and for an accounting, finding that defendant's claim to certain realty was without right, negatived allegations of cross complaint as to which specific findings were not made, and such general finding was sufficient.

6. Joint Adventures 🔑5(2)

In action by makers who were compelled to pay a note, for contributions from other joint and several makers of the note, wherein defendants filed a cross complaint for termination of a joint adventure, distribution of assets, and for an accounting, evidence sustained finding that one of the defendants had no interest in, and that there was no value to leases assigned for security, or in personalty, or options for purchase of certain claims, and that there was no value in a trust deed assigned by one of the defendants, and that joint venture expended a certain sum on a personal obligation of one of the defendants for fertilizer.

7. Appeal and Error 🔑1071(6)

In action by makers who were compelled to pay a note for contribution from other joint and several makers of the note, wherein defendants filed a cross complaint for termination of a joint venture, distribution of assets and for an accounting, failure of court to make findings on any particular items or to adjust all equities between the parties, if any, would not be deemed prejudicial on theory that way was left open for possible future suits for contribution, where contribution of the respective parties was set forth, and where defendants pointed to no additional evidentiary matter not considered by the court which would support a further finding favorable to them or which would have resulted in a different judgment.

8. Appeal and Error ⚷1071(6)

Failure to find on an issue is not ground for a reversal unless it appears there was evidence introduced as to such issue sufficient to sustain a finding in favor of appellants.

9. Partnership ⚷93

By statute, rights and duties of partners in relation to a partnership must be determined according to such statute, subject to any other agreement between them. West's Ann.Corp.Code, § 15018(b, c).

10. Joint Adventures ⚷1.14

Where a judgment was obtained on a note against a comaker, for funds which were contributed to a joint venture, such adventurer's right to share of the assets of the joint venture were determinable under terms of the joint venture agreement.

Dorsey, Bultman & Bianchi, Bakersfield, for appellants.

Borton, Petrini, Conron & Brown, Bakersfield, for respondents.

GRIFFIN, Presiding Justice.

Originally, this was an action against other makers, under sections 1431, 1432 of the Civil Code, for contribution by some of the joint and several makers of a note who, allegedly, were compelled to pay said note. The complaint of R. E. Lewis and Vera M. Lewis, husband and wife, hereinafter referred to as plaintiffs, sought 7⁄9 contribution, there being nine makers and two payers. By stipulation it was agreed that defendants, cross-complainants and appellants E. E. Firestone and Olive Firestone, and Irving S. Kravitz, Edith Z. Kravitz and Hardy W. Wallen (hereinafter referred to as appellants) all makers of the note, were actually combined for a one-third interest; that cross-defendants and respondents Harry Rogers and Eleanor A. Rogers, husband and wife, were combined for a one-third interest, and that plaintiffs R. E. Lewis and Vera M. Lewis had a like interest.

Non-appealing defendants, Rogers and wife, answered by general denial, and set up as a defense a joint venture, as evidenced by a written agreement of July 22, 1954 (Exhibit 2) and contended they had sold their entire interest to plaintiffs Lewis. Appellants Firestone, et al., answered and pleaded a long cross-complaint, the essence of which was to allege a joint venture by a claimed oral agreement which was ratified by a subsequent written agreement (Exhibit 2). They alleged breach of the agreement by plaintiffs and cross-defendants Lewis, and prayed for judgment terminating the joint venture, distribution of the assets, and for an accounting. The same matter was pleaded as an affirmative defense to the complaint.

There is considerable dispute as to the facts established. The principal contention on this appeal is the insufficiency of the evidence to support the facts found; that the findings are incomplete; and that the judgment is not supported by the findings and is contrary to the evidence and the law.

The Ranch Income Shares, Inc., was adjudicated a bankrupt in May, 1953. Defendant Firestone had been farming its real property and leased land under a lease executed by the trustee in bankruptcy. Firestone had purchased a sprinkling system and new pump on contract. He was indebted to one Bonaventura for fertilizer in the sum of $3,250; to Pacific Gas & Electric Company for power in the sum of $5,200; and owed one Kemble $11,626.12 on an unsecured note given to purchase a one-half interest in a trust deed hereinafter mentioned. During this time Firestone had acquired options to purchase the following claims against the bankrupt: (1) a judgment lien in favor of one Bowline in the sum of $17,000, which he claimed could be purchased for $5000, and a mechanic's lien in favor of one Freeborn for $4,000, which could be purchased for $3,500. Firestone and his wife claimed they then owned an undivided one-half interest in a promissory note secured by a trust deed in the principal sum of $22,575, dated February 1, 1952, and executed by Ranch Income Shares, Inc., and certain assignments of agricultural leases. Just prior to June 24, 1954, plaintiffs, appellants, and respondents had some form of oral agreement to purchase the assets of said bankrupt. On June 24th, all joined in signing a joint and several note for $15,000, payable to Security First National Bank at Bakersfield (hereinafter referred to as Security Bank), which was due on October 1, 1954, or on demand at the option of the holder. The money was paid over on July 22, 1954. On July 6, 1954, an agreement in writing was entered into between R. E. Lewis and Harry Rogers as first parties and E. E. Firestone, as second party, reciting:

> "Whereas: First parties contemplate making a bid to the Trustee in Bankruptcy in the matter of 'Ranch Income Shares, Inc., a Corporation Bankrupt' for all of the land and agricultural leases held in the name of said bankrupt. * * *
>
> "Whereas, Second Party has outstanding certain obligations and indebtedness incurred in connection with the operation of a portion of said property as lessee from the said Trustee in Bankruptcy during the year 1953 and,
>
> "Whereas, Second Party has joined with First Parties in procuring a loan in the sum of $15,000 from the Security First National Bank, * * *.
>
> "Now therefore, in consideration of the premises and the mutual covenants and agreements hereafter set forth *and be* performed by the parties, it is agreed:
>
> "1. The proceeds of said $15,000.00 loan are to be paid to the legal firm of Mack, Bianco, and King of Bakersfield with instructions by the parties as to the disbursement thereof.
>
> "2. Second party agrees to sell, assign, transfer and set over to First Parties *two thirds* of his right title and interest in and to the following described property to wit:
>
> "(a) His equity in the pump and sprinkler system purchased by him under conditional sales contract during the year 1953 while operating a portion of said property as lessee.
>
> "(b) That certain Deed of Trust dated February 2, 1952 executed by Ranch Income Shares, Inc., * * *
>
> "(c) Those certain agricultural leases acquired by said Second Party on February 27, 1952 from Louis S. Kemble and Esther Kemble * * *
>
> "(d) His option to purchase that certain judgment in the matter of Arnold Bowline * * * and any monies due thereunder.
>
> "(e) Any and all other claims against said Bankrupt Corporation which said party may now have.
>
> "3. That in the event said property, when acquired, is sold or leased the receipts therefrom shall apply first, to the retirement of said $15,000.00 note to Security First National Bank * * * Second to the retirement of a note to Louis Kemble in the sum of $11,626.12. * * * *Third* the power bill due Pacific Gas & Electric Company in the sum of $5200.00 and incurred by Second Party during his said farming operations in 1953.
>
> "4. It is agreed that First Parties will transfer to Second Party by proper deed and assignment an undivided one-third of the interest acquired by

them from the Trustee in Bankruptcy by virtue of the bid referred to in the first paragraph of this agreement.

"It is the intention of the parties hereto that said property shall be held in equal shares by the three persons whose names are signed hereto, and that each of them will execute all necessary deeds, transfers and assignments to effect and carry out the provisions of the agreement.

(Signed) "R. E. Lewis
"Harry Rogers
"First Parties
"E. E. Firestone
"Second Party"

◆

A letter of July 6, 1954, from the law firm mentioned in paragraph 1 was directed to Lewis and Firestone. It recites, in part:

> "I have for acknowledgment Cashiers Check No. 138965 of Security-First National Bank of Los Angeles, Bakersfield Branch, dated July 6, 1954, payable to you gentlemen, and endorsed to Mack, Bianco & King, in the amount of $15,000.00. This money is to be deposited in our Trustee Account and used as follows:

Paid. 1st: Pay Bonaventura judgment in the amount of $3,250.00, plus interest, etc.

Pd. 1000 July 14: 2nd: Pay Bowline for assignment of claim, as per option in your hands.

Pd. Fr.
Pd 3rd: Pay Freeborn claim in the amount of $4,000.00 or less.

4th: $2,000.00 is to be used to 'back up' a bid for all of the assets of Ranch Income Shares in bankruptcy, which bid is to be made for the assets, subject to the following secured claims:

Firestone-Kelly Trust Deed, approximate amount	$24,000.00
Bowline claim	17,000.00
Freeborn claim	4,000.00
	$45,000.00

"We are authorized to prepare such bid in the name of R. E. Lewis and submit the same to the bankruptcy court.

Yours Very Truly,

Mack, Bianco & King,
(Signed)
By Henry Mack

"The foregoing is satisfactory.
"Dated: July 6, 1954.

"(Signed) E. E. Firestone

"(Signed) R. E. Lewis"

Lewis and Rogers, in their own names, purchased all the trustee's right, title and interest in the real property and leases of the bankrupt estate, subject to Kemble's note and trust deed, for the sum of $3,000. They purchased the Bowline judgment for $5,000, the Freeborn lien for $3500, and paid the fertilizer bill in the sum of $3,200, plus incidental transfer charges.

According to the evidence, it appears that the Firestone interests, at the time of the written joint venture agreement, did not own the sprinkler or pump. Each had been previously repossessed by the owner and taken from the property, with some claimed oral understanding that it might be repurchased if not previously sold. It further developed, at that time, the note given by Firestone for the one-half interest in the trust deed was in default, suit had been instituted thereon, and an attachment levied; that the leases Firestone was to transfer to the joint venture were never owned by him and were not transferred, but had already expired and were subsequently renegotiated to Lewis; that the Bowline judgment and Freeborn claim were purchased with the joint venture monies; that the Pacific Gas & Electric bill contracted by Firestone was raised to $7,043.88, which included stand-by charges; (It is claimed by plaintiffs this was never an obligation of the joint venture) that all financial arrangements by Firestone, in reference to the sprinkler system, pump and deed of trust, represented nothing more than the execution of promissory notes by Firestone, all of which were in default, and nothing was paid thereon except the original note given for the down-payment on the conditional sales contract for the sprinkler and pump, which was paid through the proceeds of Firestone's 1953 farming activities and through the cotton gin company. The Pacific Gas & Electric Company subsequently obtained a personal judgment against Firestone for the full amount of its claim.

On October 1, 1954, upon demand for payment by the Security Bank, Lewis and his wife paid the $15,000 loan plus interest, by his personal check from money obtained through a subsequent loan, and the note was returned to him. There is some evidence that others participated in the payment of the interest.

Plaintiff testified that this $15,000, used to pay off the Security Bank loan, was obtained from the Bank of America by means of a promissory note executed on September 30, 1954, which was due and payable December 30, 1954, and that it was signed by plaintiff Lewis alone; that the Firestones, Lewises and Rogers signed a separate document designated "Continuing Guaranty" of payment of said sum on the same date; that this sum was placed to Lewis's credit in that bank and he paid the Security Bank by personal check drawn on that account; that $15,000, plus interest, was repaid to said Bank of America by means of a personal loan obtained by Lewis from the Security Bank, which was evidenced by a series of notes payable to said bank, all of which notes he personally paid, plus interest, without the aid of any funds obtained through the joint venture and that he placed his home as security for $3000 of this amount; and that he made the last payment on these notes on December 13, 1955.

It does appear, however, that before the Bank of America would make the loan to Lewis, it required some evidence of security. Defendant Firestone claims he discussed these several loans with Lewis and Rogers before they were made; that in order to obtain them, Lewis represented to him the notes were to be considered an obligation of the joint venture; that Lewis also represented to him that before the Bank of America would make the loan it would be necessary for Lewis to show an assignment of Firestone's deed of trust (Kemble) to a one-half interest in the real property; that he gave this trust deed to Lewis and the next day Lewis came back and said the Bank required an assignment of it to him; that he did so assign but did not notarize it; that the bank refused to consider it in that form so he notarized it, handed it to Lewis and told him not to record it, but in violation of his agreement and without notice to him, Lewis did record it on January 17, 1955 and did not return it to Firestone, as agreed. The assignment is dated September 25, 1954, and acknowledged October 20, 1954, and is marked recorded January 17, 1955. On January 26, 1955, Lewis gave notice of foreclosure of the trust deed and the property was subsequently sold at foreclosure sale for $20,000, to one Kelly and plaintiff R. E. Lewis. Appellants claim plaintiffs voluntarily paid off the $15,000 Bank of America note without notice to them.

After trial of these issues a detailed accounting was subsequently had. In general the court found that the note given to the Security Bank was an individual three-way obligation, not a joint venture note, although the proceeds were used for the joint venture and the two nonpaying groups were obligated to reimburse the plaintiffs, payers of said note. Second, that plaintiff Lewis holds legal title to the property (security obtained by foreclosure of the Kemble trust deed), as trustee, to the extent of one-third for appellants Firestone, et al., plus one-third in favor of respondents Rogers, and subject to reimbursement to plaintiff Lewis of the sum of $15,217.50 advanced by him to the benefit of the other parties above named; that the joint venture be dissolved, the property sold, and the proceeds distributed in accordance with their written agreement of joint venture above set out, and according to the contributions of said parties; that certain advances were made by the joint venturers to the joint venture as follows: By R. E. Lewis, $2,690.79; by E. E. Firestone, $545.80; by Harry Rogers, $27.50; that the sum of $3,250 has been expended by the joint venture to the credit of Firestone on a personal obligation of Firestone in said amount for a fertilizer bill; that the evidence fails to sustain any interest or value in Firestone of any leases assigned for security purposes or of any value or equity in the pump or sprinkler system or in any options taken by Firestone for the purchase of the Bowline and/or Freeborn liens or claims; and that the evidence fails to sustain any evaluation in the trust deed assigned by Firestone to the joint venture referred to in the contract of the 22nd of July, 1954. An interlocutory judgment was entered accordingly.

Plaintiffs recovered judgment against appellants Firestone et al. for $5,072.50 and against respondents Rogers for $5,072.50. The sale of the joint venture property described in a subsequent decree, was ordered to be had by a commissioner. Subsequently, it was stipulated that the real property could be withdrawn and said assets sold at private sale for $17,500, in accordance with the terms of an escrow agreement entered into by Ed Kelly and R. E. Lewis, as sellers and one T. L. Jameson as purchaser on April 6, 1956, and the net proceeds received from said sale, together with the promissory note and trust deed of the purchaser, be deposited with the court, to be held pending the results of the appeal taken by appellants Firestone, et al.

The first contention of appellants is that findings No. 2 and No. 3, to the effect that the original note given to the Security Bank was a personal note of the joint and several makers to secure a loan and was not a joint venture loan on the part of the joint venture business, were not supported by the evidence, and the further finding that plaintiffs were compelled to and did pay the Security Bank note, entitling them to contribution, was erroneous. The argument is that all the testimony shows that the Bank of America loan, arranged by all the parties, was made to pay off the Security Bank loan; that the oral agreement of the parties to form a joint venture clearly shows that the first note was a part of the joint venture; that since it was conclusively shown that the execution of the Bank of America note and "continuing guaranty" by all the parties was a part of the joint venture agreement and business, it could not reasonably be held that this same situation did not apply to the execution of the Security Bank note; and that as a general rule a personal judgment cannot be entered against a partner in a suit for accounting and settlement until all the firm assets have been converted into money, the debts paid, and a final balance ascertained, citing such authority as Clark v. Hewitt, 136 Cal. 77, 68 P. 303; Shuken v. Cohen, 179 Cal. 279, 176 P. 447; Steinberg v. Goldstein, 129 Cal.App.2d 682, 278 P.2d 22; Driskill v. Thompson, 141 Cal.App.2d 479, 296 P.2d 834, and Nakamura v. Kondo, 65 Cal.App. 211, 223 P. 425.

[1, 2] The evidence in respect to the first part of this contention is susceptible of two different interpretations. There is support for the finding of the trial court on this subject. Apparently all of the parties did have some oral arrangements or understanding as to a method of obtaining the property of the bankrupt estate and the other property and interests indicated. It was necessary for each party to secure a loan in order that this could be accomplished. Each signed the note of the Security Bank as indicated, for the purpose of obtaining the money with which to make the purchase. The funds were received about one month before the written agreement pertaining to the joint venture was signed. That agreement recites the prior acquisition of the funds for the purpose of acquiring the property therein stated in connection with the joint venture which the parties therein agreed to subsequently carry on for their mutual benefit, and they agreed that said note would be paid from the return of sale of this joint venture. The Security Bank did demand payment of the loan and it fairly well appears that the bank looked to plaintiffs to repay said loan because of the inability of the remaining co-signers to financially respond. The court's finding that the first note executed by the individuals named was separate from the joint venture and constituted an individual transaction to raise funds later used in the joint venture, has evidentiary support. The rule of law applicable, therefore, is stated in Bull v. Coe, 77 Cal. 54, 59, 18 P. 808, 810, where it is said:

> "It is well settled in this state, as elsewhere, that one partner cannot sue another upon a demand arising out of the partnership transactions, in the absence of a settlement of the accounts. But by the terms of this rule it does not apply where the transaction is not a partnership matter."

To the same effect are Emerzian v. Emerzian, 6 Cal.App.2d 721, 44 P.2d 656; Collins v. Meis, 139 Cal.App. 233, 33 P.2d 472, and Johnson v. Rosenstein, 132 Cal.App. 675, 23 P.2d 418.

Next, it is argued that the court failed to find on certain facts and particularly in reference to various allegations of plaintiffs' cross-complaint. It does appear that in the reconstruction of proposed findings by counsel for plaintiffs, by error or inadvertence in the signed findings of September 27, 1957, no finding was actually made in reference to certain paragraphs indicated. Judgment was rendered on the same day. Notice of appeal was filed on November 15, 1957. This error or inadvertence was subsequently, on May 16, 1958, called to the attention of the trial judge. Upon proper showing, on June 13, 1958, the court made an order correcting the signed findings *nunc pro tunc,* due to clerical error or inadvertence, as of the date of the original findings, and found in detail that the allegations of the paragraph in question were either true or not true. The final supplemental judgment was entered November 25, 1957.

[3, 4] It has been held that clerical errors in its records may be corrected by the trial court to speak the truth, even though an appeal has been taken and is pending. Crawford v. Meadows, 55 Cal.App. 4, 10, 203 P. 428; Vol. 3, Witkin's California Procedure, p. 1896, sec. 18. In this case it appears that the original proposed findings were, on September 11, 1957, fully discussed and considered upon objections of the appellants, and counsel for respondents were ordered to prepare findings according to the court's order. No prejudicial error resulted in entering the order *nunc pro tunc.* As thus amended, they sufficiently find on the facts alleged and sufficiently alleviated any claimed ambiguity. Appellants were

not prejudiced. Petersen v. Murphy, 59 Cal.App.2d 528, 139 P.2d 49.

[5] There was a sufficient finding that appellants' title should not be quieted against plaintiffs' claim of title. That claim followed a prayer for relief based on the general cause of action alleged in the cross-complaint. The court found that cross-defendants' claim in this respect was without right. The disposition of the first cause of action sufficiently disposed of this additional one in reference to the prayer to quiet title. The findings made necessarily negative the allegations of the cross-complaint as to which specific findings are not made. The findings are sufficient. Petersen v. Murphy, supra; South v. Wishard, 123 Cal.App.2d 642, 650, 267 P.2d 827; Culjak v. Better Built Homes, Inc., 58 Cal. App.2d 720, 137 P.2d 492.

[6] Next, appellants attack the finding that Firestone had no interest in and there was no value to the leases assigned for security, or in the pump or sprinkler, or options for purchase of the Bowline or Freeborn liens or claims, and that there was no value in the trust deed assigned by Firestone to Lewis, referred to in the contract of the 22nd of July, 1954.

Although there is some conflict in the evidence, it shows that the leases were not assigned by Firestone but were purchased through the bankruptcy proceedings with joint venture funds, and by their terms had expired, had no value at the time, and were subsequently renewed by Lewis and Kelly. The Freeborn claims and Bowline judgment were actually purchased from funds from the joint venture although there is some evidence that Firestone had made some payments on the pump and sprinkler contract of purchase during his operation of the property. Both had been repossessed by the seller at the time of the joint venture agreement. The only equity Firestone claimed was a claimed oral agreement to a right to repurchase them at a 10 per cent discount if they were still available. The court found these so-called equities had no value. This finding has evidentiary support. As to Firestone's claimed one-half interest in the trust deed, a somewhat different question arises. He did purchase this interest by giving Kemble a promissory note in the sum of $11,626.12 for such interest, which note was unpaid. Kemble brought an action on this note and obtained a judgment against Firestone. On March 31, 1958, satisfaction of said judgment was duly entered. In the original finding the court stated that Firestone contributed this one-half interest in the Kemble trust deed to the joint venture although, at the time, it had no evaluation, but concluded that any balance in the joint venture funds after sale, should, in turn, as mentioned, be applied to the retirement of the $11,626.12 note to Kemble on condition that Firestone present satisfaction of the judgment in that action. Such a satisfaction was subsequently filed in this action, as heretofore indicated. The court then found that Lewis held title to the real property therein described, as trustee, to the extent of one-third to appellant Firestone, et al., one-third to defendant Rogers, subject to reimbursement to Lewis of $15,217.50 advanced by him to the benefit of said parties. The evidence supports this finding.

Complaint is made to a finding that the joint venture expended $3,250 on a personal obligation of Firestone for fertilizer, the argument being that the written agreement makes this an obligation of the joint venture and not that of Firestone, and that the assumption of that debt by the joint venture was part of the consideration for the agreement and should be paid by it. It is true that neither this agreement, nor the letter to the attorneys in reference to disbursement of the original funds obtained, acknowledged this particular item as a debt of the joint venture but considered together, it did direct that the Bonaventura judgment in the sum of $3,250, plus interest, be paid from the proceeds of the original loan in the order therein specified. There is a notation thereon that this item had been paid from such funds and the evidence indicates it was paid. There is sufficient evidence to indicate that although this was a personal obligation of Firestone, it was a part of the consideration agreed upon whereby Firestone was to turn over to the joint venturers his one-half interest in the trust deed. It would therefore appear that this sum should not be offset against Firestone in the distribution of the remaining assets. Under the written joint venture agreement (subdivision 3) although the Pacific Gas & Electric Company bill in the sum of $5200 was incurred by Firestone, the only agreement was that "in the event said property, when acquired, is sold or leased the receipts therefrom shall" be applied as therein stated, to the payment of this bill. Otherwise it remained a personal obligation of Firestone. That company obtained a judgment against Firestone individually in the full amount of this bill, and it should be paid from the balance of the proceeds of sale, if any, in the order mentioned in the written agreement.

Next, it is argued that the court failed to consider, in the accounting, all items of contribution, losses, debts owing, uncollected claims, and other assets of the joint venture; failed to find on particular items, and also failed to adjust all equities between the parties; that accordingly the way is left open for possible future suits for contribution, citing such authorities as Griggs v. Clark, 23 Cal. 427, and Rassaert v. Mensch, 17 Cal.App. 637, 120 P. 1072.

[7, 8] After considering all the evidence above discussed the record affirmatively shows the trial court then questioned counsel for the respective parties as to a further accounting by an accountant of all additional claims to be considered. Counsel stated they could possibly agree on most items, if a copy of the transcript of the evidence previously taken could be furnished them. Such copies were furnished and some form of accounting was submitted to the court which made the findings indicated. Nowhere does it show that there were any losses suffered by the joint venture and its assets were determined. The contribution of the respective parties were set forth. Appellants point to no additional evidentiary matter not considered by the trial court which would support a further finding favorable to appellants which would result in a different judgment. Failure to find on an issue is not ground for a reversal unless it appears there was evidence introduced as to such issue sufficient to sustain a finding in favor of appellants. Petersen v. Murphy, supra, 59 Cal.App.2d at page 534, 139 P.2d 49; Culjak v. Better Built Homes, Inc., supra, 58 Cal.App.2d at page 725, 137 P.2d 492.

It is next argued that under Corporations Code, Section 15018, the rights and duties of the partners in relation to the partnership shall be determined, subject to any agreement between them, by certain prescribed rules. Under subdivision (a) thereof:

> "Each partner shall be repaid his contributions, whether by way of capital or advances to the partnership property and share equally in the profits and surplus remaining after all liabilities, including those to partners, are satisfied; and must contribute towards the losses, whether of capital or otherwise, sustained by the partnership according to his share in the profits."
>
> Subdivision (b) provides that "The partnership must indemnify every partner in respect of payments made and personal liabilities reasonably incurred by him in the ordinary and proper conduct of its business, or for the preservation of its business or property."
>
> Subdivision (c) recites: "A partner, who in aid of the partnership makes any payment or advance beyond the amount of the capital which he agreed to contribute, shall be paid interest from the date of the payment or advance."

[9, 10] It is therefore argued that where one joint venturer advanced to the joint venture property which he has acquired with personal funds the other joint venturers having the benefit thereof, should be charged with their share of the value of the property, citing Boskowitz v. Nickel, 97 Cal. 19, 31 P. 732, and that where the property assigned to the

joint venture by one joint venturer had value at the time of the assignment but subsequently became worthless and the loss of value occurred while the property was a joint venture asset, such loss should be borne by all of the joint venturers in the proper proportion, citing Crowley v. Thomson, 41 Cal.2d 636, 262 P.2d 1. In this connection it is argued that Firestone's contributions to the joint venture are itemized in the written joint venture agreement; that the value, as of that time, of the Kemble trust deed and note in the principal sum of $22,575, with interest, plus his interest in the leases and liens, total $12,914.81; that $9,788.07 had been paid on the sprinkler or pump contracts and Firestone was entitled to this credit for his contribution to the joint venture, after dissolution. It should be here pointed out that under section 15018, supra, the rights and duties of the partners in relation to the partnership shall be determined according to that section, *subject to any other agreement* between them.

The court found that the written joint venture agreement set forth the rights of the partners and fully provided the manner in which the assets should be distributed. A question therefore arises as to the sufficiency of the evidence to support this finding. Such finding is not entirely consistent with the facts shown. The court did rely, in part, upon the written agreement in determining the priority of the disposition of the assets of the joint venture after sale. The agreement did not make provision for priority payment of certain allowed claims. It did provide, only in part, for a disposition of the proceeds in case of a voluntary sale. The sale here under consideration was by order of the court and arose out of a dissolution decree. We see no apparent distinction in the sales for the purposes here under consideration. It specifically provided that in case of sale the proceeds should first be applied to the payment of the original note. That note provided for interest. Accordingly, the finding and judgment ordering the first $15,000, plus interest, applied to the repayment of that debt and payment of the judgment obtained in reference thereto on plaintiffs' cause of action, was proper. Since plaintiff Lewis paid this note by means of another personal note to the Bank of America executed by him and by means of another personal loan secured from the Security Bank, which was paid by him, and that plaintiff, as well as other joint venturers, should first recover the principal amount, it would seem reasonable they should also recover interest paid by them respectively on all loans thus made. It then appears, from this interpretation of said written agreement, that the next application of any balance should go toward the retirement of the note to Kemble in the sum of $11,626.12, plus interest. Since a judgment was obtained on that note against Firestone and he fully satisfied it, any payments thereon would be payable to him. It was partly by virtue of this one-half interest in said trust deed that the joint venturers had any money to pay the above obligations. Firestone should therefore be reimbursed in accordance with the priority agreed upon in the written agreement without any conditions attached. It appears that under the evidence no balance would then remain. The next application of the balance, if any, would be applied to the payment of the Pacific Gas & Electric Company bill in the sum of $5,200. The court should first have considered the provisions of the written agreement, in respect to priority of payments and, if any balance did remain Section 15018 of the Corporations Code would govern as to the priority of the other payments, including other contributions of the joint venturers. The findings and judgment should be modified accordingly.

The judgment, in so far as it is not inconsistent with the conclusions here reached, is affirmed. The remaining portion of the judgment is reversed and the court is directed to make proper findings and enter judgment in accordance with these conclusions. Each party to pay their own costs on appeal.

MUSSELL and SHEPARD, JJ., concur.

170 Cal.App.2d 468

PEOPLE of the State of California, Plaintiff and Respondent,

v.

David Albert SHAPIRO, Defendant and Appellant.

Cr. 6474.

District Court of Appeal, Second District, Division 1, California.

May 19, 1959.

Rehearing Denied June 15, 1959.

Hearing Denied July 15, 1959.

Prosecution of duly appointed, commissioned, and acting agent of Department of Alcoholic Beverage Control under count which charged asking for and agreeing to receive bribe from owner and manager of liquor store for purpose of influencing agent's vote and opinion upon matter concerning alleged violation of Alcoholic Beverage Control Act, and second and separate count which charged solicitation of owner and manager to commit and join in commission of bribery. The Superior Court of Los Angeles County, Richard C. Fildew, J., rendered judgment of conviction under second count, and agent appealed. The District Court of Appeal, Fourt, J., held that evidence, including tape recording, established that, even if bribery idea did not originate with agent, it was intent of agent to solicit owner and manager to offer and join in offer of bribe, and acquittal under first count was not inconsistent with finding of guilty under second count.

Affirmed.

1. Bribery ⚷1(1)

Under statute relating to solicitation of another to offer bribe, corpus delicti consists of asking and intent, gist of offense is solicitation to offer or join in offer of a bribe and not commission of bribery, intent may be gathered from surrounding circumstances, contemplated overt act is not essential element, and offense is complete when solicitation takes place even if object of solicitation is never consummated or if no steps are taken toward consummation. West's Ann.Pen.Code, § 653f.

2. Bribery ⚷11

In prosecution of duly appointed, commissioned, and acting agent of Department of Alcoholic Beverage Control for solicitation of bribe, evidence, including tape recording, established that, even if bribery idea did not originate with agent, it was intent of agent to solicit owner and manager of liquor store to offer and join in offer of bribe for purpose of influencing agent's vote and opinion upon matter concerning alleged violation of Alcoholic Beverage Control Act. West's Ann.Bus. & Prof. Code, § 23000 et seq.; West's Ann.Pen. Code, § 653f.

3. Criminal Law ⚷878(4)

In prosecution of duly appointed, commissioned, and acting agent of Department of Alcoholic Beverage Control under count which charged asking for and agreeing to receive bribe from owner and manager of liquor store for purpose of influencing agent's vote and opinion upon matter concerning alleged violation of Alcoholic Beverage Control Act and second and separate count which charged solicitation of owner and manager to commit and join in bribery, acquittal under first count was not inconsistent with finding of guilty under second count. West's Ann.Bus. & Prof.Code, § 23000 et seq.; West's Ann.Pen.Code, §§ 68, 653f, 954.

◆

G. Vernon Brumbaugh, Los Angeles, for appellant.

Stanley Mosk, Atty. Gen., Edward M. Belasco and Warren H. Deering, Deputy Attys. Gen., for respondent.

FOURT, Justice.

This is an appeal from a judgment of conviction of the crime of violation of section 653f, Penal Code (soliciting a bribe).

In an indictment in Los Angeles county, the appellant, a duly appointed, commissioned and acting agent of the Department of Alcoholic Beverage Control, was accused of committing three felonies. In count I it was charged that the appellant committed the crime of bribery in violation of section

68, Penal Code, for corruptly asking for and agreeing to receive a bribe in the sum of $300 from Fernando J. Galluccio (sometimes hereinafter referred to as the "owner"), and Anthony Schiavone (sometimes hereinafter referred to as the "manager"), for the purpose of influencing appellant's action, vote and opinion upon an agreement and understanding that appellant's action, vote and opinion upon a matter concerning violations of the Alcoholic Beverage Control Act, Business and Professions Code, § 23000 et seq., and of the rules enacted and adopted by the Department of Alcoholic Beverage Control, pursuant to such section would be unlawfully and unjustly influenced thereby. In count II, it was charged that the aforesaid actions constituted a different offense of the same class of crime as charged in count I, and for the commission of these actions appellant violated section 653f of the Penal Code in that he feloniously solicited the owner and the manager to commit and join in the commission of the crime of bribery. In count III, it was charged that the aforesaid actions constituted a different offense of the same class of crimes as charged in counts I and II, and by the commissions of these actions appellant committed the crime of grand theft in violation of section 487, subdivision 1 of the Penal Code.

The appellant pleaded not guilty, and in open court with his counsel, waived his right to be tried before a jury; trial was held before the court sitting without a jury. Evidence was introduced, and at the conclusion of the trial the court found appellant not guilty on counts I and III, and guilty on count II. Appellant made an application for probation, which was denied, and appellant was thereupon sentenced to imprisonment in the state prison for the term prescribed by law. Appellant appeals from the judgment of conviction.

A résumé of the facts most favorable to the respondent is as follows: In March, 1958, appellant was an agent of the Department of Alcoholic Beverage Control (hereinafter referred to as the "Department"), and had been so employed for over eight years. The appellant worked in the wholesale unit which was under the general supervision of Wallace Montgomery, with Joseph Wofford as agent in charge of the unit.

The function of the wholesale unit was to investigate fair trade violations by liquor licensees as the rules and regulations by the Department generally limited discounts on liquor sales to customers to ten percent per case. If a wholesale unit agent returned from an investigation and reported that a liquor licensee was giving an illegal discount on liquor sales to customers, usually an accusation would be filed with the Department against the licensee. Further, if the charges in the accusation were found to be true, a suspension from doing business for from five to thirty days would ordinarily be imposed on the licensee by the Department. In the course of investigating a fair trade violation, an investigator, if he discovered a situation involving a false ownership violation, would continue his investigation and mention such fact in his report to his office.

In the latter part of 1957, or early in 1958, Charles Cameron, Supervisor of the Department's Van Nuys office, received a complaint that the Airport Liquor Store in Burbank was selling liquor to employees of an airline at a fifteen percent discount. Cameron forwarded this complaint to the Department's wholesale unit in Los Angeles. In March, 1958, appellant was handed the complaint by Wofford, which was the customary method of assignment. Attached to the complaint was an assignment form sheet instructing appellant to make an investigation at the address shown in the complaint.

On March 26, 1958, at about 3:00 o'clock p. m., appellant went to the Airport Liquor Store, which was licensed under an off-sale general license in the names of its owners, Mr. and Mrs. Fernando Galluccio. The general manager of the liquor store was Anthony Schiavone. The manager and one of the clerks was on the premises at the time the appellant arrived, and appellant asked to see the owner. Upon being informed that the owner was out and that Schiavone was the general manager, appellant stated that he would talk with him and thereupon identified himself as an agent of the Department.

The manager asked the appellant if there was any trouble and appellant replied, "Perhaps." The manager invited the appellant into the office where the appellant inquired whether liquor was sold or delivered outside of the premises. Upon being answered in the affirmative, the appellant asked if invoices were made out, and the manager replied that they were not made out except when a charge sale was made.

The appellant proceeded to look around the office, opening and looking into drawers, cubby holes and the desk. The manager asked the appellant a few times what the trouble was and received the reply, "Well, maybe there is trouble, may there isn't." When the manager stated that he did not think the appellant had any right to look into personal drawers of the company, the appellant replied in effect, that he had the right to do anything he pleased. When the manager again inquired what the trouble was, appellant stated, "It seems like we have evidence that you have been selling liquor at fifteen percent below retail." The manager told the appellant that he knew of no instances when liquor was sold for fifteen percent below retail, to which the appellant replied, "Well, I will be happy to know different."

The appellant then took a piece of paper about six by eight inches out of his pocket and showed it to the manager. The paper contained a typewritten statement that liquor could be purchased at the store at fifteen percent below retail, and it was signed by a person from Slick Airways. The manager told the appellant that he had never seen the paper before and did not believe that the owner had given anybody authority to typewrite a paper like that. The manager asked appellant how he got the paper, to which the appellant replied, "Well, you might make some enemies among salesmen or some of your competitors or Mr. Galluccio's competitors might turn these things over to us. We have various ways of getting these things." The manager told appellant that sales of champagne were made to airlines for flights going to Las Vegas, Del Mar, and some other places, and that there were invoices for such sales. The appellant said, "Well, it looks like we're going to have to shut you down for ten or fifteen days." The manager asked, "Well, why should we be shut down? What did we do to be shut down?", and appellant replied, "Well, we have evidence here that you have been selling liquor at fifteen percent below retail." The manager insisted that such was not true.

At about 3:30 o'clock p. m., Edward Hermann, a representative of Seagram's Distillery, and Richard C. Glouner, a liquor salesman for McKesson and Robbins, Inc., entered the premises and went to the back of the store where they saw the manager with appellant in the office near the warehouse. The manager stepped out of the office to see Hermann and Glouner, and told them he was busy, and that there was an investigator from the Department in the office. Hermann had seen the appellant before and knew of his position, and likewise he had been to the liquor store once before at which time he had met the owner.

Later the appellant came out of the store office and was greeted by Hermann who then introduced appellant to Glouner. The manager at that time stayed in the office. During this first conversation between appellant, Hermann and Glouner, they discussed the reason appellant was at the store, and appellant said the manager was in trouble concerning the ownership of the store, and also appellant showed Hermann and Glouner the complaint letter, and appellant told Hermann and Glouner to show the letter to the manager if the latter wanted to see what kind of trouble he was really in.

Hermann and Glouner then took the letter back to the office while appellant remained in the front portion of the store, looking in various drawers and in a book with various names in it. Hermann and Glouner showed the letter to the manager, who said, "Oh, gimminy," or something to that effect, and said, "What do you think will happen?" Hermann replied, "I don't know." Glouner mentioned something to the manager to see if they could get it straightened out. Hermann and Glouner then took the letter back to the appellant and Glouner asked appellant if the matter could be straightened out, and appellant said for $300 he could square it.

Glouner and Hermann then went back to the office and talked to the manager, and either Glouner or Hermann told the manager that appellant said it would cost $300 to take care of it. The manager said, "I don't have that kind of money here." Hermann came out and retold this to the appellant, and appellant stated he did not know whether he could come back.

Appellant then went back to the store office, where he had a conversation with the manager. The first thing appellant said to the manager was, "I talked to Hermann, * * * Is everything satisfactory?" The manager stated, "Now, when I give you this $300.00 * * * are you going to come back and get more money or— * * * are you going to keep pestering me for money?" Appellant said, "As far as this beef is concerned, I am not getting no part of this $300.00. I got to fix up the boys in the office." The appellant said that this was no shakedown, and that he was doing this as a personal favor to the manager because he, the manager, seemed like a nice person, and the $300 would go to the fellows in the office. The manager told appellant that if he, the appellant, did not come back and ask for any more money, "everything will be fine. I will have the money for you tomorrow." The appellant said, "as far as this beef is concerned, this is all we'll want."

Appellant stated at the store that the office setup was that the letter comes down from Sacramento to the office, and it is turned over to outside investigators. Appellant stated that if the "beef" turned out unfavorably for the manager, the place would be investigated. Appellant and the manager agreed to meet the next morning at 11:00.

Hermann overheard part of the foregoing conversation between the appellant and the manager. Hermann heard the manager say that he did not have that kind of money with him in the store, and that he would give it to the appellant the next day, and heard appellant reply that he did not want to come back but he would be back the next morning. Appellant left the liquor store prior to the time Hermann and Glouner left.

That evening the manager attempted to contact a member of the Burbank police department but was unsuccessful.

On the next day, March 27, 1958, the manager was at the liquor store when the owner arrived at 8:00 o'clock a. m. The manager told the owner about appellant and then contacted George Carsten, a member of the Burbank police department, who was also employed on Fridays as a guard at the liquor store. Carsten arrived at the liquor store about 10:15 or 10:30 o'clock a. m., when the manager and the owner were at the store, and he instructed the manager to go to the bank.

The manager withdrew $800 from the bank, of which $500 was for use in the business, and upon his return to the store handed $300 to Carsten who copied some of the serial numbers from the bills and handed the money to the owner. Carsten attached a recording device to the owner, and explained to him how to use it.

Appellant arrived at the liquor store about 10:45 o'clock a. m., at which time the manager was behind the counter and the owner was between the counter and the office. Carsten remained in the back part of the warehouse. Appellant was greeted by the manager, who introduced him to the owner saying, "This is the owner of the place, Mr. Galluccio." The owner left appellant for a few minutes for the purpose of adjusting the recording device, and then returned and had a conversation with him. Appellant conversed about the remodelling of the store and wandered about for four or five minutes looking around the place and also out in the warehouse portion.

Appellant and the owner then went to the office of the store where they had a conversation. The manager overheard a part of that talk. The manager heard the owner ask appellant for the paper and he observed appellant pull out an envelope and the owner take a piece of paper out of such envelope. The owner stated to the appellant that he did not know where the paper had come from. Appellant stated it looked as if the owner was in trouble and said, "We might have to investigate here and all that." Appellant said that the investigation would be about fifteen percent discount dealings. The owner asked appellant for his identification card which the appellant displayed. The appellant and the owner then conversed about selling liquor at a fifteen percent discount and the owner denied any such sales.

The owner told the appellant that he thought $300 was too much, to which the appellant replied, "I am not even sure they are going to go for the three hundred. * * * That's pretty cheap." The appellant told the owner that there were two other fellows at the office to whom he had to give $100 each, and of course all that wasn't going to him. The owner said, "I don't know why we should pay any money. We haven't done anything." To which the appellant said, "Well, that's up to you."

Carsten, who had gone from the storeroom area and crouched below the cashier's window of the office, heard the appellant and the owner conversing in the office, but he could not determine what was said.

Appellant told the owner he wanted $300, and the owner stated, "How about $200.00?", and appellant replied, "No. * * * Let's forget the whole thing," and further stated that they could land in jail. The owner said, "Well, I don't want no investigation around here. * * * I'll give you the $300.00. * * * If I give you the $300.00 will I have any more trouble with you later? * * * Maybe you might come back later and you'll want some more." Appellant replied, "Well, * * * I'm not sure, it might be enough. Maybe it isn't enough." The manager then came into the office and joined the conversation. The manager said, "Mr. Shapiro, how do I know this shakedown isn't going to go on after we give you this money?", and appellant stated, "Don't call this a shakedown. This is no shakedown. * * * As far as this beef is concerned, this is going to take care of it," or words to that effect.

Appellant glanced out of the window and observed Carsten crouched below the cashier's window of the office. Carsten jumped up, told the appellant to put his hands over his head and entered the office. He made a fast search of the appellant for the $300 which had been marked, but did not find it on the appellant. The manager heard appellant say, "You don't got anything on me," to which Carsten replied, "Oh, yeah?", and pulled back the owner's jacket and said, "We got it all on tape."

Carsten observed the $300 was still in the owner's possession, and the owner started to hand the $300 to the appellant and Carsten grabbed the owner's arm. Appellant would not take the money and stated he wanted no part of it at that time. The appellant stated that he wanted to call his office and an attorney, and Carsten would not permit him to do so at that time. Carsten also refused the appellant's request to call Mr. Cameron of the Department's Van Nuys office. The owner handed the money to the manager, who then said to appellant, "Go ahead, Shapiro, take the money, let's forget about that. I don't want to become involved in any political deal or anything like that, just take the damned money." Appellant said, "No, I'll not take no money." The manager asked Carsten to let the appellant go, and Carsten did permit his release.

Carsten told the manager in the doorway of the office, about eight or ten feet from where the appellant was seated in the office, that he thought the case had "blown" because appellant did not have the money on him and Carsten did not know what was in the recording. After Carsten left for the police station and took the recording device with him, the manager walked outside the store with the appellant, who said, "I'm not taking the $300.00." The appellant referred to the owner in some uncomplimentary terms for "setting him up on a deal like that." The manager remarked to appellant, "Well, how would you feel if you was in Mr. Galluccio's place? * * * How would he know you wouldn't be coming back time after time for money?" The appellant replied, "I told you as far as this one beef was concerned I wouldn't be back." The manager then asked the appellant to take the money and appellant stated in effect that he would not take the money unless he could get the tape recording, and finally said, "You try. I will do anything for that tape recording. These guys are going to flip their lids in the office when I don't bring back the money." The manager then said, "Well, here, you bring them back the money." Appellant replied, "Now, look, just understand this; I am not getting a damned cent. It was never my intention to get a damned cent. This money was going to the two fellows in the office."

The appellant and the manager then got in the car and the manager laid the money down and said, "Go ahead, Shapiro, take it." Appellant then, in effect, requested the manager to do everything he could to secure the tape recording, and while in the car appellant stated that he would square the beef, and that the money was going to the two men in the office, but he did not mention their names.

When the manager left the automobile, the appellant took the $300 and put it in his inside pocket. The manager stated that he gave the money to the appellant because he, the manager, was scared.

The appellant made no report to his superiors of the incidents at the Airport Liquor Store on March 26, and March 27, 1958.

On the evening of March 28, 1958, George Dennett, a special agent of the Department, went to the Department's offices in Los Angeles and searched Wofford's desk, appellant's desk and all of the files in the vicinity and found no report relative to an investigation at the Airport Liquor Store. Dennett found appellant's daily work sheet for March 25th, but found none for the 26th and 27th of March.

On March 31, 1958, Dennett again searched the same office and found the aforesaid work sheet crumpled in the waste basket. There was testimony that it was customary for an agent to make reports of his investigation and to complete a daily work sheet reflecting his activities for the day. Montgomery found no reports in his files relative to an investigation of the liquor store in question; nor did he find any work sheet turned in by the appellant for the 26th and 27th of March, although he had requested the appellant to turn in such a work sheet. Neither Montgomery nor Wofford, the appellant's supervisors in the Department, received any portion of the $300, nor did Montgomery instruct or authorize the appellant to collect $300 from the liquor store to quash a "beef."

About a week or ten days after the incident of the 27th, Hermann received a telephone call from appellant, who said that if Hermann was called by anyone, "You better tell your buddy to keep his mouth shut."

On April 16th or 17th, appellant was questioned in the district attorney's office by Dennett and a Mr. McNary. Appellant was asked what happened at the Airport Liquor Store and appellant stated that he had not been there and did not know where it was.

Appellant asserts:

(1) The evidence is insufficient as a matter of law to sustain the judgment;

(2) The verdicts of not guilty on count I (Bribery), and the finding of guilt on count II are inconsistent as a matter of law, and the verdict of guilty cannot stand.

A bribe is defined by section 7(6) of the Penal Code, as follows:

"The word 'bribe' signifies anything of value or advantage, present or prospective, or any promise or undertaking to give any, asked, given, or accepted, with a corrupt intent to influence, unlawfully, the person to whom it is given, in his action, vote, or opinion, in any public or official capacity; * * *."

Penal Code, section 653f provides as follows:

"Every person who solicits another to offer or accept or join in the offer or acceptance of a bribe, or to commit or join in the commission of murder, robbery, burglary, grand theft, receiving stolen property, extortion, rape by force and violence, perjury, subornation of perjury, forgery, or kidnapping, is punishable by imprisonment in the county jail not longer than one year or in the state prison not longer than five years, or by fine of not more than five thousand dollars. Such offense must be proved by the testimony of two witnesses, or of one witness and corroborating circumstances."

[1] The corpus delicti consists of the asking and the intent. It was said in People v. Rissman, 154 Cal.App.2d 265, at pages 275–276, 316 P.2d 60, at page 69, "When any person solicits another to offer or join in the offer of a bribe, the solicitor has committed the offense described in section 653f. (Citing case.) The gist of the offense is the solicitation to offer or join in the offer of a bribe, and not the commission of bribery. (Citing cases.) The intent may be gathered from the surrounding circumstances. (Citing case.) A contemplated overt act is not an essential element of the offense denounced by section 653f. The offense 'is complete when the solicitation is made, and it is immaterial that the object of the solicitation is never consummated, or that no steps are taken toward its consummation.'"

[2] Appellant asserts that the idea of offering money to the appellant originated with Hermann, Glouner and the manager, and further that Hermann, Glouner and the manager solicited him, the appellant. There has heretofore been set forth a rather extensive résumé of the evidence, and it is clear that appellant's position cannot be sustained. In any event, the origin of the idea is not the true test. See, People v. Wayne, 41 Cal.2d 814, 825, 264 P.2d 547. In our opinion it was clearly established that it was the intent of appellant to solicit another to offer and to join in the offer of a bribe.

In this particular case there were at least three separate, distinct solicitations by the appellant. The People's case was bolstered by the presence of two witnesses, or at least of one witness and corroborating circumstances. The tape recording strongly supports the guilt of appellant (see, People v. Willmurth, 77 Cal.App.2d 605, 612, 176 P.2d 102); furthermore, on the morning of the 27th the appellant was observed by the witness Carsten to be looking around the store, the office and the back room. This, coupled with the fact that shortly thereafter the appellant, for no apparent reason, looked over the cashier's window and discovered Carsten crouched there, can lead only to the conclusion that the appellant was apprehensive that someone might be observing the transaction.

Further, the appellant, although a public official charged with enforcing the Alcoholic Beverage Control Act, did not report the incidents of the 26th and 27th of March to his superiors, nor did his superiors receive any report of the appellant's investigation of the liquor store. Appellant apparently made out no work sheets for the days in question. Also, there is the undisputed fact that on April 16th, when the appellant was questioned in the district attorney's office, he denied any knowledge of the Airport Liquor Store and denied ever having been there. See, People v. Simpson, 43 Cal.2d 553, 565, 275 P.2d 31. Also, there is the fact that about a week or ten days after March 27th, appellant telephoned Hermann and told him that he had better tell his "buddy" to keep his mouth shut. See, People v. Weiss, 50 Cal.2d 535, 554, 327 P.2d 527.

[3] In his second contention the appellant argues in effect that since the essential elements necessary to constitute a

violation of Penal Code, section 653f, as set forth in count II, are the same as those necessary to constitute a violation of Penal Code, section 68 (count I), an acquittal upon the latter must logically and necessarily constitute an acquittal of the former.

There can be no question that the charges contained in counts I and II relate to the same general factual situation. However, section 954 of the Penal Code provides in part as follows:

"An accusatory pleading may charge two or more different offenses connected together in their commission, or different statements of the same offense or two or more different offenses of the same class of crimes or offenses, under separate counts, and if two or more accusatory pleadings are filed in such cases in the same court, the court may order them to be consolidated. The prosecution is not required to elect between the different offenses or counts set forth in the accusatory pleading, but the defendant may be convicted of any number of the offenses charged, and each offense of which the defendant is convicted must be stated in the verdict or the finding of the court; provided, that the court in which a case is triable, in the interests of justice and for good cause shown, may in its discretion order that the different offenses or counts set forth in the accusatory pleading be tried separately or divided into two or more groups and each of said groups tried separately. *An acquittal of one or more counts shall not be deemed an acquittal of any other count.*" (Emphasis added.)

The italicized portion of the quoted section was added in 1927 "probably to avoid the result of those cases which interpret inconsistent verdicts as acts of stupidity rather than acts of leniency." People v. Horowitz, 131 Cal.App.Supp. 791, 794, 19 P.2d 874, 875.

In People v. Ranney, 123 Cal.App. 403, at page 406, 11 P.2d 405, at page 406, it was said:

"* * * It may be conceded that the jury was inconsistent in convicting the defendant upon these two counts and acquitting him upon the remaining five counts of the indictment. It may be true that a reconciliation of these opposing verdicts should have required the conviction of the defendant upon all seven of the counts. The motive which prompted the jury to acquit the defendant upon five counts of the indictment is not before this court on appeal. The only question which is presented to this court in that regard is whether there is sufficient evidence to sustain the verdict of guilty with respect to the fifteenth and seventeenth counts. * * *"

In People v. Villa, 156 Cal.App.2d 128, at page 133, 318 P.2d 828, at page 832, the court said:

"* * * Under this section, each count charging a separate and distinct offense must stand or fall on its own merits. The disposition of one count has no effect or bearing upon the other counts. This is so even though the respective verdicts in the various counts may be logically inconsistent. People v. McCree, 128 Cal. App.2d 196, 275 P.2d 95; People v. Codina, 30 Cal.2d 356, 181 P.2d 881; People v. Ranney, 123 Cal.App. 403, 11 P.2d 405."

In any event the offenses alleged in the separate counts in this case are not identical. In count I the appellant was charged with asking for, receiving and agreeing to receive $300 for the purpose of influencing appellant's own action as an executive officer in violation of section 68, Penal Code; count II charged appellant with soliciting others to commit and join in the commission of the crime of bribery in violation of section 653f. The difference is obvious.

Had appellant been convicted upon count I and count II, he could not, on the evidence before us, have successfully argued that the verdicts were inconsistent, even though they pertain to the same transaction. People v. Megladdery, 40 Cal.App.

2d 748, 780–781, 106 P.2d 84. In this case the appellant made reference several times to the fact that third persons were to be the recipients of the $300, and that he was not to benefit therefrom. Perhaps the court was influenced thereby.

In any event, it is clear that it was a benefit and not a detriment to the appellant to be acquitted of count I.

The judgment is affirmed.

WHITE, P. J., and LILLIE, J., concur.

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170 Cal.App.2d 394

Eleanor STOETZNER and Isabel Lambert, Plaintiffs and Appellants,

v.

CITY OF LOS ANGELES, a Municipal Corporation, and Board of Building and Safety Commissioners of the City of Los Angeles, Defendants and Respondents.

No. 23419.

District Court of Appeal, Second District, Division 1, California.
May 18, 1959.

Rehearing Denied June 15, 1959.
Hearing Denied July 15, 1959.

Proceeding for peremptory writ of mandate. From judgment of the Superior Court of Los Angeles County, Philbrick McCoy, J., denying application for peremptory writ, plaintiffs appealed. The District Court of Appeal, Nourse, J. pro tem., held that the evidence supported finding that plaintiffs' hotel building was so wracked and deteriorated that it must be reconstructed to be made safe, the necessarily implied finding that building constituted a nuisance and the order for demolition thereof.

Affirmed.

1. Nuisance ⇨79

A building, erected for use as and used as a hotel, which has so deteriorated as to be unsafe for human habitation, is a public nuisance which may be abated by demolition of structure, if the nuisance which it creates cannot be otherwise abated. West's Ann.Health & Safety Code, § 15035.

2. Nuisance ⇨84

In proceeding before city board of building and safety commissioners on order requiring owners to show cause why building used as a hotel should not be declared a nuisance and ordered repaired or demolished, evidence supported finding that building was so wracked and deteriorated that it must be reconstructed to be made safe, the necessarily implied finding that building was a nuisance and order that it be demolished. West's Ann.Health & Safety Code, § 15035.

3. Municipal Corporations ⇨601(29)

Los Angeles city ordinances are not invalid insofar as they empower city board of building and safety commissioners to order demolition of a building, which constitutes a nuisance in fact which cannot be abated other than by demolition. West's Ann.Health & Safety Code, § 15035.

4. Mandamus ⇨172
Municipal Corporations ⇨121

Where evidence warranted exercise of power of city board of building and safety commissioners under city ordinances to order demolition of building as a nuisance, in proceeding by owners of building for peremptory writ of mandate to annul demolition order, whether other provisions of city ordinance, as interpreted and applied by board, were unconstitutional was immaterial and plaintiffs could not raise question of their constitutionality in such proceeding, in absence of showing that board had applied such provisions against plaintiffs. West's Ann.Health & Safety Code, § 15035.

5. Municipal Corporations ⇨63(1)

Court has no jurisdiction to pass upon the wisdom of city charter provision for administrative proceedings to determine whether the property of a citizen constitutes a nuisance.

6. Constitutional Law ⚷320

Los Angeles city charter provisions for abatement of a nuisance do not deny to property owners due process of law merely because power to determine whether the property of a citizen constitutes a nuisance and, if it does, to order its demolition is given to administrative body, which acts as investigator and prosecutor as well as judge, and such body is given the further power to appoint a person under its sole control and without qualification to rule on questions of law involved, to hear the evidence and recommend action to be taken by administrative body. Administrative Procedure Act, §§ 2–12, 5 U.S.C.A. §§ 1001–1011; West's Ann.Gov.Code, §§ 11500–11528.

Murchison, Cumming & Baker, R. Bruce Murchison and Earle K. Stanton, Los Angeles, for appellants.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty. and Marcus E. Crahan, Jr., Deputy City Atty., Los Angeles, for respondents.

NOURSE, Justice pro tem.

Plaintiffs appeal from the judgment of the lower court denying their application for a peremptory writ of mandate directed to the defendant city of Los Angeles and the defendant Board of Building and Safety Commissioners of that city.

The plaintiffs are the owners of a three-story frame building erected in 1903. The first floor is devoted to commercial uses and the second and third floors are operated as a hotel. After inspection by the building department, fire department and health department of the city and upon the basis of the reports made by those departments the defendant board issued an order requiring the plaintiffs to show cause before it why the building should not be declared a dangerous building and as such a nuisance and ordered vacated and repaired or demolished.

After a prolonged hearing before an examiner appointed by the board pursuant to a city ordinance (Los Angeles City Ordinance No. 95338 as amended by Ordinance No. 108209) providing for such appointment, at which the testimony of numerous witnesses called by the board as well as witnesses called by the plaintiffs was heard, he made his report summarizing the evidence and recommending the demolition of plaintiffs' building. The board after reviewing the report of the examiner and the transcript of the evidence taken before him, made certain findings of fact, hereinafter alluded to, and upon the basis of those ordered plaintiffs' building demolished.

The purported findings of the board as set forth in a resolution adopted by the board at the completion of the hearings before it, reads in part as follows: "The Board of Building and Safety Commissioners has determined after full and fair consideration of the Building Inspector's report; evidence received at the hearings held on January 10, March 7, April 11, May 3, June 6, June 12, July 10 and July 11, 1957; the transcript of said hearings; the Hearing Examiner's report; and oral and written objections to the Hearing Examiner's report presented by the interested parties that the certain building or structure located at 1019–21 East 7th Street and 669–671 Ceres Avenue, being more particularly described as Lot No. 3 of Tract No. 2145, is a dangerous building and a substandard residential building, a nuisance, and a building unfit for human habitation *within the terms of the Los Angeles Municipal Code* and the California Health and Safety Code, 15035, and that said building cannot be reasonably repaired so that it will no longer exist in violation of the law in the following particulars:

"The building is so wracked and deteriorated that it must be reconstructed to be made safe." [1] (Emphasis added.)

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[1] The ordinance (Los Angeles Munic.Code, § 96.111(b)) under which the proceedings were had requires the board to make findings of fact.

The first paragraph of the resolution is not a finding of any fact but a pure conclusion of law. The second paragraph which we have italicized does constitute a finding of fact and the facts found in substance amount to a finding that the building is a nuisance in fact, and that it must be reconstructed so as to be made safe.

[1] No argument or citation of authorities is needed for the proposition that a building erected for use as, and which is used as a hotel and which has so deteriorated as to be unsafe for human habitation, is a public nuisance or for the proposition that such a nuisance may be ordered abated by the demolition of the offending structure if the nuisance which it creates cannot be otherwise abated.

The proceedings which resulted in the order for the demolition of plaintiffs' building were initiated and prosecuted pursuant to the provisions of division B of article 6 of chapter 9 of the Los Angeles Municipal Code. By their brief the appellants attack the constitutionality of many of the provisions of this chapter of the code as well as certain sections of the Los Angeles Building Code which are incorporated in the Municipal Code. Appellants have, however, in their brief utterly failed to show that any of the provisions of the ordinance which they attack as unconstitutional were applied by the respondent board in arriving at its finding of fact that the building was so wracked[2] and deteriorated that it must be reconstructed to be made safe. They content themselves, without any transcript references, with inviting this court to read and analyze the entire record consisting of 600 pages of the transcript of the oral proceedings before the examiner and numerous exhibits, in order that this court may satisfy itself that in the light of the entire record the order of demolition is not warranted. Respondents have, by their brief, however, referred to evidence given before the examiner which substantially supports the finding in question and therefore the order.

[2-4] This evidence consisting of testimony given by competent witnesses is sufficient to establish that the building in question was wracked in that the upper stories were out of plumb; that this was due to both vertical and lateral stresses and the fact that building was so designed as to be unable to withstand these stresses; that there was substantial deterioration in the structural members of the building due to dry rot and the fact that the plaster on the interior of the building had dried out to the extent that it had separated from the lath and therefore had no fire resistent quality and gave no aid to the structural members of the building in resisting lateral stress; that due to the conditions we have just related the building was in danger of sudden collapse which collapse would, of course, endanger not only the lives of those within the building but those who might be in the streets adjacent to it. The evidence further showed that in order to render the building safe it would be necessary to practically reconstruct it at a cost but slightly below the cost of a new building of the same design and materials. This evidence fully supports the findings of fact which we have quoted, the necessarily implied finding that the building is a nuisance and the order for its demolition. There is and could be no contention that the ordinances in question insofar as they empower the board to order the demolition of a building which constitutes a nuisance in fact, which cannot be abated other than by demolition, are invalid. The fact that other provisions of the ordinance may be unconstitutional or that as interpreted and applied by the board they may be unconstitutional, is immaterial here for the plaintiffs having failed to show that the board applied any of these provisions of the ordinance against them, they may not raise the question of their unconstitutionality in this proceeding. Estate of Childs, 18 Cal.2d 237, 244, 115 P.2d 432, 136 A.L.R. 333; Max Factor & Co.

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[2] "Wracked" was used throughout the proceedings in the sense of the building in its upper portion having tilted out of plumb due to vertical and lateral stresses.

v. Kunsman, 5 Cal.2d 446, 468, 55 P.2d 177; American Distilling Co. v. Johnson, 132 Cal.App.2d 73, 79–80, 281 P.2d 598.

Appellants assert that they were denied due process in that they were forced to litigate their rights before a biased tribunal and an examiner, appointed by and under the control of that tribunal, who was unqualified to pass upon the questions of law necessarily involved in the controversy. The people of the city of Los Angeles have, however, seen fit through the city charter to give an administrative body which acts as investigator, prosecutor and judge the power to determine whether the property of a citizen constitutes a nuisance and if it does, to order its demolition; and the further power to appoint a person, under its sole control and who is without qualification to rule upon questions of law involved in the proceeding, the power to hear the evidence and recommend the action to be taken by the administrative body.

[5] This provision in the charter is justly subject to criticism,[3] but it is not within the province of this court to pass upon the wisdom of the people in adopting it and we have not been cited to nor has our research disclosed any decision which holds that the procedures provided for in the charter deprive the property owner of due process of law.

[6] Appellants have not attempted to show that they were not accorded notice and a full and fair hearing. Their only complaint is as to the character of the tribunal provided for by the charter and the bias of the witnesses. Their contention that they were denied due process of law cannot, therefore, be sustained.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

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170 Cal.App.2d 376

PEOPLE of the State of California, Plaintiff and Respondent,

v.

Guy Dewey JAQUISH, Defendant and Appellant.

Cr. 6521.

District Court of Appeal, Second District, Division 2, California.

May 15, 1959.

Prosecution for violation of § 288 of the Penal Code. The Superior Court, Los Angeles County, Ralph K. Pierson, J., entered judgment of conviction and defendant appealed. The District Court of Appeal, Ashburn, J., held that court could not depart from record and make independent factual investigations and record failed to reveal that trial judge was prejudiced against defendant or that defendant's attorney was incompetent.

Affirmed.

1. Criminal Law ⚷1159(2)

District Court of Appeal may not weigh the evidence.

2. Infants ⚷20

Female victim's testimony clearly showed violation of § 288 of the Penal Code and was not inherently improbable and needed no corroboration. West's Ann.Pen. Code, § 288; West's Ann.Welfare & Inst. Code, § 5501 et seq.

3. Criminal Law ⚷1128(1)

District Court of Appeal's review is confined to and bound by the record before it and Court cannot depart from record and make independent factual investigations.

4. Criminal Law ⚷655(1), 656(2)

In prosecution for violation of § 288 of the Penal Code, record failed to disclose that trial judge was prejudiced against defendant or that he coached witnesses and gave testimony himself. West's Ann.Pen. Code, §§ 288, 288a.

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[3] The dangers of unfairness or bias in administrative procedure where the administrative body is investigator, prosecutor and judge, was one of the inducing causes of a special study of administrative procedures made by the Judicial Council of this state, which study resulted in the enactment of sections 11,500–11,528 of the Government Code. (See 10th Biennial Report of the Judicial Council of California, pp. 8–30; see also 5 U.S.C.A. §§ 1001–1011; Wong Yang Sung v. McGrath, 339 U.S. 33, 70 S.Ct. 445, 94 L.Ed. 616.)

5. Criminal Law ⚿1035(3)

Where no point was raised in trial court that trial judge showed prejudice against defendant and was guilty of coaching witnesses and giving testimony himself, such point was not available for review in District Court of Appeal.

6. Criminal Law ⚿641(1)

In prosecution for violations of § 288 of Penal Code, record failed to disclose that defendant's counsel was inadequate in presentation of defense. West's Ann.Pen. Code, § 288.

7. Criminal Law ⚿641(1)

Handling of defense by counsel of accused's own choice will not be declared inadequate except in those rare cases where his counsel displays such a lack of diligence and competence as to reduce trial to a farce or a sham.

8. Criminal Law ⚿322

Where it did not appear that officers at time of taking certain evidence did not have a search warrant, it must be presumed that they lawfully performed their duties.

9. Searches and Seizures ⚿7(27)

Defendant could not claim error by reason of unlawful search and seizure of evidence when it was apparent that police officers had entered defendant's house in his company and with his consent and that none of the evidence was offered at trial.

10. Criminal Law ⚿1031(1)

Where question of unlawful search and seizure was not raised in trial court, it could not be raised on appeal.

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Guy Dewey Jaquish, in pro. per.

Stanley Mosk, Atty. Gen., William E. James, Asst. Atty. Gen., Marvin L. Part, Deputy Atty. Gen., for respondent.

ASHBURN, Justice.

Defendant was charged with violation of § 288, Penal Code, the victim being a 13-year-old girl named Carol. He was also charged with two prior felony convictions, one an assault with intent to rape and the other a violation of §§ 288 and 288a, Penal Code. Defendant entered pleas of not guilty and not guilty by reason of insanity. After a non-jury trial he was found guilty and was held to have been sane at the time of commission of the offense, also at the time of trial. The charges of prior conviction were found to be true. Pursuant to proceedings under § 5501 et seq., Welfare and Institutions Code, defendant was found to be a probable sexual psychopath and committed to Atascadero State Hospital for observation; ultimately he was held by the court to be a sexual psychopath and a menace to the health and safety of others, not capable of benefiting from further treatment. Probation was denied and appellant sentenced to the state prison for the term prescribed by law. He appeals from the judgment.

[1] Appearing in propria persona appellant submits a brief containing a running argument which seems upon analysis to be directed primarily to an effort to persuade this court to re-weigh the evidence, notwithstanding appellant's concession that "Judge Pierson did not believe that the defendant told the truth." "This defendant will only bring forth the facts as he knows them, and the testimony of the State's witnesses to show that they committed perjury and contradictions, and lies, and now with a prayer of truth to the one's who judge these words to find the facts as they truly are." Of course this court may not weigh the evidence. People v. Newland, 15 Cal.2d 678, 681, 104 P.2d 778.

[2] Carol's testimony clearly shows the commission of the crime charged. It is not inherently improbable (see, People v. Huston, 21 Cal.2d 690, 693, 134 P.2d 758), and it needed no corroboration (People v. Westek, 31 Cal.2d 469, 473, 190 P.2d 9; People v. Huston, 156 Cal.App.2d 670, 672, 320 P.2d 175).

[3] Nor can this court depart from the record and make independent factual investigations, as appellant repeatedly requests it to do. For example: "The Defendant now asks the Court to investigate this "F.

B.I. Report', and report its finding to the defendant. * * * The defendant is again requesting this Court investigate the above mentioned allegations by the Deputy Sheriff Wagnon's Office." That the court of review is confined to and bound by the record before it is well established. See, 3 Cal.Jur.2d, § 261, p. 782; Altman v. Poole, 151 Cal.App.2d 589, 593, 312 P.2d 6; Bobier v. Baugh, 114 Cal.App. 647, 649, 300 P. 473.

[4, 5] Charges that the trial judge was prejudiced against defendant, that he coached the witnesses and gave testimony himself, find no support in the record. Moreover, no such point was raised in the trial court and hence is not available here. See, Gantner v. Gantner, 39 Cal.2d 272, 277–278, 246 P.2d 923; People v. Ottey, 5 Cal.2d 714, 721, 56 P.2d 193; People v. Corrigan, 48 Cal.2d 551, 556, 310 P.2d 953.

[6, 7] Likewise, the claim that defendant's attorney "wouldn't present the facts that were given to him", "did not take sincere interest in the defendant's case", "refused to get the character witnesses that the defendant asked of him to bring into Court", and "throughout the defendant's Trial kept glancing at the Courtroom clock, which is evident that he, the counsel, was more interested in the time than in a fair trial for the defendant", is without substantial basis in the transcript. Moreover, "[t]he handling of the defense by counsel of the accused's own choice will not be declared inadequate except in those rare cases where his counsel displays such a lack of diligence and competence as to reduce the trial to a 'farce or a sham.'" People v. Wein, 50 Cal.2d 383, 410, 326 P.2d 457, 473. See, also, People v. Dupree, 156 Cal.App.2d 60, 69, 319 P.2d 39.

[8–10] Unlawful search and seizure is asserted by appellant. This refers to the taking from defendant's home and booking as evidence the bed sheet, an open jar of vaseline and some of Carol's garments. There are numerous answers to this claim. It does not appear that the officers did not have a search warrant and hence it is presumed that they lawfully performed their duties. People v. Farrara, 46 Cal.2d 265, 268, 294 P.2d 21; People v. Citrino, 46 Cal.2d 284, 287, 294 P.2d 32. It is apparent that the officers entered defendant's house in his company and with his consent (see, People v. Burke, 47 Cal.2d 45, 49, 301 P.2d 241). Examination of the items which were impounded by the police revealed no incriminating spots or the like and none of them was offered in evidence. Moreover, the question of unlawful search and seizure was not raised in the trial court and hence is not available here. Robison v. Superior Court, 49 Cal.2d 186, 187, 316 P.2d 1; People v. Guy, 145 Cal.App.2d 481, 488, 302 P.2d 657.

The judgment is affirmed.

FOX, P. J., and HERNDON, J., concur.

170 Cal.App.2d 364

Lillian May MURRY, Individually, and Lillian May Murry, as Guardian ad litem of Leah Beatrice Murry Valdez, a minor, Marvin R. Murry, a minor, Darwin Murry, a minor, Lillian Faye Murry, a minor, Patricia Anne Murry, a minor, Vera Dolores Murry, a minor, Julian Valdez, Sr., and Mazie Valdez, Plaintiffs and Appellants,

v.

Walter Carl MANLEY, Defendant and Respondent.

Civ. 9624.

District Court of Appeal, Third District, California.

May 14, 1959.

Automobile accident case. The Superior Court, Sonoma County, Lincoln F. Mahan, J., rendered judgment of nonsuit, and plaintiffs appealed. The District Court of Appeal, Warne, J. pro tem., held, inter alia, that the fact that plaintiffs had not made out a prima facie case could not warrant refusal to allow them to call a defendant, pursuant to statute, as an adverse witness.

Reversed.

1. Witnesses ⚷276

Under statute, an adverse party may be called as a witness, even to prove the whole case of the party calling him. West's Ann.Code Civ.Proc. §§ 2042, 2055.

2. Witnesses ⚷276

The fact that plaintiffs had not made out a prima facie case could not warrant refusal to allow them to call a defendant, pursuant to statute, as an adverse witness. West's Ann.Code Civ.Proc. §§ 2042, 2055.

3. Depositions ⚷86

Under statute, an adverse party's deposition may be used to establish any material fact, a prima facie case, or even to prove the whole case. West's Ann.Code Civ.Proc. § 2016.

4. Appeal and Error ⚷1043(6)
Depositions ⚷88

That plaintiffs had not yet proved a prima facie case did not justify trial court in refusing to permit them to introduce a defendant's deposition, taken in accordance with provisions of statutes, but, in view of fact that such deposition contained nothing which would have aided them, trial court's error was harmless. West's Ann.Code Civ. Proc. §§ 2016, 2055.

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Henry F. Saunders and Ralph E. Kingston, Stockton, for appellants.

Wyman, Finell & Rothman, Beverly Hills, for respondent.

WARNE, Justice pro tem.

This is an appeal from a judgment of nonsuit entered in a wrongful death and personal injury action.

The evidence reveals that on the 25th of April, 1955, one of appellant Lillian May Murry's sons and her husband were fatally injured when the automobile in which they were riding collided with respondent's truck and trailer. Another son of Mrs. Murry's was injured in the accident, but he was asleep at the time and has no recollection thereof. In his opening statement made to the jury, plaintiffs' counsel stated that he would call a disinterested witness to support his case, but it does not appear from the settled statement upon which this appeal is presented whether the witness was the Highway Patrol officer who investigated the accident or an eyewitness. In any event, the Highway Patrol officer was called as a witness, but plaintiffs did not interrogate him relative to any phase of his investigation but chose to limit their inquiry to establishing a foundation for the introduction of certain photographs. Appellants then sought to call as a witness the defendant-respondent Walter Carl Manley under the provisions of section 2055 of the Code of Civil Procedure, and upon objection, the trial court ruled that appellants had not made out a prima facie case, and until they did so they would not be allowed to call respondent as an adverse witness under the provisions of said section. Upon the same ground appellants were not permitted to read into evidence Manley's deposition taken under the provisions of sections 2016 and 2055 of the Code of Civil Procedure, and respondent's motion for a nonsuit was granted.

[1, 2] Appellants contend that each of the above-mentioned rulings of the trial court constituted prejudicial error. On the other hand, respondent argues that under the provisions of section 2042 of the Code of Civil Procedure the order of proof was a matter to be regulated in the sound discretion of the trial court. While there is authority to support respondent's position (Land v. Del Mar Turf Club, 120 Cal.App.2d 829, 831, 262 P.2d 54), this court in MacGregor v. Kawaoka, 1955, 132 Cal.App.2d 407, 410, 282 P.2d 130, 132, expressed the opposite view, stating: "Whenever it was material to her case or whenever she desired before the close of the case to call Carlson as an adverse witness it was her privilege under the statute to do so." In

Daggett v. Atchison, T. & S. F. Ry. Co., 1957, 48 Cal.2d 655, 663, 313 P.2d 557, 64 A.L.R.2d 1283, the court noted with approval that plaintiffs had called defendant engineer and another employee of the defendant railway as their first two witnesses. Further, our Supreme Court in Lawless v. Calaway, 24 Cal.2d 81, 89–91, 147 P.2d 604, 609 as pointed out by this court in the MacGregor case, supra, in a case where the trial court had sustained objections addressed to the adverse party called under such section, which questions called for expert testimony on his part, held that such a ruling was reversible error, and in discussing the matter determined that section 2055 of the Code of Civil Procedure was enacted to enable the party to call his adversary and elicit his testimony without making him his own witness; that it was remedial in character and should be liberally construed in order to accomplish its purpose; that any relevant matter in issue in the case is within the scope of examination of witnesses called pursuant to its provisions. The court quoted approvingly from the opinion in Langford v. Issenhuth, 28 S.D. 451, 134 N.W. 889, 892 wherein that court said in respect to a similar statute that under it examination must be given the widest and freest scope; that the whole case could be fully and minutely investigated; that the main purpose of the statute was to permit an adverse party to be called to prove or to be questioned about facts material to the case of the party calling him, whether to prove a single material fact or a number of material facts, *or even the whole case;* that the facts as to which a party calling such a witness might desire to examine him were wholly within the party's discretion. Our Supreme Court, in the Lawless case, further declared that the usual rule that a party objecting to the exclusion of evidence must make an offer of proof in order to show prejudicial error had no application, and the court disapproved certain cases decided in the District Court of Appeal holding to the contrary. The court said: "Further, the examination of a party under section 2055 is often exploratory and it would be unreasonable to require an offer of proof under such circumstances." Therefore, since an adverse party may be called under section 2055 even to prove the whole case, we feel that the trial court in the instant case abused its discretion in refusing to permit the appellants to call the respondent Manley under the provisions of section 2055 because they had not then made out a prima facie case.

[3,4] The same reasoning applies with equal force, if not greater, to the trial court's refusal to permit the appellants to read into the record the respondent Manley's deposition taken under the provisions of sections 2016 and 2055 of the Code of Civil Procedure. Section 2016 provides that the deposition of a party may be used by an adverse party for any purpose. There is no limitation. Consequently, it may be used to establish any material fact, a prima facie case, or even to prove the whole case. However, Manley's deposition has been lodged with this court and we find nothing therein which tended to establish appellants' cause of action. Hence, we fail to see wherein they were prejudiced by its exclusion, notwithstanding the trial court's error in refusing to permit it to be read into evidence.

However the same may not be said of the trial court's refusal to permit the appellants to call Manley as an adverse witness. By further questioning appellants may have been able to elicit testimony from the witness to establish material and pertinent evidence towards establishing their cause of action. Whenever it was material to appellants' case, or whenever they desired to call Manley as an adverse witness, it was their privilege under the statute to do so.

We do not deem it necessary to discuss other matters presented in the briefs.

The judgment is reversed.

VAN DYKE, P. J., and PEEK, J., concur.

170 Cal.App.2d 344

Helen KING, Plaintiff and Respondent,
v.
A. H. KARPE, Defendant and Appellant.
Civ. 5690.

District Court of Appeal, Fourth District, California.
May 13, 1959.
Hearing Denied July 8, 1959.

Action for damages based on destruction by defendant of plaintiff's registered Hereford cow. The Superior Court, Kern County, Norman F. Main, J., entered judgment for plaintiff and defendant appealed. The District Court of Appeal, Stone, J. pro tem., held that where defendant's veterinarian on one day examined approximately 70 "hard breeder" cows which were slaughtered, plaintiff's cow being one of them, and during his examination a herdsman made notes dictated by the veterinarian, and it appeared original notes made by the herdsman had been altered, and the herdsman was not called as a witness by defendant, although he had been in defendant's employ until a month before the trial, court did not err in permitting counsel to comment on failure of defendant to produce the herdsman as a witness, and did not err in instructing jury that it could consider failure of defendant to produce the herdsman as a witness as presenting weaker and less satisfactory evidence than was available.

Judgment affirmed.

1. Trial ⚿122, 234(8)

Where veterinarian of defendant, charged with wrongful destruction of plaintiff's registered Hereford cow, examined approximately 70 "hard breeder" cows, which were slaughtered, plaintiff's cow being one of them, and during his examination a herdsman made notes dictated by the veterinarian, and it appeared original notes made by the herdsman had been altered, and the herdsman was not called as a witness by defendant, although he had been in defendant's employ until a month before the trial, court did not err in permitting counsel to comment on failure of defendant to produce the herdsman as a witness, and did not err in instructing jury that it could consider failure of defendant to produce the herdsman as a witness as presenting weaker and less satisfactory evidence than was available. West's Ann.Code Civ.Proc. § 2061, subds. 6, 7.

2. Appeal and Error ⚿1003

A District Court of Appeal will not weigh substantial evidence which supports a verdict as against contrary evidence.

3. Damages ⚿208(1)

In action for destruction of plaintiff's registered Hereford cow, evidence, including testimony that three bull calves the cow had dropped were outstanding animals, that the blood line of the cow produced good calves particularly valuable for inbreeding, and that plaintiff needed this type of stock to build her herd of Herefords, and that defendant was a leading breeder of registered Herefords, and knew of her value and the value of her calves, was sufficient to present a question for the jury as to whether the destroyed cow had peculiar value to the plaintiff. West's Ann.Civ.Code, § 3355.

4. Damages ⚿105

Where defendant, in an action for wrongful destruction of plaintiff's registered Hereford cow, was an outstanding breeder of registered Herefords, and was familiar with plaintiff's herd, and sold the registered cow to plaintiff, and thought well enough of the cow to breed her to his renowned bull, and demand a half interest in the calves, which won several awards for their outstanding qualities, defendant had "knowledge" of peculiar value of the cow to plaintiff within statute providing that where certain property has a peculiar value to a person recovering damages for deprivation thereof, that may be deemed to be its value against one who had notice thereof. West's Ann.Civ.Code, § 3355.

See publication Words and Phrases, for other judicial constructions and definitions of "Knowledge".

5. Evidence ⟹545
Trial ⟹235(7)

Where, in action for destruction of plaintiff's registered Hereford cow, a veterinarian testified that in his opinion the cow was sterile, but a herdsman who was born and reared on a cattle ranch and stated that he had worked with cattle all his adult life, and who testified that he had attended a cattle breeding school on three different occasions, testified that in his opinion the cow could have been made productive by additional treatments, trial court was justified in instructing jury on conflicting opinions of expert witnesses, in view of fact sufficient foundation was laid to qualify the herdsman as an expert on the subject of cattle breeding.

6. Trial ⟹125(4), 133(3, 6)

In action for damages for destruction of a registered Hereford cow, plaintiff's counsel would not be deemed to have been guilty of misconduct in asking defendant questions concerning the size of his ranch and as to whether he owned more than one ranch, if purpose of such questions was to indicate his standing as a top ranking registered Hereford breeder, although, if plaintiff's counsel asked the questions for the sole purpose of conveying to the jury the idea that defendant was a wealthy man who could afford to pay a substantial judgment, asking of the questions would have been highly prejudicial and unethical, but, in any event, in view of fact defendant's objections to the questions were sustained upon ground they were not material, and court made appropriate remarks, asking of the questions would not be deemed reversible error.

7. Witnesses ⟹270(2)

In action for damages for destruction of a registered Hereford cow, plaintiff would not be deemed guilty of misconduct in asking defendant as to whether he paid $80,000 or $90,000 for a bull he used on several occasions to breed to plaintiff's cow, in view of fact that although ultimate fact for the jury was value of the cow, value of the bull which had been bred to the cow was material to that issue since it was not reasonable that a breeder of registered Herefords would waste the services of such a valuable bull on a mediocre cow.

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Deadrich, Bates & Stewart, Kenneth H. Bates, Bakersfield, for appellant.

Conron, Heard & James, Calvin H. Conron, Jr., Bakersfield, for respondent.

STONE, Justice pro tem.

This is an appeal by defendant-appellant from a judgment entered upon a jury verdict in favor of plaintiff-respondent for damages by reason of the destruction of a registered Hereford cow. The defendant was doing business under the name of A. H. Karpe's Greenfield Hereford Ranch, and raised, bought, and sold registered Hereford cattle and held sales at his ranch. He owned a particularly fine bull which went by the name of Baca Duke 2nd. In 1952, at one of defendant's cattle sales, plaintiff purchased a registered Hereford cow, one Domino Belle, which was carrying a calf the get of Baca Duke 2nd. Plaintiff paid $2,200 for the animal.

The first calf of Domino Belle was dropped in July of 1952. After the first calf was dropped, plaintiff and defendant entered into an agreement by which Domino Belle was returned to defendant's ranch, for breeding to Baca Duke 2nd, and plaintiff and defendant were to share ownership in the calf. The cow was bred twice before coming safe with calf, and was then taken back by plaintiff to her ranch; the second calf, named "Duke Boniface", was dropped in October of 1953. After this event, plaintiff and defendant again entered into the same agreement with respect to the breeding services of Baca Duke 2nd, whereupon the cow was returned to defendant's ranch, and was bred on three occasions to Baca Duke 2nd before becoming safe with calf. The third calf, named "Duke Boniface 2nd", was born in January of 1955. Later in 1955 a similar arrangement was again made between plaintiff and defendant, for the further breeding of Domino Belle to Baca Duke 2nd. The record indicates that nine separate attempts were made in 1955 to get the cow with calf, all without success. After these unsuccessful attempts, defendant placed Domino Belle with a group of other cows, all identified as "hard breeders", for special attention and care, in an attempt to restore her to brood cow status.

Tattoo marks are placed upon Hereford cattle as a part of the ordinary custom and practice in that business. It is the practice for the ranch owner to tattoo a number on each calf born on his ranch, selecting the numbers anew each year. Thus, the first calf dropped on a ranch in each year might be tattooed "01", the next "02", and so on. This number is usually tattooed in the right or left ear, and the same number is painted on the base of the horn. The letter "L" or "R" is used to indicate the left, or right ear. Domino Belle was identified by the tattoo number L–03. During all of the period in question, defendant had continued to buy and sell cattle, and one cow he purchased had the tattoo mark L–03. This cow was on defendant's ranch when Domino Belle was there.

In 1956, the hard breeding cows were examined by Dr. Irwin, a veterinarian, to cull out of the herd those that were deemed to be incapable of restoration to brood cow status. Each cow was physically examined, and the determination then made as to whether the cow was ready for breeding or was suitable for further treatment, or was incapable of being restored to brood cow status, and therefore designated for the slaughterhouse. Defendant Karpe was present at this examination of Domino Belle, and Dr. Irwin, the examining veterinarian, was assisted by an employee of defendant, a Mr. Becker. Eighteen of the group were deemed to be beyond reasonable expectation of recovery to brood status, and were sent to the slaughterhouse. As indicated, the cow of plaintiff, Domino Belle, was in this "hard breeder" group, identified only by the tattoo mark L–03. When she was examined, the veterinarian was of the opinion that she was incapable of restoration to brood status. Defendant, believing that Domino Belle was his L–03 cow, included her in the batch consigned to the slaughterhouse. The mistake was not discovered until approximately one month later when plaintiff came to the ranch in August, 1956, and all parties discovered that Domino Belle must have been sent to the slaughterhouse, since defendant still had his own L–03 cow. The jury awarded plaintiff $5,000 damages and defendant appeals.

[1] Defendant presents five grounds of appeal, the first and second of which will be considered together because the answer to each is the same. Defendant urges first that it was error for the court to permit counsel to comment on the failure of defendant to produce a former employee, and second, that it was error for the court to instruct the jury that it could consider the failure of defendant to produce the employee as a witness as presenting weaker and less satisfactory evidence than was available.

The factual situation reflected by the record is that on one day defendant's veterinarian examined approximately 70 "hard breeder" cows, plaintiff's cow being one of them. He could not remember examining the particular cow and relied on and testified from the records made at the time of the examination. It was impracticable for the veterinarian to write while examining the cows so a herdsman named Becker made notes as dictated by the veterinarian. The notes were later copied in the interest of legibility. However, there was a discrepancy between the original notes concerning Domino Belle and the copy thereof. It also appeared that an erasure had been made on the original notes and it appeared that one notation might have been added to the original after it had been completed. Becker, the man who made the original notations as dictated by the veterinarian, was not called as a witness by the defendant. Plaintiff developed that Becker had been in defendant's employ until a month before the trial and that he was in San Jose at the time of trial. Plaintiff commented to the jury that whereas the veterinarian relied entirely upon the notes taken and because there was a discrepancy in the notes, Mr. Becker who made the notes should have been called as a witness. The trial court saw the evidence in the same light and overruled defendant's objection to such comment, and at plaintiff's request gave an instruction on the subject taken from the last paragraph of BAJI No. 30, which reads as follows:

> "If and when you should find that it was within the power of a party to produce stronger and more satisfactory evidence than that which was offered on a material point, you should view with distrust any weaker and less satisfactory evidence actually offered by him or her on that point."

The testimony of the veterinarian was an essential element in defendant's case. Had he testified concerning facts within his own knowledge we would concede appellant's point, but he depended upon the records made by Becker, which were open to question. Therefore, the comment of counsel and the instruction of the court did not constitute error. C.C.P. Sec. 2061, subdivisions 6 and 7; Hays v. Viscome, 122 Cal.App.2d 135, 141, 264 P.2d 173, 39 A.L.R.2d 1435; People v. Beal, 116 Cal.App.2d 475, 479, 254 P.2d 100.

Defendant's third assignment of error is that the court erred in permitting counsel for plaintiff to argue "peculiar value" to the jury. Civil Code, section 3355 provides:

> "Where certain property has a peculiar value to a person recovering damages for deprivation thereof, or injury thereto, that may be deemed to be its value against one who had notice thereof before incurring a liability to damages in respect thereof, or against a willful wrongdoer."

[2–4] The court gave an instruction embodying this language. Defendant concedes that the instruction is proper in form but argues that it was error to give it because there was neither evidence that the cow had peculiar value to plaintiff nor that the defendant had knowledge of such peculiar value. The evidence as to value was conflicting, the defendant contending that the only value was for meat, approximately $200, while plaintiff claimed great value for breeding purposes in the sum of $10,000. In support of the jury's verdict of $5,000 there was testimony by the herdsman who had treated Domino Belle that she was destroyed before she had completed the "hard breeder" course of treatment. He also testified that in his opinion she was not sterile and would have produced for another five or six years. The evidence also disclosed that the three bull calves Domino Belle had dropped were outstanding animals. Defendant took a half interest in them as the breeding fee and he exhibited the calves at various shows. There was also testimony that the blood line of Domino Belle produced good calves particularly valuable for inbreeding, and that plaintiff needed this type of stock to build up her herd of Herefords. This constituted evidence of peculiar value. Drinkhouse v. Van Ness, 202 Cal. 359, 378, 260 P. 869. This court will not weigh the substantial evidence which supports the verdict as against defendant's evidence to the contrary. Berniker v. Berniker, 30 Cal.2d 439, 444, 182 P.2d 557. The other essential element of proving damages of "peculiar value" is proof that defendant had knowledge of such "peculiar value" before he incurred liability for damages. The evidence disclosed that defendant was a leading breeder of registered Herefords and as such should have been well aware of the results of inbred stock with outstanding and unusual qualities. The defendant was also familiar with the plaintiff's herd and as an expert Hereford breeder should have known the needs of the herd. Defendant sold Domino Belle to the plaintiff and he thought well enough of the cow to breed her to his renowned bull, Baca Duke 2nd, and demand a half interest in the calves, which calves won several awards for their outstanding qualities. All of this was known to defendant before he accepted the cow at his ranch for breeding and treatment the fourth time, when the unfortunate incident occurred.

Thus, defendant had "knowledge" within the meaning of the statute. Since evidence pertaining to the requirements of Civil Code, Section 3355 was introduced during the trial, the question of whether plaintiff proved "peculiar value" was a factual question for the determination of the jury and that question was properly submitted to it for decision.

[5] Defendant's fourth specification of error pertains to an instruction given by the court concerning conflicting opinions of expert witnesses. Defendant contends there was no conflict because the veterinarian who examined the cow for defendant testified that in his opinion the cow was sterile. This position assumes that the herdsman who testified to the contrary was not an expert. The herdsman had been treating the cow and he gave as his opinion that she could have been made productive by additional treatments. It was established that defendant had the cow sent to the slaughterhouse before the recommended course of treatments had been completed. The only merit to defendant's argument lies in his contention that his expert was a veterinarian while plaintiff's expert was simply a herdsman. However, the evidence discloses that the herdsman was born and reared on a cattle ranch and that he had worked with cattle all of his adult life. He testified that he had attended a cattle-breeding school on three different occasions. Hence, sufficient foundation was laid to qualify the herdsman as an expert on the subject of cattle breeding. Whether he was as well qualified as a licensed veterinarian was a question for the jury to consider. The court quite properly instructed the jury that:

> "In this case there has been a conflict in the testimony of expert witnesses. You must resolve that conflict. To that end, you must weigh one expert's opinion against that of another, the reasons given by one against those of another, and the relative credibility and knowledge of the experts who have testified. Thereupon, you shall find in favor of that expert testimony which, in your opinion, is entitled to the greater weight."

[6] Defendant's final assignment of error alleges misconduct and reversible error on the part of plaintiff's counsel in asking defendant questions concerning the size of his ranch, whether he owned more than one ranch and whether his ranch had not formerly been owned by President Hoover. When defense counsel objected to the questions counsel for plaintiff explained to the court that he was asking the questions for the purpose of showing the scope of defendant's operations to indicate his standing as a top ranking registered Hereford breeder. Defendant contends these questions were asked for the sole purpose of conveying to the jury the idea that he was a very wealthy man and could afford to pay a substantial judgment. If this were the purpose of plaintiff's counsel it would indeed be highly prejudicial and unethical. The trial court was satisfied with the explanation in so far as good faith is concerned but sustained the defendant's objections upon the ground the questions were not material. The court made appropriate remarks and it does not appear that the jurors were influenced or misled by the questions.

[7] Defendant also cites as misconduct a question asked defendant as to whether he had paid $80,000 or $90,000 for the bull Baca Duke 2nd. The court sustained an objection to the question for the same reason objections were sustained to questions concerning the size and nature of defendant's ranch operations. However, the question of the value of the bull was material. The bull had been bred to the cow concerned in this action and the testimony was that they had at least one common ancestor. It would not seem reasonable that a breeder of registered Herefords would waste the services of such a valuable bull on a mediocre cow. Particularly so when the owner of the bull demanded a half interest in the calves produced. The ultimate fact was the value of the cow, but the value of the bull to which she had been bred was material to that issue. The record does not

reflect reversible error by reason of the conduct of counsel for plaintiff.

The judgment is affirmed.

GRIFFIN, P. J., and SHEPARD, J., concur.

Hearing denied; PETERS, J., dissenting.

170 Cal.App.2d 387

PACIFIC TELEPHONE AND TELEGRAPH COMPANY, a corporation, Plaintiff and Respondent,

v.

PACIFIC GAS AND ELECTRIC COMPANY, a corporation, Coast Counties Gas and Electric Company, a corporation, Defendants and Appellants.

Civ. 18288.

District Court of Appeal, First District,
Division 2, California.
May 18, 1959.

Action to recover sums paid by telephone company to settle a wrongful death action against a power company. From a judgment for the telephone company in the Superior Court, City & County of San Francisco, Clarence W. Morris, J., the power company appealed. The District Court of Appeal, Kaufman, P. J., held that under a joint pole agreement, the power company was obligated to indemnify the telephone company for the amount paid as settlement of employee's death action, that the telephone company did not make a voluntary payment, and that the Workmen's Compensation Act did not exonerate the power company as a matter of law from any responsibility to the telephone company.

Judgment affirmed.

1. Indemnity 🔑8

Where telephone company and power company under a "joint pole agreement" agreed to maintain and repair its own electrical apparatus in conformity with the applicable regulations and the power company failed to do so and such failure was the sole cause of the death of an employee of the power company by electrocution and the agreement required each party to indemnify the other from any and all loss including liability to third parties or by its neglect to perform any of its covenants therein contained, power company was obligated to indemnify the telephone company which settled the action for death of the employee. West's Ann.Labor Code, § 3860.

2. Indemnity 🔑8

In absence of express language a contract of indemnity may not be construed to indemnify a party against his own negligence.

3. Indemnity 🔑11

A "volunteer" as respects right to indemnity is a person who has made a payment without compulsion of a debt of a third party without request and with no promise of repayment from the party whose debt is paid.

See publication Words and Phrases, for other judicial constructions and definitions of "Volunteer".

4. Indemnity 🔑11

Where telephone company settled action for death of employee of power company and there was compulsion by suit of the heirs of the employee and of the statute as well as the promise of repayment in a written indemnity agreement between the power company and telephone company, the telephone company was not barred from recovering indemnity from the power company for contribution to the settlement on the ground that it made a "voluntary payment". West's Ann.Labor Code, § 3860.

See publication Words and Phrases, for other judicial constructions and definitions of "Voluntary Payment".

5. Indemnity 🔑11

Where an indemnitee notifies the indemnitor of a pending claim and the indemnitor denies liability under the contract and refuses to assume a defense of the claim, indemnitee may make a good-faith settlement without assuming the risk of being able to prove absolute legal liability or the actual amount of damages.

6. Workmen's Compensation ⚷186

The Workmen's Compensation Act affects only the employer-employee relationship and does not affect other relationships under a written contract.

7. Workmen's Compensation ⚷2193

A telephone company was not precluded from recovering indemnity under a written agreement between it and a power company for contribution to settlement of a death action involving an employee of the power company on the ground that the Workmen's Compensation Act exonerated the power company as a matter of law from any responsibility to the telephone company, where the power company had agreed to keep its apparatus on the joint pole, on which the employee was electrocuted, in a safe condition and to indemnify the telephone company from any resulting loss.

◆

Boyd, Taylor, Nave & Flageollet, San Francisco, for appellants.

Bronson, Bronson & McKinnon, San Francisco, for respondent.

KAUFMAN, Presiding Justice.

This is an appeal from a judgment in favor of the plaintiff, Pacific Telephone & Telegraph Co., in an action to recover sums paid to settle a wrongful death action against Pacific Telephone & Telegraph Company, brought by the heirs of one Leon Pettus. Pettus, an employee of defendant Coast Counties Gas & Electric Company, a subsidiary of defendant Pacific Gas & Electric Company,* was killed while working on a pole owned jointly by P. G. & E. and Pacific Telephone Company. The sole issue on appeal is whether P. G. & E. is obliged to indemnify Pacific Telephone under the terms of a written agreement.

The facts are not in dispute. On December 11, 1914, Pacific Telephone and Coast Counties entered into a written "joint-pole" agreement, which was amended in 1936, and remained in full force and effect thereafter. As far as relevant, this agreement provided:

> "*First–D.* Each of the parties hereto shall place and maintain, at its own risk and expense, its wires, cables, crossarms, fixtures and appurtenances thereto in a safe condition, in thorough and complete repair and in conformity with the specifications contained in the Seventh Section of this agreement and the duly authorized laws, regulations and ordinances that may apply, and shall promptly replace or repair any defective part thereof when notified so to do by the other party in writing.
>
> "*Sixth*: Each party shall indemnify and save harmless the other party from any and all loss, damage and liability, including liability to third persons, caused by any negligence or wrongdoing on the part of the former or by its neglect to perform any of its covenants herein contained. If any loss or damage shall be suffered or any liability to third persons shall be incurred by either or both of the parties hereto by reason of the installation, maintenance or operation of any of the wires, fixtures or appliances of either of the parties hereto upon said jointly owned poles, and if the cause of such loss, damage or liability shall be the joint or concurrent negligence or wrongdoing of both parties hereto or the negligence or wrongdoing of some third party for which neither of the parties hereto is responsible, or is so obscure that it cannot be ascertained by whose negligence or wrongdoing such loss, damage or liability was caused, then in every such case each party hereto shall bear all loss and damage which it shall suffer in respect to its own property and shall bear and defray all liability which it shall incur for injury to its

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* Hereafter, for convenience, the parties will be referred to as Pacific Telephone, Coast Counties and P. G. & E.

> own employees and shall bear and defray the expenses and fees of its own attorneys and all other loss, damage or liability caused as in this paragraph specified, together with all expenses, charges and costs incurred in connection therewith, shall be borne and paid by the parties hereto jointly and in equal shares."

During 1936, Coast Counties installed Pole No. 12,368 on Sunset Beach Road in Santa Cruz County, and equipped with electrical apparatus and wires. In 1947, Pacific Telephone, acting under the joint-pole agreement purchased one-half of the bare pole and installed a telephone circuit. The pole was thereafter identified by the parties as Joint Pole 24. In 1948, Coast Counties installed additional electrical equipment. Each company inspected, maintained and repaired its own equipment on Joint Pole 24.

On August 1, 1952, Leon Pettus, who was employed as a lineman by Coast Counties, climbed Joint Pole 24 for the sole purpose of working on Coast Counties' electrical equipment. On that date, the clearance between two of Coast Counties' wires was ½ – 2 inches instead of the 6 inches required by General Order 95 of the State of California Public Utilities Commission, and one wire was so installed that it was too short for the required clearance. This condition caused the electrocution and instant death of Leon Pettus. The apparatus of Pacific Telephone on Joint Pole 24 was carefully and properly installed and maintained and did not cause or contribute to the death of Pettus.

As the heirs of Pettus were prevented by the Workmen's Compensation Act from suing Coast Counties and P. G. & E., they filed a wrongful death action against Pacific Telephone on the theory that Pacific Telephone's ownership interest in the pole made it liable to a third party for a dangerous condition, however created. In 1954, defendant Coast Counties was merged into defendant P. G. & E., which assumed all the liabilities and obligations of Coast Counties. Pacific Telephone tendered the defense of the Pettus action to P. G. & E. P. G. & E. refused the tender and refused to acknowledge any obligation under the Joint Pole Agreement. In July 1955, Pacific Telephone settled the Pettus action for the sum of $24,150. Coast Counties asserted the statutory lien of an employee because of death benefits paid (Labor Code, § 3860) against this sum and received $5,264.96. The balance was paid to the heirs of Pettus by Pacific Telephone. In September 1955, Pacific Telephone filed this suit for the indemnity provided in the agreement. The complaint stated two causes of action: the first for breach of contract; the second for negligence, and sought damages in the amount of $33,658.05, ($24,150 plus costs and attorneys fees). The case was tried without a jury. The trial court found the facts as stated above and concluded that the first portion of indemnity agreeement called for complete indemnity to Pacific Telephone. Judgment for the plaintiff was entered accordingly.

P. G. & E. argues on appeal that this judgment must be reversed because: (1) The trial court ignored the written agreement and went beyond its terms to base its conclusion on common law theory of indemnity; (2) The agreement provided that each party was to defray all liability to its own employees and P. G. & E. had done so by complying with the Workmen's Compensation Act; (3) Pacific Telephone's "voluntary" payment precluded recovery.

[1] There is no merit in any of these arguments. Under the agreement, each party covenants to place and maintain and repair its own electrical apparatus in conformity with applicable laws and regulations. It is not disputed that here P. G. & E. failed to do so and that this failure was the sole cause of the death of Pettus. The first sentence of the sixth paragraph of the indemnity clause provides that "[e]ach party shall indemnify the other party * * * *from any and all loss* * * * including liability to third parties * * * caused by any negligence or wrongdoing on the part of the former, *or* by its *neglect to perform any of the covenants herein con-*

tained." (Emphasis supplied.) The second sentence is also phrased in the alternative and applies to different situations than the first: where the loss or damage is caused by either the joint and concurrent negligence of both parties, or the negligence or wrongdoing of some third party, or the cause of loss is so obscure that it cannot be ascertained by whose wrongdoing or negligence the loss was caused. Under the facts here found, the first sentence is the applicable one. The same conclusion was reached in Booth-Kelly Lumber Co. v. Southern Pac. Co., 9 Cir., 183 F.2d 902, 20 A.L.R.2d 695, which is similar to the instant case and answers many arguments raised here by P. G. & E.

[2] P. G. & E. argues that the trial court went beyond the terms of the agreement, as a contract of indemnity may not be construed to indemnify a party against his own negligence, citing Sproul v. Cuddy, 131 Cal.App.2d 85, 280 P.2d 158, and Pacific Indem. Co. v. California Electric Works, Ltd., 29 Cal.App.2d 260, 84 P.2d 313. These cases, however, hold merely that in the absence of express language, a contract of indemnity may not so be construed. Southern California Gas Co. v. Ventura etc. Co., 150 Cal.App.2d 253, 309 P.2d 849, also cited, held that the indemnity agreement did not by its terms cover the obligation. In Werner v. Knoll, 89 Cal.App.2d 474, 201 P.2d 45, where the contract expressly so provided, it was held that the indemnitee was indemnified against his own negligences.

[3, 4] P. G. & E. further argues that Pacific Telephone made a "voluntary" payment. A volunteer has been defined as a person who has made a payment (without compulsion) of a debt of a third party without request and with no promise of repayment from the party whose debt is paid. McMillan v. O'Brien, 219 Cal. 775, 29 P.2d 183, 91 A.L.R. 383. Here, there was the compulsion of a suit by the Pettus heirs and of Labor Code, section 3860, as well as a promise of repayment in the written indemnity contract. Southern Pacific Co. v. Fellows, 22 Cal.App.2d 87, 71 P.2d 75; Alberts v. American Casualty Co., 88 Cal. App.2d 891, 200 P.2d 37.

[5] P. G. & E. argues that since it alone was responsible for the loss, Pacific Telephone could not be liable to a third person. However, Pacific Telephone's liability here was based on its joint ownership of the pole. Emery v. Pacific T. & T. Co., 43 Cal.App.2d 402, 110 P.2d 1079; Dow v. Sunset T. & T., 157 Cal. 182, 106 P. 587. As pointed out in Booth-Kelly v. Southern Pacific Co., supra, the fact that the indemnitee may be held to be at fault to a third person is the very reason for the first part of the indemnity agreement. Otherwise, the provision would be unnecessary. Furthermore, where the indemnitee notifies the indemnitor of a pending claim and "the indemnitor denies liability under the indemnity contract and refuses to assume the defense of the claim, then the indemnitee is in full charge of the matter and may make a good faith settlement without assuming the risk of being able to prove absolute legal liability or the actual amount of the damage. (Citations) A contrary rule would make the right to settle meaningless in cases where the indemnitor has denied liability." Chicago, R. I. & P. R. Co. v. Dobry Flour Mills, 10 Cir., 1954, 211 F.2d 785, at page 788. This is the general rule throughout the country (See 142 A.L.R. 812) and was recently applied to an indemnity clause in an insurance policy in Peterson v. All State Insurance Co., 164 Cal.App.2d 517, 330 P.2d 843.

[6, 7] P. G. & E.'s final argument is that the Workmen's Compensation Act exonerated it as a matter of law from any responsibility to Pacific Telephone. Our Supreme Court has ruled that the Workmen's Compensation Act affects only the employer-employee relationship, and does not affect other relationships under a written contract. Baugh v. Rogers, 24 Cal.2d 200, 148 P.2d 633, 152 A.L.R. 1043; Singleton v. Bonnesen, 131 Cal.App.2d 327, 280 P.2d 481; see also San Francisco Unified School Dist. v. Cal. Bldg. Etc. Co., 162 Cal.App.2d 434, 328 P.2d 785; cf. Ryan Stevedoring Co. v. Pan-Atlantic S. S. Corp., 350 U.S. 124, 76 S.Ct. 232, 100 L.Ed. 133. While the Workmen's

Compensation Act protects an employer from actions brought against it by its employee on account of tortious conduct causing injury to the employee, there are no logical grounds for relief from the full consequences of an independent contractual obligation, voluntarily assumed, to a third party. P. G. & E. agreed to keep its apparatus on the joint pole in a safe condition and indemnify Pacific Telephone for any resulting loss.

In view of the foregoing, the judgment must be affirmed.

Judgment affirmed.

DOOLING and DRAPER, JJ., concur.

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170 Cal.App.2d 429

A. W. MASTELOTTO, Plaintiff and Appellant,

v.

HARBOR BOX & LUMBER COMPANY, a California corporation, Defendant and Respondent.

Civ. 23333.

District Court of Appeal, Second District, Division 3, California.

May 18, 1959.

Hearing Denied July 15, 1959.

Proceeding on defendant's motion to dismiss action on ground of plaintiff's failure to timely prosecute the action. The Superior Court of Los Angeles County, Kenneth N. Chantry, J., entered judgment of dismissal, and the plaintiff appealed. The District Court of Appeal, Vallée, J., held that action was not properly dismissed under statute giving court discretionary power to dismiss when plaintiff has failed for two years after action is filed to bring such action to trial, where dismissal was made within two-year period following partial trial.

Reversed.

1. Dismissal and Nonsuit ⚷60(2)

Where there is partial trial of action within five years after action is filed, the action is not subject to dismissal under statute making dismissal mandatory for failure to bring action to trial within five years after action is filed. West's Ann. Code Civ.Proc. § 583.

2. Dismissal and Nonsuit ⚷60(2)

Where plaintiff filed action on June 6, 1952, trial was commenced on June 6, 1956 and continued until June 19, 1956 when a mistrial was declared, there had been a partial trial of the action within five years after the action was filed, and consequently the action was not subject to dismissal under statute making dismissal mandatory for failure to bring action to trial within five years after action was filed. West's Ann.Code Civ.Proc. § 583.

3. Dismissal and Nonsuit ⚷60(2)

Action was not properly dismissed under statute giving court discretionary power to dismiss when plaintiff has failed for two years after action is filed to bring such action to trial, where dismissal was made within two-year period following partial trial. West's Ann.Code Civ.Proc. § 583.

A. P. G. Steffes, Los Angeles, for appellant.

Gibson, Dunn & Crutcher, Sherman Welpton, Jr., and Martin E. Whelan, Jr., Los Angeles, for respondent.

VALLEE, Justice.

Appeal by plaintiff from a judgment of dismissal entered on the granting of defendant's motion.

The motion was made on three grounds: failure to bring the action to trial within five years after it was filed; failure to bring the action to trial within two years after it was filed; and the inherent power of the court to dismiss for failure to diligently prosecute the action. The motion was heard on the record in the action, an affidavit of defendant's counsel which is set out in the margin,[1] and an affidavit of counsel for plaintiff which is also set out in the margin.[2]

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[1] "Sherman Welpton, Jr., being first duly sworn, deposes and says:

"The he is and at all times mentioned herein was an attorney duly admitted to practice law in the State of California and is a partner in the firm of Gibson, Dunn & Crutcher of Los Angeles, California.

"The above case was filed in Los Angeles County on or shortly prior to June 6, 1952, at which time affiant undertook the representation of defendant in connection with said suit. Plaintiff's Complaints were attacked by Motions and Demurrers and finally resulted in plaintiff filing a Fourth Amended Complaint, to which the defendant filed its Answer, Counterclaim and Cross-Complaint on January 20, 1953, and the plaintiff in turn filed its Answer to the Cross-Complaint on January 30, 1953, when the cause was then at issue. Plaintiff did not file his original request for setting until about April 8, 1953, and on April 24, 1953 the Court set the case for trial on April 19, 1954. Affiant observed that he had a conflict in his calendar for the April 19, 1954 setting and, accordingly, a stipulation was entered into in December, 1953 continuing the trial of the case one month to May 24, 1954. On May 24, 1954, plaintiff's counsel permitted the case to go off calendar under the '30-day rule' and in November, 1954, affiant, at the request of plaintiff's counsel, readily signed a stipulation re-setting the case for trial on February 14, 1955. In January, 1955, plaintiff's counsel again requested a continuance of the case and affiant signed a stipulation re-setting the case for trial on June 8, 1955. In May, 1955, plaintiff's counsel again requested a continuance of the case and affiant signed a stipulation setting the case for trial on January 16, 1956. In December, 1955, plaintiff's counsel again requested a continuance of the case and affiant signed a stipulation setting the case for trial on May 8, 1956. Affiant, again observing that he had a conflict in trial dates, requested a one-month continuance and, in February, 1956, a stipulation was signed continuing the trial of the case from May 8, 1956 to June 6, 1956. On June 6, 1956, the above-entitled case was called and assigned for trial before a jury. The case proceeded with the submission of testimony on behalf of the plaintiff, to and including June 19, 1956, at which time a mistrial was declared, based on the misconduct of plaintiff's counsel. No action was taken by plaintiff between June 19, 1956 and September 26, 1957 to re-set said case for trial, on which latter date plaintiff's counsel served on affiant's firm a Memorandum For Setting Contested Action, and on this date affiant was on his vacation, from which he did not return until October 7, 1957.

"In the original trial defendant was required to bring into Court voluminous records and files that filled two wooden boxes, the dimensions of each of which were approximately 4′ x 2′ x 1′, and the defendant was further required to obtain and have present in court witnesses who were and are no longer in the employ of the defendant and some of whom came from out of Los Angeles County and all of whom were required to be present in Court at great inconvenience and serious detriment to their business interests. Furthermore during the trial that lasted from June 6 to June 19, 1956, inclusive, plaintiff had not yet concluded the submission of his testimony which it was anticipated would take at least several days longer, following which the defendant would then be required to present all of its testimony on its Answer and Counterclaim and Cross-Complaint, which it was reasonably anticipated would require at least another two to three weeks' time, and nothing has occurred in the intervening time to shorten the trial time in the event the case were to be re-tried. Affiant, accordingly, submits that because of the long delay in bringing this case to trial and the great inconvenience and expense that has been and will be further imposed on the defendant, the Court in the exercise of its sound discretion as well as on mandatory grounds should dismiss said suit."

[2] "A. P. G. Steffes, being first duly sworn, deposes and says:

"That he is the attorney for plaintiff in this action and as such, is better informed than plaintiff concerning all the facts and circumstances connected with the prosecution of this action and the reasons for not having the case set for trial at any earlier date.

"That in preparing this case for trial affiant spent approximately five full days immediately preceding the commenceent of the trial on June 6, 1956, during which time affiant became acquainted with the facts concerning plaintiff's financial condition resulting from his having failed to receive from the defendant more than $35,000 to which he was enti-

Note 2—Continued

tled, as alleged in his Fourth Amended Complaint.

"That, based on the evidence which affiant accumulated, it is the opinion of affiant plaintiff was forced into bankruptcy by the refusal and failure of defendant to pay to plaintiff the amount of money for which plaintiff is suing and to which affiant verily believes plaintiff is justly entitled. That as an additional result of plaintiff's being unable to pay his financial obligations when due, plaintiff has had his home and home property foreclosed and has had his earning capacity practically destroyed.

"That when plaintiff was first referred to affiant by a client in Porterville, California, affiant informed plaintiff that in order for affiant to handle plaintiff's case, it would be necessary for affiant to associate another attorney to handle the numerous details connected with the case, owing to the fact that most of affiant's time was being taken up by his duties as an associate attorney in the office of Parker, Stanbury, Reese & McGee; that thereafter affiant did associate another attorney but by reason of the complicated nature of the logging transaction which gave rise to this lawsuit, it subsequently became necessary for affiant personally to take over the handling of the entire case.

"That after this action was first set for trial on April 19, 1954, which date was one year and eleven days after the filing of the memorandum to set the case for trial, that several continuances of the trial were had thereafter until the trial actually commenced on June 6, 1956; that at least two of said continuances of the trial were at the request of counsel for the defendant.

"That at no time prior to said trial did the defendant or any of the counsel for the defendant complain to affiant or to anyone else to the knowledge of affiant, that the action was not being diligently prosecuted, and each of the continuances of the trial that were requested by affiant was readily agreed to by counsel for the defendant; that if, in fact, defendant or any of defendant's counsel then had, or previously had had any objection to the manner in which the action was being prosecuted by plaintiff and his counsel, said objection or objections were at all times waived, and the defendant and its counsel engaged in the trial until June 19, 1956, when a mistrial was declared by the Court at the instance and request of the defendant, over the objection of affiant.

"That both plaintiff and his son, Glen Mastelotto, who was his principal witness were required to be in Los Angeles continuously from on or about June 1, 1956 to June 19, 1956 in order to prepare for the trial and while the trial continued, and were thereby compelled to absent themselves from their work in Northern California at the busy time in logging operations; that before leaving Los Angeles they informed affiant that the partial trial had drained their financial resources and that they would be unable to be present again in Los Angeles for the second trial unless the trial date was fixed at a time which was not within the logging season, which usually occurred between May 1 and approximately December 1 of each year.

"That affiant understood shortly after defendant's motion for a mistrial was granted that if a memorandum for setting the case for trial was served and filed at that time, the trial date would be set about one year later, which would have occurred after the commencement of the 1957 logging season; that at that time affiant did not know that any priority would be given to the trial of this case by reason of the fact that the case had previously been partially tried, and affiant therefore waited and did not file a memorandum to set the case for trial until he could arrange for the trial to be set between January 1, 1958 and May 1, 1958, in order to enable plaintiff and his son to be present at the trial and in order also that affiant would be able to try the case for plaintiff.

"That had the case been reset for trial between December 1, 1956 and May 1, 1957, it would have been absolutely impossible for affiant to try the case on plaintiff's behalf owing to the congested condition of the trial calendar of affiant and the law firm with which he was associated; that in addition thereto, numerous pre-trials were being set during that period and the legal duties of affiant became so many and so great, that it was necessary for affiant to work practically every night and every Saturday and Sunday; that, in fact, affiant had no alternative but to terminate his association with the firm of Parker, Stanbury, Reese & McGee in order to prosecute diligently the work which he had already obligated himself to perform, including the instant case; that affiant did terminate his said association on June 1, 1957, and has since so arranged his personal practice that he will be able to try the case for plaintiff instead of having plaintiff obtain other counsel, as af-

The following is the chronological history of the cause:

June 6, 1952—complaint filed and summons issued.

November 25, 1952—fourth amended complaint filed.

January 20, 1953—answer and cross-complaint filed.

January 30, 1953—answer to cross-complaint filed and cause at issue.

April 9, 1953—memorandum for setting filed.

April 24, 1953—trial set on April 19, 1954.

December 30, 1953 to May 1956—continuances of trial to June 6, 1956—five at instance of plaintiff, two at instance of defendant.

June 6, 1956—trial began.

June 19, 1956—mistrial declared because of misconduct of plaintiff's counsel.

September 26, 1957—plaintiff filed memorandum for setting.

October 4, 1957—trial set for March 25, 1958.

October 15, 1957—notice of motion to dismiss filed by defendant.

December 10, 1957—motion to dismiss granted.

The motion was granted under section 583 of the Code of Civil Procedure.[3] We do not, therefore, consider whether the motion was properly granted in the exercise of the court's inherent power to dismiss.

Section 583 of the Code of Civil Procedure in pertinent part provides:

> "The court may in its discretion dismiss any action for want of prosecution on motion of the defendant and after due notice to the plaintiff, whenever plaintiff has failed for two years after action is filed to bring such action to trial. * * * Any action heretofore or hereafter commenced shall be dismissed by the court in which the same shall have been commenced or to which it may be transferred on motion of the defendant, after due notice to plaintiff or by the court upon its own motion, unless such action is brought to trial within five years after the plaintiff has filed his action."

[1, 2] We consider first whether the action was properly dismissed under the mandatory 5-year provision of section 583. It has frequently been held that a partial trial within the 5-year period takes the action out of the operation of section 583. Krasnow v. Superior Court, 15 Cal.App.2d 141, 142, 143, 59 P.2d 442; Meier v. Superior Court, 55 Cal.App.2d 675, 676, 131 P.2d 554; Clements v. Ragghianti, 155 Cal.App.2d 188, 190, 317 P.2d 706. In Mercantile Inv. Co. v. Superior Court, 218 Cal. 770, 25 P.2d 12, the cause was partially tried at a time within the 5-year period, at which time a continuance was granted to permit the plaintiff to amend his complaint to include a new defendant. It was held that the mandatory provisions of section 583 were without application. Kosturos v. Mu-

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fiant had previously thought that it might become necessary by reason [of] affiant's heavy work load.

"That while affiant was making the necessary arrangements to have the trial set at a time when plaintiff and his son would be able to be in attendance, affiant made inquiries to determine the best way in which this could be accomplished; that affiant then learned that, even though it was not a statutory ground for priority, a preferential setting date could be obtained owing to the fact that the case had already been partially tried; that affiant availed himself of this procedure which enabled him to have the Pre-trial set on February 17, 1958 at 9:00 A.M. in Department 2, and the Trial set on March 25, 1958 at 9:00 A.M. in Department 1 of this Court; that said procedure was followed, not as stated in defendant's memorandum of points and authorities (Page 2, lines 27–29) that affiant anticipated this motion to dismiss, but in order to have a trial at a time when plaintiff would be financially able to go through with it."

[3] The minute order granting the motion reads: "Motion granted. Action is ordered dismissed pursuant to the provisions of section 583 C.C.P."

nicipal Court, 51 Cal.App.2d 700, 125 P.2d 572, holds that the calling of one witness who testified was sufficient to stay the application of the 5-year period.

At bar, the action was partially tried within the 5-year period just as in the foregoing cases. It is conceded that the trial was commenced on June 6, 1956 and that it continued until June 19, 1956, when a mistrial was declared. June 6, 1956 was within the 5-year period. Consequently, the court was without power to dismiss the action under the mandatory 5-year provision of section 583.

[3] We next consider whether the action was properly dismissed under the discretionary 2-year provision of section 583. The discretion is to dismiss the action "whenever plaintiff has failed for two years after action is filed to bring such action to trial."

Clements v. Ragghianti, 155 Cal.App.2d 188, 317 P.2d 706, is directly in point. The court stated (155 Cal.App.2d at page 191, 317 P.2d at page 708):

> "Counsel for respondent argues that in any event the dismissal may be supported under that portion of Code of Civil Procedure section 583, which gives the court discretionary power to dismiss '* * * whenever plaintiff has failed for two years after action is filed to bring such action to trial * * *.' No case has been cited authorizing the court to dismiss under this provision after the action has in fact been brought to trial and we are satisfied that such motion must be made before the action is brought to trial.
>
> "It is doubtless true that unreasonable delay in bringing an action on for further trial after a partial trial would justify the court in dismissing under its inherent power, but the order here is expressly based on Code of Civil Procedure section 583, and it so recites."

So, here, the order is expressly based on section 583 and it so recites. As heretofore noted, the dismissal was made within the 2-year period following the partial trial. It follows that the court was without power to dismiss the action under the discretionary 2-year provision of section 583.

Reversed.

SHINN, P. J., and PARKER WOOD, J., concur.

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170 Cal.App.2d 405

Beulah E. FOGARTY, Plaintiff and Respondent,

v.

Henry W. McGUIRE, Executor of the Last Will and Testament of Henry B. Rickard, Defendant and Appellant.

Civ. 23598.

District Court of Appeal, Second District,
Division 1, California.
May 18, 1959.
Hearing Denied July 15, 1959.

Action against executor on an alleged account stated. From adverse judgment of the Superior Court, Los Angeles County, Clinton L. Clad, J. pro tem., the executor appealed. The District Court of Appeal, Lillie, J., held that where plaintiff was employed in decedent's store and her earnings were retained to be accumulated and paid to her in a lump sum when store was sold, and after store was closed in 1955 plaintiff moved to Oregon and commenced negotiations for purchase of farm, and assistant cashier of bank through which plaintiff was negotiating sent a letter to decedent for verification of payments plaintiff was receiving from decedent and decedent replied stating that plaintiff was receiving $100 per month and when store was sold she would receive $7,000, an account was stated between decedent and plaintiff in amount of $7,000 by the letter and reply thereto.

Judgment affirmed as modified.

1. Account Stated ⚷4

Where plaintiff was employed in decedent's store and her earnings were retained to be accumulated and paid to her in a lump sum when store was sold, and after store was closed plaintiff moved to Oregon and commenced negotiations for purchase of farm, and assistant cashier of bank through which plaintiff was negotiating sent a letter to decedent for verification of payments plaintiff was receiving from decedent and decedent replied stating that plaintiff was receiving $100 per month and when store was sold she would receive $7,000, an account was stated between decedent and plaintiff in amount of $7,000 by the letter and reply thereto.

2. Account Stated ⚷1

Theory on which action on account stated is allowed is that transactions have occurred between parties from which the relation of debtor and creditor has arisen, that thereafter one or both have rendered or made statements or declarations specifying definitely amount due on account thereof, and thereupon there has been an agreement, express or implied, by the one who is the debtor, to the other, that a certain sum is due from him on such account, together with an express or implied promise to pay the same.

3. Account Stated ⚷4, 14

Action upon an account stated is not upon the original dealings and transactions of the parties, but is upon new contract by and under which parties have adjusted their differences and reached an agreement and such agreement need not necessarily be in writing, but if in writing, it should appear to be something more than a mere memorandum and should show with clearness and certainty that it was intended to be a final settlement up to date.

4. Account Stated ⚷20(1)

Whether conditions exist necessary to establish an account stated is usually a question to be determined by trier of fact from all the circumstances, and in reaching that determination reasonable inferences can be drawn in support of the claim of either party if there is any credible evidence warranting such action.

5. Account Stated ⚷5

Offer to strike a balance need not come from the creditor, but may be made by the debtor and an account is stated when the other expressly or impliedly assents.

6. Contracts ⚷9(1)

The law does not favor destruction of contracts because of uncertainty but will, if feasible, so construe contracts as to carry into execution reasonable intentions of parties if they can be ascertained.

7. Principal and Agent ⚷14(1), 177(1)

Where plaintiff was employed in decedent's store and her earnings were retained by decedent to be accumulated and paid to her in a lump sum when store was sold, and after store was closed plaintiff moved to Oregon and commenced negotiations for purchase of farm and assistant cashier of bank through which she was negotiating sent letter to decedent for verification of payments plaintiff was receiving from decedent and decedent replied stating that plaintiff was receiving $100 per month and if market was sold she would receive $7,000, assistant cashier could properly be deemed to have been acting as plaintiff's agent and notice to him was notice to respondent for purpose of establishing an account stated.

8. Account Stated ⚷5

Where plaintiff was employed in decedent's store and her earnings were retained by decedent to be accumulated and paid to her in a lump sum when store was sold, and after store was closed plaintiff moved to Oregon and commenced negotiations for purchase of farm and assistant cashier of bank through which she was negotiating sent letter to decedent for verification of payments plaintiff was receiving from decedent, and decedent replied stating she was receiving $100 per month and would receive $7,000 when market was sold, assent to account stated by plaintiff was inferable from her subsequent conduct in accepting checks from decedent up to time of his demise and otherwise failing to register her objection.

9. Account Stated ⚿5, 6(4)

Acquiescence for unreasonable time by a debtor or a creditor may constitute assent to an account stated.

10. Account Stated ⚿20(3)
Appeal and Error ⚿1071(1)

Where plaintiff was employed in decedent's store and her earnings were retained by decedent to be accumulated and paid to her in lump sum when store was sold and following closing of store plaintiff moved to Oregon and commenced negotiations for purchase of farm and assistant cashier of bank through which she was negotiating sent letter to decedent in California for verification of payments plaintiff was receiving from him, and decedent replied stating she was receiving $100 per month and would receive $7,000 when store was sold, finding that cashier's letter constituted an offer and that decedent's reply represented his acceptance, was erroneous but did not require a reversal.

11. Venue ⚿7

A contract action may be tried either in county where contract was made or in county where defendant resides.

12. Executors and Administrators ⚿453(2)

A judgment against an executor on an account stated should provide for payment thereof in due course of administration. West's Ann.Prob.Code, § 730.

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Lester V. Peterman, Wallace J. Manley, Pasadena, for appellant.

Fisk & Tyson, Richard P. B. Tyson, Pasadena, for respondent.

LILLIE, Justice.

Following the rejection of her claim by defendant executor, plaintiff recovered judgment against the estate on an alleged account stated in the sum of $7,000, less certain credits. The matter was heard by the court sitting without a jury. Defendant executor has appealed from the judgment.

[1] The correctness of plaintiff's statement of facts is conceded. It appears therefrom that plaintiff was employed by decedent Rickard from 1940 or 1942 to 1955, at the latter's grocery store in East Pasadena. Decedent also owned an undivided one-half interest in the building and property where his grocery business was operated. During the entire period of her employment, plaintiff's earnings were retained by the decedent to be accumulated and paid to her in "one lump sum" when the market was sold. The grocery business was closed in January of 1955. Plaintiff subsequently moved to Cottage Grove, Oregon, and commenced negotiations there for the purchase of a farm. This fact was known to decedent. In July of 1955 he issued a check for $3,500 to Esther Whitelaw, plaintiff's sister, who likewise resided in Oregon. On August 20, 1955, the following letter was directed to decedent at his Pasadena address by the assistant cashier of a Cottage Grove bank:

> "Dear Mr. Rickard:
>
> "Mrs. Beulah Fogarty has referred me to you in deference to a payment that she is receiving in the amount of $100.00. She informs us that this is a payment she gets for her interest in a super market that is maintained by you in Pasadena, California.
>
> "Would you be kind enough to confirm this to the writer, giving such information as you might deem necessary. Mrs. Fogarty is applying to us for real estate credit and we are most anxious to complete our files in that regard. * * *
>
> "Thank you very much for your assistance in this matter.
>
> "/s/ A. C. Schaefer
> "Assistant Cashier"

Decedent's reply to the above letter, in his own handwriting, and immediately below the signature of the assistant cashier, was as follows:

> "Mr. A. C. Schaefer
> "Dear Sir:
> "Mrs. Beulah Fogarty receives $100.00 per month and in case the market is sold she will receive $7,000.00.
> "Very truly yours,
> "/s/ H. B. Rickard"

Schaefer's letter, with decedent's handwritten reply on the bottom of the page was returned to Schaefer in an envelope addressed to him and bearing a Pasadena postmark.

Prior to August 20, 1955, decedent had issued several checks to plaintiff. On September 1, 1955, plaintiff purchased a farm in Oregon from Thelma Thieland, who took a second mortgage on the property. Following the sale, decedent drew checks to plaintiff, Mrs. Thieland and the Cottage Grove branch of an Oregon bank. Rickard died on November 13, 1955. The market building was sold by defendant executor on November 9, 1956.

The trial court found that an account was stated at Pasadena by and between Rickard and the plaintiff whereby it was agreed that Rickard was indebted to plaintiff in the sum of $7,000 of which $450 had been paid, leaving a balance due and owing in the sum of $6,550. It was further found that Rickard was the owner of a grocery business at a specified address in East Pasadena and owned an undivided one-half interest in the building and property at such address, it being additionally found that plaintiff performed services for Rickard at his special instance and request and had been paid only a portion of her wages due to Rickard's request that the balance of her compensation be allowed to accumulate.

Defendant admits that his testator and plaintiff had carried on previous transactions of a monetary nature, but contends on this appeal that an account was not stated by the letter, and the reply thereto of August 20, 1955. Asserting that to establish such an account there must be an agreement between the parties, that is, an express or implied promise to pay a sum certain, he argues that the communications in question lack the essentials of a contract in that there was no *offer* by the decedent which met with plaintiff's *acceptance,* and that the additional element of *mutuality* was also absent by failure to prove that plaintiff agreed to the balance of $7,000 then assertedly struck. In this connection he advances the claim that the bank was not acting as plaintiff's agent but was merely an independent third party seeking information for its own particular benefit.

[2-4] "The theory upon which the action on an account stated is allowed is that transactions have occurred between the parties from which the relation of debtor and creditor has arisen, that thereafter one or both have rendered or made statements or declarations specifying definitely the amount due on account thereof, and thereupon there has been an agreement, express or implied, by the one who is the debtor, to the other, that a certain sum is due from him on such account, together with an express or implied promise to pay the same" (Bennett v. Potter, 180 Cal. 736, 745, 183 P. 156, 160). "The action upon an account stated is not upon the original dealings and transactions of the parties * * * It is upon the new contract by and under which the parties have adjusted their differences and reached an agreement" (Gardner v. Watson, 170 Cal. 570, 574, 150 P. 994, 995). Such an agreement need not necessarily be in writing (Bennett v. Potter, supra, 180 Cal. 743, 183 P. 156; Ahlbin v. Crescent Commercial Corp., 100 Cal.App.2d 646, 647, 224 P.2d 131); but if in writing, it should appear to be something more than a mere memorandum and should show with clearness and certainty that it was intended to be a final settlement up to date (Coffee v. Williams, 103 Cal. 550, 556, 37 P. 504). Whether these conditions exist is usually a question to be determined by the trier of fact from all the circumstances of the case (Kinkle v. Fruit Growers Supply Co., 63 Cal.App.2d 102, 114, 146 P.2d 8), and in reaching that determination reasonable inferences can be

drawn in support of the claim of either party if there is any credible evidence warranting such action. Kinkle v. Fruit Growers Supply Co., supra, 63 Cal.App.2d 115, 146 P.2d 8.

Preliminarily, much of appellant's argument is based on the premise that the trial court erroneously applied the law to proven facts and that the question here is solely one of law. But the rule we are asked to apply necessarily means that there must be no conflicting inferences which the trial judge could have drawn (Export Leaf Tobacco Co. v. County of Los Angeles, 89 Cal.App.2d 909, 916, 202 P.2d 622); hence, in order that it may be said that there is no conflict in the evidence and that the trial court's finding was a conclusion of law, appellant must demonstrate that no inference can reasonably be drawn from the evidence other than that contended for by him.

[5, 6] Although objections to respondent's competency as a witness under the dead man's statute were sustained (Code Civ.Procedure, section 1880, subd. 3), there is evidence in the record which points to the fact that Rickard and respondent had orally struck some balance (upon which an action might have been brought) as early as January of 1955 when the grocery business ceased to operate. At that time decedent told a mutual friend that respondent would be paid in "one lump sum" upon the sale of the building. Respondent subsequently took up residence in Oregon; her plans for the purchase of a farm in that state were known to decedent who wrote on August 15, 1955, as follows: "On your property we had better pay $100 a month plus int. until we can *due* better. Please let me know what the int. will be." There then follows the letter from Schaefer only five days later. A reading of the communication persuades us that it falls short of the requirement that the amount due must be specified or there must be a reference to something by which the amount due can be definitely and specifically ascertained (MacLaren v. Gilbert, 111 Cal.App. 198, 201, 295 P. 349). No mention was made of the pending sale of the building, which could have made the letter sufficiently specific, and of course the claimed total balance was not referred to. However, and contrary to the first of appellant's contentions, the offer to strike a balance need not come from the creditor but may be made by the debtor (Bennett v. Potter, supra, 180 Cal. 736, 745, 183 P. 156, 160). As declared in that case, where the relation of debtor and creditor has arisen between the parties, "one or both" may render a statement specifying the amount due and an account is stated when the other party expressly or impliedly assents. The language used by the decedent speaks for itself. He might have said: "I have received your letter. When I sell the building, I will be in a position to pay Mrs. Fogarty what I then determine I owe her." Although not required to do so, however, he answered in unequivocal terms and struck the balance then and there owing to respondent. Under the circumstances at bar, such a construction does not seem strained or unwarranted. As stated in Meyers v. Nolan, 18 Cal.App.2d 319, 322, 63 P.2d 1216, 1217: "The law does not favor the destruction of contracts because of uncertainty but will, if feasible, so construe contracts as to carry into execution the reasonable intentions of the parties if they can be ascertained." In actions of the present kind, where the dead man statute is applicable, the foregoing pronouncement is peculiarly pertinent.

[7] But, appellant contends, respondent did not and could not consent to the striking of such a balance because it was not made to her directly. While there is authority that declarations to a third person do not constitute evidence of an account stated (Williston on Contracts, Rev.Ed., Sec.1862), it seems apparent that Schaefer was more than an independent third party. He plainly communicated with decedent for and on behalf of respondent, as well as his bank; furthermore, it can be inferred from his letter of August 15 that decedent

knew of respondent's dealings with that institution. We hold that Schaefer could properly be deemed to have been acting as respondent's agent, and notice to him was therefore notice to respondent. Appellant's reliance on Parker v. Merchants, etc., Co., 44 Cal.App. 214, 186 P. 192, is misplaced, since there the alleged creditor did not know that negotiations for the settlement of her account were in progress.

[8, 9] Finally, assent to the account is inferable from her subsequent conduct in accepting checks from decedent up to the time of his demise and otherwise failing to register her objection. If acquiescence for an unreasonable time may constitute assent by the debtor, conversely the same rule is applicable to the creditor. Cf. Meyers v. Texas Co., 6 Cal.2d 610, 617, 59 P.2d 132. The length of such time is dependent on the circumstances of each particular case (1 Cal.Jur.2d 382–383).

[10, 11] The complaint alleged and the trial court found that the account was stated at Pasadena, the trial court presumably being of the view that Schaefer's letter constituted an offer by respondent and that decedent's reply represented his acceptance. This erroneous finding does not require a reversal. A contract action may be tried either in the county where the contract was made *or* in the county where the defendant resides (Code Civil Procedure, section 395), and there is no question about the residence of the defendant executor (cf. Beltaire v. Rosenberg, 129 Cal. 164, 61 P. 916). The trial court is directed to make such modifications in its findings as will conform to the views herein expressed.

[12] Finally, the judgment erroneously fails to provide for the payment thereof in due course of administration (Probate Code, section 730). The judgment is modified by adding the words "payable in due course of administration" to be inserted after the figure $6,550, and, as so modified, the judgment is affirmed. The respondent to recover costs.

WHITE, P. J., and FOURT, J., concur.

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170 Cal.App.2d 351

In the Matter of the ESTATE OF William L. HALE, Deceased.

Clara M. HALE, Claimant and Appellant,

v.

John Darrow HALE and Katherine B. Hale, Claimants and Respondents.

Civ. 6014.

District Court of Appeal, Fourth District, California.

May 13, 1959.

Proceeding on petition to determine heirship, wherein widow claimed that value of 40-acre tract which was devised by husband to his sister, son, and widow was 64.84% community property and that the devise to sister and son had been adeemed by sale. The Superior Court of Kern County, Norman F. Main, J., entered decree in favor of sister and son, and widow appealed. The District Court of Appeal, Shepard, J., held that sale of tract by husband after the bequest and receipt back of note and deed of trust for balance of price thereon did not work ademption on interests of sister and son, and evidence supported position of trial court that tract did not become community property, and that widow did not acquire any community interest therein.

Affirmed.

1. Appeal and Error 🔑931(1), 990, 996

On appeal by widow from decree that husband's bequest to his sister and son of interest in 40-acre tract had not been adeemed by sale and that tract was not community property, reviewing court would resolve all conflicts in favor of sister and son, would indulge in all legitimate and reasonable inferences to uphold decree, could only determine whether there was substantial evidence, contradicted or not, to support decree, and could not substitute its judgment for that of trial court if two or more inferences could reasonably be deducted from facts.

2. Wills 🔑767

Under statute relating to encumbrance by which testator does not wholly divest his interest in property which he has previously disposed of by will, sale by husband of 40-acre tract, which he had previously devised to wife, sister, and son, and receipt back of note and deed of trust for balance of price thereon did not work ademption of interest of sister and son in property. West's Ann. Prob.Code, § 78.

3. Husband and Wife ⚿255, 257

Real property purchased with separate funds of husband, and rents, issues, and profits therefrom, and increase in value thereof, are separate property.

4. Husband and Wife ⚿259

Where husband is operating business which is his separate property, income from such business is allocated to community or separate property in accord with extent to which it is allocable to husband's efforts or his capital investment.

5. Husband and Wife ⚿262(1)

Where family expenses equal or exceed amount of money allocable from husband's personal efforts to community funds, it is presumed that money used in maintenance of family is drawn from community funds before there is encroachment on separate property.

6. Husband and Wife ⚿262(1)

Separate property of spouse, so held before marriage, presumably continues to be such.

7. Husband and Wife ⚿262(1)

There is no presumption that community funds were used to improve separate property.

8. Husband and Wife ⚿258

Generally, in absence of agreement to contrary, where improvements are made upon husband's separate real property with community funds, improvements have character of his separate property and belong to him.

9. Husband and Wife ⚿264

In hearing on petition to determine heirship, wherein widow claimed that value of 40 acres which was devised by husband to his sister, son, and widow was 64.84% community property, evidence supported position of trial court that 40 acres did not become community property and that widow did not acquire any community interest therein.

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Leonard C. Hall, Jr., Bakersfield, for appellant.

Maddox, Abercrombie, Kloster & Jacobus, Visalia, for respondents.

SHEPARD, Justice.

Deceased died on November 25, 1956, and his will was admitted to probate. On the hearing of a petition to determine heirship, the widow Clara Mae Hale, appellant herein, claimed that a bequest to deceased's son John Darrow Hale, and to deceased's sister Katherine B. Hale, the respondents herein, of certain interests in a specifically described parcel of land had been adeemed by sale, and that 64.84% of the value of said parcel was the community property of herself and deceased. Said widow's claim was rejected by the trial court and she has appealed.

The property subject of dispute is approximately 40 acres described as Lots 31 and 32 (Southeast Quarter of the Southeast Quarter) of Section 11, Township 30 South, Range 27 East, M. D. B. & M. in Kern County, California, and was acquired by deed to deceased November 9, 1912. In 1917, deceased and his then wife borrowed $3,000 on this property from the Federal Land Bank at Berkeley. Deceased married appellant herein December 19, 1931, and the evidence indicates that at that time there remained unpaid on the mortgage to the Federal Land Bank on said loan the sum of $2,402.12.

Paragraphs Fourth and Fifth of deceased's will read as follows:

> "Fourth: I hereby give, devise and bequeath to my sister Katherine B. Hale a life estate in and to the North Half of the Southeast Quarter of the Southeast Quarter of Section 11, sometimes described as Los 31 and 32 in said Section, Township 30 South, Range 27

> East, M. D. B. & M.; and I hereby give, devise and bequeath unto my wife Clara Mae Hale a life estate in and to the South Half of the property last hereinabove described; provided, however, that said life estate hereby given to my said sister shall terminate upon her marriage, and that the life estate hereby given to my wife shall terminate upon her re-marriage after my death.
>
> "Fifth: I hereby give, devise and bequeath unto my son John Darrow Hale the property described as the Southeast Quarter of the Southeast Quarter of Section 11, Township 30 South, Range 27 East, sometimes known as Lots 31 and 32 in said Section, subject to the life estates hereinabove devised; and I also give, devise and bequeath to my said son said property and each parcel thereof upon the termination of said life estates or either of them on the marriage of my said sister or my said wife."

The respondent sister has never married and appellant has not remarried.

On February 24, 1955, deceased sold said 40 acres for the agreed purchase price of $80,000 (reserving a 50% interest in petroleum and mineral rights), and received back a note and deed of trust thereon. The balance of principal and interest unpaid at deceased's death was in the amount of $71,997.86. Appellant introduced testimony that she had assisted deceased in some of the clerical work on payrolls and weighing of crops produced on this and other property during the married relationship; that improvements in an amount totaling $7,000 or more were put on the property after the married relationship began; that all of the funds of deceased were handled through a single bank account, the details on which she did not have full information; and that deceased during their married relationship made certain oral statements to her indicating lack of intention by deceased to leave any property to either of respondents. She contends that the improvements were made with community funds and that she has a community interest in this property of 64.84%.

The record before us shows that deceased owned other separate property, and the records of rentals and sales on the whole of deceased's separate property indicate that the income from such sources were more than sufficient to have paid the mortgage to the Federal Land Bank as well as the improvements put on the property in dispute, and that the property in dispute was consistently dealt with by deceased as his separate property. Appellant stated in the affidavit filed for inheritance tax purposes:

> "Decedent was a farmer and operated his properties, including the property above referred to as the Wible Road property, from date of marriage to 1946 at which time he retired. During the operational period, he devoted his personal services entirely thereto; and the income therefrom was entirely consummated in the living expenses of decedent and wife, or was consumed by the community."

The evidence further shows that all of the real property acquired by the deceased after marriage was placed in joint tenancy with appellant, which joint tenancy property was appraised by the inheritance tax appraiser in the amount of $22,060, and no claim of ownership is made by the estate to any part of such joint tenancy property. In the later years of his life deceased had occasion to consult on some of these with his attorney, who had drawn the will in question, but made no change in his will. Contrary to some of the implications in appellant's oral testimony deceased, at his own request, was taken to the home of the sister-respondent and there remained during his last illness until his death.

[1] The rules relating to the province of the trial court and of the appellate court are the same in a proceeding of this kind as in any other civil case.

> "'* * * all conflicts must be resolved in favor of the respondent, and all legitimate and reasonable inferences indulged in to uphold the verdict if pos-

> sible. It is an elementary * * * principle of law, that when a verdict is attacked as being unsupported, the power of the appellate court begins and ends with a determination as to whether there is any *substantial* evidence, contradicted or uncontradicted, which will support the conclusion reached by the jury. When two or more inferences can be reasonably deducted from the facts, the reviewing court is without power to substitute its deductions for those of the trial court.' " In re Estate of Bristol, 23 Cal.2d 221, 223[2], 143 P.2d 689, 690.

This rule continues to receive recognition in numerous cases and has been directly applied to decisions on whether or not property is separate or community. Long v. Long, 88 Cal.App.2d 544, 550[4], 199 P.2d 47; In re Estate of Guidotti, 155 Cal.App.2d 812, 813[2], 318 P.2d 740.

[2] Appellant's contention that the sale above referred to worked an ademption is without merit. Section 78 of the Probate Code reads as follows:

> "Neither a charge or encumbrance placed by a testator upon property previously disposed of by his will, for the purpose of securing the payment of money or the performance of any covenant or agreement, nor a conveyance, settlement, or other act of a testator, by which his interest in any such property is altered, but not wholly divested, is a revocation of the disposal; but the property, subject to such charge or encumbrance, or the remaining interest therein, passes by the will."

In Re Estate of Moore, 135 Cal.App.2d 122, 131, 132(12) (16), 286 P.2d 939, 944, the court was considering a claimed ademption alleged to have resulted from the sale, after the will was made, of a parcel of devised property with a trust deed back for the balance of the purchase price. The problem was identical with that of the case at bar, and the court said in holding that there was no ademption:

> "And a trust deed definitely does represent an interest in the land, for the title is in the trustee for the benefit of the creditor * * *.
>
> "* * * The vendor's interest in the property has been 'altered, but not wholly divested' by a sale with trust deed back."

In Re Estate of Trainer, 161 Cal.App.2d 353, 326 P.2d 520, the court again had before it a devise of a specifically described parcel of real property to one devisee and another described parcel of real property to another devisee. Both parcels were sold, and the testator received in each case a note for the balance secured by a deed of trust. Again the court holds that under the provisions of Section 78 of the Probate Code there was no ademption. The court said, at pages 354, 355 of 161 Cal.App.2d, at page 521 of 326 P.2d:

> "* * * we are in complete agreement that by virtue of the deed of trust the devisor has a 'remaining interest' in the real property which by the terms of Probate Code, section 78 'passes by the will.' "

[3-8] The next contention of appellant is that there is no evidence to support the finding by the court that the community had no interest in said 40 acres in dispute. The numerous documents produced by respondents show quite clearly that ample funds were received through the medium of sale and rentals to have paid for not only the balance on the trust deed to Federal Land Bank, but also all of the improvements. In addition thereto, appellant herself by her own affidavit states that the income was entirely consumed in the living expenses of decedent and wife or was consumed by the community. There is no evidence that the deceased had any substantial outside income from his efforts unconnected with his own separate property. Nowhere did appellant produce evidence that the deceased's earnings exceeded the family living expenses, and no evidence was introduced in any way seeking to apportion any amount as being a

fair estimate of deceased's own productive efforts.

> "Real property purchased with the separate funds of the husband is his separate property. (Citations.) Likewise the rents, issues and profits therefrom and increase in value thereof are separate property. * * *
>
> "In regard to earnings, the rule is that where the husband is operating a business which is his separate property, income from such business is allocated to community or separate property in accordance with the extent to which it is allocable to the husband's efforts or his capital investment." Huber v. Huber, 27 Cal.2d 784, 791, 792[8], [9], [11], 167 P.2d 708, 712.

When, however, the evidence shows that the family expenses equalled or exceeded the amount of money allocable from the husband's personal efforts to community funds "* * * it is presumed that money used in the maintenance of the family is drawn from community funds before there is an encroachment on separate property. [Citations.] Evidence that there was no excess of community income over living expenses has been considered an effective manner of demonstrating the separate character of property remaining." Kenney v. Kenney, 128 Cal.App.2d 128, 136[13], [14a], 274 P.2d 951, 957; In re Estate of Ades, 81 Cal.App.2d 334, 338[4], 339[5], 184 P.2d 1; In re Estate of Guidotti, supra, 155 Cal.App.2d 813[3], 318 P.2d 740. Separate property of a spouse, so held before marriage, presumably continues to be such. Holmes v. Grange Fraternal Fire Ins. Ass'n, 102 Cal.App.2d 911, 917[2], 228 P.2d 889. There is no presumption that community funds were used to improve separate property. Seligman v. Seligman, 85 Cal.App. 683, 690[4], 259 P. 984. While there are some exceptions, it is nevertheless true that as a general rule "* * * in the absence of an agreement to the contrary, where improvements are made upon the husband's separate real property with community funds, the improvements have the character of his separate property and belong to the husband." Wheeland v. Rodgers, 20 Cal.2d 218, 222[2], 124 P.2d 816, 819.

[9] We are satisfied that the evidence was sufficient to support the position of the trial court that the 40 acres under dispute did not become community property, nor did appellant acquire any community interest therein. This conclusion renders unnecessary the discussion of other points raised by respondents and appellant.

The decree appealed from is affirmed.

GRIFFIN, P. J., and MUSSELL, J., concur.

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170 Cal.App.2d 399

Gerald DUNITZ, Morris Luskin, Elliot R. Fine, Jacob Albert, Bernard Fineman, Abner Parker, Sydney J. Dunitz, Sylvia Dunitz, Dorothy Brown and Shirley Glossman, co-partners, doing business under the name and style of Macy Industrial Realty Company, Plaintiffs and Appellants,

v.

CITY OF LOS ANGELES, a municipal corporation, Department of Building and Safety of the City of Los Angeles, an administrative agency of the City of Los Angeles, Board of Building and Safety Commissioners of the City of Los Angeles, an administrative agency of the City of Los Angeles, Sidney F. Hill, Louis Warschaw, Ernest C. Hillman, Jr., Herman Charles Light and F. L. Sebesta, as members of the Board of Building and Safety Commissioners of the City of Los Angeles and Gilbert E. Morris, Superintendent of Building of the City of Los Angeles, Defendants and Respondents.

Civ. 23490.

District Court of Appeal, Second District, Division 1, California.

May 18, 1959.

Rehearing Denied June 15, 1959.

Hearing Denied July 15, 1959.

Action by property owners against city and others for declaratory judgment as to provisions of city municipal code respecting conditions of buildings deemed to be nuisances. The Superior Court of Los Angeles County, Leon T. David, J., rendered judgment denying relief and plaintiffs appealed. The District Court of Appeal, Nourse, J., pro tem., held that since property owners asked judgment declaring that sections of municipal code as interpreted by city authorities, relating to conditions of buildings, were invalid, alleging that they received notices that a city board had determined that there was probable cause to believe that their buildings were dangerous and had ordered them to show cause why they should not be condemned as public nuisances to be razed or reconstructed properly, but they failed to allege the nature or character of deficiencies and none of their allegations stated a present existing controversy for which declaratory relief could be addressed, but what they sought was actually an advisory opinion as to validity and meaning of numerous code provisions, declaratory relief was properly denied.

Judgment affirmed.

1. Declaratory Judgment ⚷5, 394

Grant of declaratory judgment lies within discretion of trial court and denial thereof will not be disturbed on appeal unless its discretion was clearly abused.

2. Declaratory Judgment ⚷315

Where property owners brought action against city for judgment declaring that sections of municipal code as interpreted by it, relating to conditions of buildings, were invalid, alleging that they received notices that a city board had determined that there was probable cause to believe that their buildings were dangerous and had ordered them to show cause why they should not be condemned as public nuisances to be razed or reconstructed, but they failed to allege nature or character of deficiencies and none of their allegations stated a present existing controversy, but what they sought was actually an advisory opinion as to validity and meaning of numerous code provisions, declaratory relief was properly denied as court could not assume that city and its agent would attempt to order demolition without hearing competent evidence.

* * *

Dunlap, Holmes, Ross & Woodson, Pasadena, for appellants.

Roger Arnebergh, City Atty., Bourke Jones, Asst. City Atty., Los Angeles, and Marcus E. Crahan, Jr., Deputy City Atty., Hollywood, for respondents.

NOURSE, Justice pro tem.

Plaintiffs appeal from a judgment dismissing the action entered after defendants' demurrer to the complaint as amended had been sustained without leave to amend.[1]

By their complaint plaintiffs sought to have the court declare "that Sections 91.0103, 96.101, 96.101.2, 96.112, 96.119 and 96.121 of the Los Angeles Municipal Code" as interpreted and applied by the defendants are invalid and unconstitutional and to have the court declare the proper meaning thereof and to enjoin the defendants from prosecuting certain proceedings against the property of the plaintiffs otherwise than in conformity with the meaning and interpretation given to the said code sections of the Municipal Code by the court.

[1] We have reached the conclusion that the lower court properly exercised its discretion under section 1061 of the Code of Civil Procedure in sustaining the demurrer and thereby denying the plaintiffs declaratory relief. Whether declaratory relief should be granted is a matter within the trial court's discretion and its denial of that remedy will not be disturbed on appeal unless it is clearly shown that the discretion was abused. Hannula v. Hacienda Homes, 34 Cal.2d 442, 448, 211 P.2d 302, 19 A.L.R.2d 1268; California Physicians' Service v. Garrison, 28 Cal.2d 790, 801, 172 P.2d 4, 167 A.L.R. 306; Moss v. Moss, 20 Cal.2d 640, 128 P.2d 526, 141 A.L.R. 1422.

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[1] Appellants make no contention that the court abused its discretion in denying them leave to amend and to the contrary waive any such grounds for reversal.

[2] By the complaint as amended plaintiffs allege in substance that they are the owners of approximately 12¼ acres of land situate in the manufacturing district of the city of Los Angeles and that there are approximately 30 buildings of various ages and types of construction situate thereon; that this property has a value in excess of $1,000,000. That prior to the commencement of this action they received notices from the Department of Building and Safety of the defendant city that the building inspectors of the city had filed with the Board of Building and Safety Commissioners of the city of Los Angeles reports as to the condition of said buildings and that the board had determined that there was probable cause to believe that each of the buildings and structures described in the notices was a "dangerous" building and ordered plaintiffs to show cause before the board at a time fixed in the notice, why said buildings or structures "should not be condemned as a public nuisance and said nuisance be abated by reconstructing or properly repairing said building or by razing or removing same." That as to three of the buildings they have received notices which conclude as follows:

"Whereas the above-enumerated dangerous and hazardous conditions exist in these buildings to such an extent that these are dangerous buildings and it is impossible to repair these buildings so that they will no longer exist as dangerous buildings and as nuisances without reconstructing them; and, Therefore, a hearing has been set before the Board of Building and Safety Commissioners to determine whether or not an order should be issued to vacate and demolish said buildings."

While it is alleged in the complaint that in the notices served upon appellants, 340 deficiencies in the buildings are specified, the complaint does not allege what the nature or character of the deficiencies specified in the notices are and it is impossible to determine whether the deficiencies claimed are due to deterioration of the buildings as erected or due to the failure of said buildings to comply with the existing building code or are deficiencies which create fire or health hazards and public nuisances in fact.

The complaint further alleges that during the two years last past the defendants have pursued a program known as a "rehabilitation survey" and have instituted proceedings "against owners of buildings that could not be presently constructed under existing law of the kind of materials and embodying certain features of design that are characteristic of older type buildings" and in said proceedings have required owners "to defend their said buildings against the claim by defendants that the same are 'nuisances.' as defined in said Sections 96.101 to 96.128, [of the Municipal Code] because they are built of such materials and embody such features of design that they do not and cannot, without virtual reconstruction, be made to comply with the law now regulating the construction of new buildings in the same location." That in many of the proceedings the property owners have been ordered by the defendants to demolish the existing buildings upon the grounds above stated; that the proceedings pursued by the defendants in the present case follow the same pattern as initiated by the defendants against other property owners; that the 18 cases in which demolition had been ordered the superior court had granted peremptory writs of mandate annulling orders for demolition.

The complaint further alleges that in order to defend the proceedings before the board it would be necessary for plaintiffs to expend not less than the sum of $25,000. The complaint then alleges that numerous controversies exist between plaintiffs and defendants in relation to the meaning and application of the sections of the Municipal Code first above mentioned.

It would unduly prolong this opinion and serve no useful purpose to state in detail the controversies that are alleged to exist between the parties. Suffice it to say that none of them states a present existing controversy based upon facts alleged to exist in the present proceedings to which any declaratory decree could be addressed. This is so because it cannot be determined from the complaint what the nature or character of the deficiencies in the plaintiffs' buildings are asserted to be and it cannot therefore be determined whether the plaintiffs will be adversely affected by the numerous sections of the ordinance here attacked, in the proceedings commenced by the defendants. What the plaintiffs seek in this action is not a declaration of their rights under the ordinance as applied to a definite factual situation but is an advisory opinion from the court as to the validity and meaning of the numerous sections of the code attacked. For example, it is alleged that the defendants contend that some of the buildings situated upon the plaintiffs' property are dangerous as that term is defined in section 96.101 and are, therefore, nuisances under section 96.101.2 of the Municipal Code, and that because certain of the materials of construction in said buildings and certain features of their design are such that they cannot without substantial reconstruction be made to conform to the standards required by existing law, said buildings may be ordered to be demolished at the expense of the plaintiffs and that said expense may be imposed by assessment as a lien against the property of the plaintiffs and that the defendants construe sections 91.0103 and 96.101–128 as authorizing retrospective application of the present building code to buildings erected prior to the enactment of that code, while the plaintiffs contend that the ordinance cannot declare buildings to be a nuisance because the material or features of design may not comply with the present building code regulating the construction of new buildings and that the ordinance cannot declare that to be a nuisance which is not in fact a nuisance. Yet there is no showing that the defendants in the present proceedings assert deficiencies in plaintiffs' buildings because the material of which they are constructed or their design does not comply with the present building code regulating the construction of new buildings in the same district or seek the demolition of plaintiffs' buildings because of such conditions. We cannot assume that the defendants will, in the pending proceedings, attempt to order the demolition of plaintiffs' buildings without first proving by competent evidence that plaintiffs' buildings are nuisances in fact which cannot from a practical standpoint be remedied by alteration or repair. We must assume that the defendants will not ignore the judgment of this court as set forth in Armistead v. City of Los Angeles, 152 Cal.App.2d 319, 313 P.2d 127.

The defendant city has the power through its administrative agency to abate nuisances and within constitutional limits to force property owners to abate conditions which in fact constitute nuisances or hazards to the public health or safety and neither this court nor could the trial court assume that in the present proceedings the defendants will attempt to exercise the police power of the city beyond its constitutional limits. If they should do so the plaintiffs have an adequate remedy under section 1094.5 of the Code of Civil Procedure and if in such proceedings the decision should be adverse to them, by appeal from such decision.

The trial court properly refused to undertake by declaratory judgment[2] to define in the abstract the meaning of the numerous provisions of the ordinance under consideration or the constitutionality of their application by the defendants. Monahan v. Department of Water & Power, 48 Cal.App.2d 746, 120 P.2d 730; Conroy v. Civil Service Commission, 75 Cal.App.2d 450, 456, 171 P.2d 500. To do so would amount to an attempt by the court to, through its decision, amend the ordinance under the guise of interpretation and lay down rules which would govern the local administrative body, not alone as to the present litigants but as to all similar matters.

The judgment is affirmed.

WHITE, P. J., and FOURT, J., concur.

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[2] The extended and erudite opinion filed by the trial court does not constitute such a judgment.

170 Cal.App.2d 58

August CICINELLI and Fay Cicinelli, Plaintiffs and Respondents,
v.
Genichiro IWASAKI, Naomi Iwasaki, Shogo Iwasaki and Three Crown Product Co., a Co-partnership, Defendants and Appellants.

Genichiro IWASAKI, Naomi Iwasaki, and Shogo Iwasaki, Plaintiffs and Appellants,
v.
ANFA PRODUCTS, INC., a California Corporation, Defendant and Respondent.
Civ. 23412, 23413.

District Court of Appeal, Second District,
Division 2, California.
April 30, 1959.

Lessees brought unlawful detainer action against sublessee to recover possession of subleased premises, on ground that sublessee's rights had terminated with alleged expiration of original lease and execution of new lease, and the sublessee contended that option to extend original lease had been exercised and that sublessee had exercised its option under the sublease to extend the sublease. The action was consolidated with an action for unlawful detainer by the lessors against the lessees. The Superior Court, Los Angeles County, Burnett Wolfson, J., entered judgments adverse to the lessees, and they appealed. The District Court of Appeal, Herndon, J., held that evidence sustained finding that option to extend original lease had been exercised and that therefore sublessee had right under sublessee to exercise its option to extend the sublease.

Judgment in action by lessees affirmed, and appeal from judgment in action by lessors dismissed.

1. Appeal and Error 🔑151(5)

Where judgment in second action was in all respects favorable to appellants, who noticed appeals from judgments in both first and second actions, and appellants made no attack on judgment in second action or on any finding or holding which underlay judgment in second action, their appeal therefrom did not lie and would be dismissed by the District Court of Appeal.

2. Appeal and Error 🔑151(5)

A party is not aggrieved by, and cannot appeal from, a judgment which is entirely in his favor.

3. Appeal and Error 🔑151(5)

When prevailing party attempts to appeal from a judgment entirely in his favor, appeal may be dismissed.

4. Landlord and Tenant 🔑86(1)

Provision in lease giving lessee option to renew lease creates only a contractual right and does not transfer any interest in the land until the option is exercised.

5. Landlord and Tenant 🔑91

When option of lessee to extend or renew lease is exercised, covenant to renew ceases to be a merely personal covenant and runs with the land, and lessee's and lessor's legal successors are entitled to the benefits and are burdened with duties and obligations, which covenant conferred and imposed on original parties.

6. Covenants 🔑53, 84

The distinguishing characteristic of a covenant running with the land is that both liability on it and enforcement of it pass with transfer of the estate, and it is binding on subsequent transferees of the property, even though they do not contractually assume any responsibility for performance of covenants running with the land.

7. Landlord and Tenant 🔑91
Specific Performance 🔑57

Where lessee has exercised option to renew lease, his right to possession of premises for additional term cannot be defeated by actions of landlord, and a lessee is entitled to specific performance of covenant to renew.

8. Landlord and Tenant 🔑91

Sublessee becomes vested with right to possession for additional term when renewal or extension options of both lease and sublease have been exercised.

9. Landlord and Tenant ⚷91

Exercise of renewal options in lease and sublease operated to vest in sublessee right to possession for additional term as against owners and their lessee.

10. Appeal and Error ⚷931(1)

On appeal, all conflicts in evidence must be resolved in favor of respondent and all legitimate and reasonable inferences indulged to uphold judgment.

11. Landlord and Tenant ⚷82

"Option" to extend lease is merely an offer, by which lessor binds himself in advance, to make a contract if lessee accepts on terms and within time designated.

See publication Words and Phrases, for other judicial constructions and definitions of "Option".

12. Landlord and Tenant ⚷86(1)

Since optionor is bound while optionee is free to accept or not, as he chooses, courts are strict in holding an optionee to exact compliance with terms of option to renew lease.

13. Landlord and Tenant ⚷86(1)

A formal written exercise of option to renew lease is not essential.

14. Landlord and Tenant ⚷86(2)

If lease does not contain any provision as to manner and time, in which option to renew lease is to be exercised, tenant may exercise option before expiration of original term by act or course of conduct indicating to lessor lessee's election to renew.

15. Landlord and Tenant ⚷86(1)

If option given to lessee to renew lease gives lessor right to demand increase in rental, lessee, to effectively exercise his option, must indicate his willingness to pay increased rental.

16. Landlord and Tenant ⚷291(13)

In unlawful detainer action by lessees against sublessee to recover possession of subleased premises, on ground that sublessee's rights had terminated with alleged expiration of original lease and execution of new lease, wherein sublessee contended that option to extend original lease had been exercised and that sublessee had exercised its option to extend sublease, evidence sustained trial court's finding that option to extend original lease had been exercised, and that therefore sublessee had right under sublease to exercise sublessee's option to extend sublease.

17. Trial ⚷382

Trier of fact properly may reject part of testimony of a witness, though not directly contradicted, and combine accepted portions with bits of testimony or inferences from testimony of other witness, thus weaving a cloth of truth out of selected available material.

18. Landlord and Tenant ⚷86(2)

Where assignee of lease and lessor had agreed that during five-year extension of lease under option to extend lease the monthly rental should be increased from $740 to $1,040, fact that check for $1,040 was sent by assignee of lease to lessor supported inference that assignee of lease was thereby indicating his intention to exercise option to extend lease for five years and was willing to pay increased rental.

19. Appeal and Error ⚷1071(5)

Where judgment under review by District Court of Appeal was independently sustained by adequately supported findings to effect that extension options in original lease and sublease were effectively exercised, issues in consolidated action concerning alleged fraud in the inducement of alleged new lease became wholly immaterial, and any technical inconsistencies in findings in the consolidated actions on issue of fraud could be disregarded by District Court of Appeal as immaterial.

20. Evidence ⚷461(1)

Where lease was fairly susceptible of either of two constructions advanced, extrinsic evidence including meaning given by parties to lease since its execution was admissible, not to vary or modify terms of lease, but to aid court in ascertaining true intent of parties.

21. Contracts ⚿170(1)

Construction given contract by acts and conduct of parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by court.

22. Action ⚿57(2)

It was within discretion of trial court to consolidate unlawful detainer action by lessees against sublessee and unlawful detainer action by lessors against lessees. West's Ann.Code Civ.Proc. § 1048.

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Welburn Mayock and Hugh E. MacBeth, Jr., Los Angeles, for appellants.

Ronald C. Roeschlaub and Walter J. McLellan, Los Angeles, for respondent Anfa Products, Inc.

HERNDON, Justice.

Appeals are here taken from the judgments rendered in two unlawful detainer actions which were consolidated for purposes of trial. The real property involved is located in Los Angeles County and consists of certain lots on which there is a food market building with a parking area.

In 1947 the owners, August and Fay Cicinelli, leased the property to one Kurtzman for a term of ten years ending December 31, 1956, with an option in the lessee to extend the lease for an additional term of five years at an increased rental. This lease will be referred to hereinafter as the "Kurtzman" lease. Later in the same year Kurtzman subleased a portion of the premises to Anfa Products, Inc., respondent herein, for a term also ending on December 31, 1956, but with an option in the sublessee to extend the sublease for an additional five years at a rental to be increased in proportion to any increase provided for in the extension of the master lease. This option was expressly conditioned upon an exercise of the lessee's option to extend the Kurtzman master lease. The Cicinellis executed a written approval of the sublease, and as a part thereof, provided that if they terminated the master lease because of the lessee's default, they would lease the sublet portions of the premises directly to Anfa.

In 1948 Kurtzman assigned his interest in the master lease to Mr. Kiro Nagano who operated the produce department on the premises. Early in 1956 Nagano discussed with Cicinelli the option provisions of the Kurtzman lease. Nagano indicated to Cicinelli that he contemplated the sale of his produce business and his interest under the Kurtzman lease to Genichiro, Naomi, and Shogo Iwasaki, appellants herein. During May or June of 1956, appellants commenced negotiations with Cicinelli for a new master lease to commence on January 1, 1957, and to run for ten years from that date. Although no agreement had been reached, a draft of a proposed lease had been examined by Cicinelli's attorney as early as June 22, 1956.

On June 26, 1956, Anfa sent Nagano, its sublessor, a notice of its exercise of its option to extend its sublease, and on June 30, 1956, Nagano sent a check for $1,040 to the Cicinellis. It should be noted at this point that the trial court found, upon evidence hereinafter more fully discussed, that Nagano's act in sending this $1,040 check was intended, and effective, to constitute an exercise of the lessee's option to extend the Kurtzman lease.

Thereafter, on July 7, 1956, the Cicinellis, as lessors, and appellants, as lessees, executed a new lease for a ten-year term commencing January 1, 1957. This lease will be hereinafter referred to as the "Iwasaki" lease. On July 30, Nagano assigned his interest in the Kurtzman lease to appellants in connection with the completion of their purchase of his produce business.

On September 13, 1956, Anfa sent to appellants and to the Cicinellis another notice of its option to extend its sublease. On September 28th appellants advised Anfa that they had secured a new master lease and did not intend to exercise the option to extend the Kurtzman lease.

On January 3, 1957, appellants filed their complaint against Anfa for unlawful detainer to recover possession of the subleased premises on the theory that Anfa's rights had terminated on December 31, 1956, with the expiration of the Kurtzman lease. Appellants alleged that they were entitled to possession of the premises by virtue of the Iwasaki lease executed on July 7, 1956.

Anfa's answer to this complaint pleaded two separate and distinct defenses: (1) that Anfa was entitled to possession of the subleased premises for the succeeding five years by virtue of the fact that on or about July 1, 1956, the lessee, Nagano, had exercised his option to extend the Kurtzman lease for five years and that contemporaneously Anfa had exercised its option to extend under the provisions of its sublease; and (2) that the Iwasaki lease of July 7, 1956, had been rescinded by the owners and lessors (the Cicinellis) upon the ground that they had been induced to execute the new lease by appellants' fraudulent representations to the effect that Anfa would be granted a new sublease. Thus, Anfa asserted that appellants had no right to possession of the premises by virtue of either the Iwasaki or Kurtzman lease.

Thereafter, on February 11, 1957, the owners, Fay and August Cicinelli, filed an action against appellants, the Iwasakis, stating one cause of action for unlawful detainer and a second for declaratory relief, alleging that the Iwasaki lease of July 7, 1956, had been effectively rescinded on the ground of fraud. Over appellant's objection the two causes were consolidated for purposes of trial. They were brought to trial before a judge sitting without a jury.

In appellant's action against Anfa the trial court found in substance that the lessee, Kiro Nagano, had exercised the option under the Kurtzman lease and that the sublessee, Anfa, had exercised its option under the sublease so that Anfa was entitled to possession of the subject premises for a term of five years from January 1, 1957. Judgment in favor of Anfa was accordingly entered in that action. In the second action the court found that appellants were innocent of fraud and entered a judgment determining that the Iwasaki lease was valid and subsisting, and that as against the plaintiff owners appellants were lawfully in possession thereunder.

[1-3] As we have indicated, appellants have noticed appeals from both judgments. But since the judgment in the second action is in all respects favorable to them, and since they have made no attack upon that judgment or upon any finding or holding which underlies it, their appeal therefrom does not lie. It is clear that a party is not aggrieved by, and cannot appeal from, a judgment which is entirely in his favor. Cook v. Stewart McKee & Co., 68 Cal.App.2d 758-762, 157 P.2d 868; In re Estate of Funkenstein, 170 Cal. 594, 595, 150 P. 987; see 3 Cal.Jur.2d 568, § 111 and 3 Witkin, California Procedure, 2181, § 35. When the prevailing party attempts to appeal from such a judgment, the appeal may be dismissed. Coburg Oil Co. v. Russell, 100 Cal.App.2d 202, 204, 223 P.2d 305. Accordingly, the appeal from the judgment in the Cicinelli case (No. 23412) will be dismissed.

On their appeal from the adverse judgment in their action against Anfa appellants contend: (1) that certain findings are unsupported by the evidence, (2) that the trial court made conflicting findings on the same evidence, and (3) that the trial court erred with respect to certain rulings on evidence, and (4) in consolidating the two actions for trial.

Despite the voluminous record and the extensive arguments of counsel, the really decisive question on this appeal may be simply stated: *is there substantial evidence in the record to support the trial court's finding that Kiro Nagano exercised the lessee's option to extend the Kurtzman lease?*

If Nagano did, in fact, exercise his option to extend the Kurtzman lease, the condition precedent to Anfa's right to extend its sublease was satisfied. Furthermore, as we shall later point out, the legal relationship between Nagano as lessee, and Anfa as sublessee, under the Kurtzman lease, was such that the substantially contemporaneous exercise of the two options created rights in favor of Anfa that were of such a character that they could not be defeated by the actions of appellants in executing a new lease with the owners and thereafter taking an assignment of the lessee's interest in the Kurtzman lease.

[4, 5] A provision in a lease giving the lessee the option to extend or renew the lease creates only a contractual right. Hayward Lbr. & Inv. Co. v. Construction Products Corp., 117 Cal.App.2d 221, 222, 229, 255 P.2d 473; 51 C.J.S. Landlord and Tenant § 56, p. 596; 35 C.J. 1012, § 129. It does not transfer any interest in the land (Dougherty v. California Kettleman, 9 Cal. 2d 58, 78, 69 P.2d 155) until the option is exercised. Standard Oil Co. v. Slye, 164 Cal. 435, 442, 129 P. 589. However, when the option is exercised the covenant to renew ceases to be merely personal and runs with the land. The legal successors of the lessee as well as of the lessor are entitled to the benefits, and are burdened with the duties and obligations, which the covenant conferred and imposed on the original parties. Standard Oil Co. v. Slye, supra, 164 Cal. 435, 129 P. 589; 30 Cal.Jur.2d 176, § 48; 51 C.J.S. Landlord and Tenant § 58(b), pp. 601–602; 35 C.J. 1013, § 133; see generally 1 Tiffany, Real Property, 208, § 126.

[6] As stated in 14 Cal.Jur.2d 17, § 12: "The distinguishing characteristic of a covenant running with the land is that both liability upon it and enforcement of it pass with the transfer of the estate. Covenants running with the land are binding on subsequent transferees of the property, even though they do not contractually assume any responsibility for their performance. In other words, if the covenant runs with the land, it is unnecessary to establish liability founded on privity of contract. It binds not only the original covenantor, but also his heirs, devisees, assignees, and subsequent purchasers."

[7–9] Thus, where the lessee has exercised an option to renew a lease, his right to possession of the premises for the additional term cannot be defeated by the actions of the landlord. The lessee is entitled to specific performance of the covenant to renew. Penilla v. Gerstenkorn, 86 Cal.App. 668, 261 P. 488; Hall v. Center, 40 Cal. 63, 68; cf. Standard Oil Co. v. Slye, supra, 164 Cal. 435, 442–444, 129 P. 589. The sublessee stands in exactly the same position and becomes vested with a right to possession of the premises for the additional term when the renewal or extension options of both lease and sublease have been exercised. In Horn & Hardart Co. v. 115 East 14th Street Co., Sup., 7 N.Y.S.2d 688, 690, the lessee, with an option to renew for an additional term, executed a sublease with a similar renewal provision. Prior to the expiration of the original term, the lessee exercised its option to renew and the sublessee, pursuant to the provisions of the sublease signified its desire to renew. It was held that the lessee could not thereafter withdraw its exercise of the option, and the sublessee was granted specific performance of the renewal provisions of the lease and sublease as against the owner and the lessee. See annotation Lease—Option to Renew—Duty to Sublessee, 127 A.L.R. 948, 953. Thus, in the case at bar the exercise of the options in the lease and sublease operated to vest in Anfa a right to possession for the additional term as against the owners and their lessees.

[10] The instant record discloses a substantial conflict in the evidence, particularly in the testimony of Cicinelli and Nagano as to conversations between them relative to the extension of the Kurtzman lease. However, according to the familiar rule, all conflicts must be resolved in favor of respondent and all legitimate and reasonable inferences indulged to uphold the judgment. Crawford v. Southern Pacific Co., 3 Cal.2d 427, 429, 45 P.2d 183; Roberts v. Salot, 166 Cal.App.2d 294, 333 P.2d 232; see 4 Cal.Jur.2d 485, § 606. In the light of this rule we may summarize the evidence bearing on Nagano's alleged exercise of the option as follows: Nagano acquired his interest in the Kurtzman lease in 1948 by an assignment from the original lessee. He

paid a monthly rental of $740. Late in 1955 or early in 1956, Nagano approached Cicinelli and discussed the exercise of the option under the Kurtzman lease. No agreement was reached by the parties, but it was the understanding of both that the monthly rental for the additional five-year period would be $1,040. In May of 1956 Nagano indicated to Cicinelli that he was considering the sale of his business and his leasehold to appellants, the Iwasakis, whom he had known for approximately twenty years. Later that month or early in June there was a meeting at Nagano's home at which appellants, Nagano, and Cicinelli were present. The sale of Nagano's business was discussed, and appellants indicated a desire for a lease with a term of ten years. Cicinelli responded that he would consider such an arrangement only *after* the five-year option of the Kurtzman lease had been taken up. No agreement was reached; however, at a second meeting of all the parties in June, 1956, Cicinelli indicated that if the five-year option was exercised, he would give appellants a new lease for a second five-year period. Again the parties came to no agreement but they consulted their respective attorneys and continued the negotiations.

On June 26, 1956, as we have previously noted, Anfa sent Nagano written notice of its exercise of the option to extend the sublease. A few days before the end of June, Cicinelli received a telephone call from Shogo Iwasaki and Cicinelli testified the following conversation ensued: "He said it was near the end of the month, and he says, 'Who is to exercise this option?'. We talked it over.

"Q. Now, what did you say? A. I said that Mr. Nagano has the lease and he should send me the check to take up the option.

"Q. Did you make any mention as to the amount? A. Yes, I told him it would be $1040.

"Q. What did Mr. Shogo Iwasaki say, if anything? A. He didn't say any more."

Thereafter, on June 30, 1956, Nagano mailed to the Cicinellis his check in the amount of $1,040. This check was received by the owners on July 3, 1956. No writing accompanied the check, nor was there any notation thereon respecting the purpose for which it was sent. It should be observed that under the Kurtzman lease the last six months' rental had been prepaid and no sums were due as rent from Nagano to Cicinelli. At about this time, appellants, with Nagano's consent, took possession of the part of the leased premises occupied by Nagano's produce business.

Nagano's version of the events leading up to the mailing of the check is quite different from Cicinelli's. He testified that he did not intend to exercise the option, and he explained that the check for $1,040 was sent to Cicinelli, at Cicinelli's request, as advance rent on the *new* lease which was to be executed between Cicinelli and appellants. His explanation was that the check was to cover the rental for a period subsequent to January 1, 1957, and that when the sale of his business and leasehold to the appellants was completed, he would be repaid the rent he had advanced. Cicinelli did not recall the conversation to which Nagano testified. It may be observed that at another point, on cross-examination, Nagano indicated that the check was sent to pay the rent for July, 1956, although that month's rent was $740 and had been prepaid nine years before.

[11–15] An option to extend a lease is merely an offer by which the lessor binds himself in advance to make a contract if the lessee accepts upon the terms and within the time designated. Hayward Lbr. & Inv. Co. v. Construction Prod. Corp., supra, 117 Cal.App.2d 221, 229, 255 P.2d 473; see generally 12 Cal.Jur.2d 204, § 15. As stated in the last-cited decision:

"Since the optionor is bound while the optionee is free to accept or not as he chooses, courts are strict in holding an optionee to exact compliance with the terms of the option." See also Wightman v.

Hall, 62 Cal.App. 632, 634, 217 P. 580. But a formal written exercise of the option is not essential. Buck v. Cardwell, 161 Cal.App.2d 830, 836, 327 P.2d 223; Schmitt v. Felix, 157 Cal.App.2d 642, 645, 321 P. 2d 473; Cafe Apollo Co. v. Anselm, 47 Cal.App.2d 151, 155, 117 P.2d 691. And if the lease does not contain any provision as to the manner and time in which the option is to be exercised, the tenant may exercise the option before the expiration of the original term by an act or course of conduct indicating to the lessor his election to renew. Dickinson v. Robinson, 4 Cir., 272 F. 77, 80; Nicklis v. Nakano, 118 Colo. 317, 195 P.2d 723, 724 [where the last month's rent had been prepaid, the tenant's mailing of a check and continuing in possession constituted an exercise of the option to renew]; see 51 A.L.R.2d 1412. However, if the option provision gives the lessor the right to demand an *increase* in the rental, to effectively exercise his option to extend the lessee must indicate his willingness to pay the increased rental. Colyear v. Tobriner, 7 Cal.2d 735, 740, 62 P.2d 741, 109 A.L.R. 191; see 30 Cal.Jur. 2d 240, § 102.

[16, 17] The evidence adequately supports the trial court's finding that the option was exercised, notwithstanding Nagano's testimony to the contrary. Odenthal v. Lee, 113 Cal.App.2d 666, 669, 248 P.2d 937; Rolinson v. Rolinson, 132 Cal. App.2d 387, 390. As stated in Nevarov v. Caldwell, 161 Cal.App.2d 762, 777, 327 P.2d 111, 121, the trier of the fact "* * * properly may reject part of the testimony of a witness, though not directly contradicted, and combine the accepted portions with bits of testimony or inferences from the testimony of other witnesses thus weaving a cloth of truth out of selected available material."

[18] Both Nagano and appellants were fully aware of Cicinelli's insistence that the five-year option under the Kurtzman lease be exercised, and Nagano was also aware of Anfa's decision to exercise its option under the sublease. Negotiations between Nagano and appellants were evidently far advanced and appellants were in possession of and operating Nagano's produce business. Granted that there is no evidence that Shogo Iwasaki was acting as Nagano's agent when he telephoned to Cicinelli, nevertheless under the circumstances it is a fair inference that Shogo Iwasaki communicated Cicinelli's instructions to Nagano. The check for $1,040 which Nagano mailed immediately thereafter is otherwise inexplicable. For the preceding nine years the monthly rental had been only $740, but Nagano and Cicinelli had agreed that during the five-year extension the monthly rental would be $1,040. The fact that a check for this larger sum was sent supports the inference that Nagano was thereby indicating his intention to exercise the option and his willingness to pay the increased rental. Cf. Colyear v. Tobriner, supra, 7 Cal.2d 735, 740, 62 P.2d 741. The fact that Nagano sent Cicinelli a check at a time when he was not obligated to pay anything, and the fact that the check was for the exact sum which Cicinelli had set as the amount required for the exercise of the option permits the inference that Nagano thereby exercised the option under the Kurtzman lease.

Nagano's explanation that the check was a prepayment of rent on a new lease still under negotiation between Cicinelli and the Iwasakis could reasonably be rejected as improbable. Whether the option was exercised by Nagano was essentially a question of fact to be resolved by the trial court. Cf. Buck v. Cardwell, supra, 161 Cal.App.2d 830, 327 P.2d 223.

Appellants' contention that the trial court made conflicting findings on the same evidence is unavailing. In the Cicinelli case (in which appellants prevailed) the trial court found that appellants were innocent of fraud and that the Iwasaki lease had not been effectively rescinded and was valid and subsisting. But in the Anfa case the court made a "catchall" finding to the effect that all allegations of the answer not expressly found to be untrue were true. Referring to the allegations of fraud in Anfa's answer (which were not expressly found untrue), appellants argue that the resulting technical conflict in the findings in the two cases requires reversal of the judgment against them and in favor of Anfa.

[19] This argument must be rejected. We have held that the judgment under review is independently sustained by adequately supported findings to the effect that the extension options in the Kurtzman lease and in the Anfa sublease were effectively exercised. Therefore, the issues concerning alleged fraud in the inducement of the Iwasaki lease have become wholly immaterial. By the same token, any technical inconsistencies in the findings upon such issues may be disregarded as immaterial. Bovo v. Abrahamson, 100 Cal.App. 373, 381–382, 280 P. 191; see 4 Cal.Jur.2d 444, § 571.

Appellants also argue that there was a finding in the Cicinelli case that the Kurtzman lease had expired on December 31, 1956, directly conflicting with the findings in the Anfa case that Anfa is entitled to possession by virtue of the Kurtzman lease. Appellants' argument ignores the language of the finding in the Cicinelli case which refers to the termination of an "original" tenancy on December 31, 1956 "* * * subject to the right of option in the lessee to extend the same for an additional term of five (5) years thereafter * * *" Moreover, in the same finding, there is an express statement that appellants' right to possession is "* * * subject to such rights of possession in Anfa Products, Inc., * * * as are adjudicated and established in the companion case * * *" Thus, it is clear that this finding merely refers to the termination of the original ten-year term under the Kurtzman lease and does not constitute a finding that the earlier exercise of the option provisions of the Kurtzman lease was ineffective to vest Anfa with the right to remain in possession under its sublease after December 31, 1956.

Appellants contend that the trial court erred in admitting the testimony of Cicinelli as to his understanding with Nagano that the monthly rental during the five-year extension would be $1,040. Appellants argue that the admission of Cicinelli's testimony violated the parol evidence rule. It is appellants' theory that under the Kurtzman lease the monthly rental during the five-year extension was to be $940, and that the trial court's finding that the monthly rental was $1,040 is without evidentiary support.

The option clause of the Kurtzman lease reads as follows: "9. It is hereby agreed that the Lessee shall have and is hereby given an option for an additional term of five years upon the same terms and conditions as are set forth in this lease except that the monthly rental may be increased to $900 per month if this is required by the Lessors."

[20, 21] The Kurtzman lease originally provided for a monthly rental of $600 per month *plus* a variable sum consisting of a percentage of certain profits of the lessee during the preceding month. Subsequently, the parties modified the Kurtzman lease as follows: a $40 a month rental was added for another lot included within the leased premises, the rental payment based on profits was deleted, and a flat increase of $100 a month was substituted therefor. The result was a constant base rental of $740 per month during the first ten years of the Kurtzman lease. In the light of these amendments to the original lease the rental provisions of the option clause ceased to be entirely clear. Respondent asserts that the obvious effect of the option clause was to give the owner the right to demand a $300 monthly increase in the rent during the five-year extension, and that the rental under the option, as amended, was $1,040. Appellants argue that the clear import of the lease, as amended, was to set a limit of $940 which the owner could demand. It is apparent that the lease, as amended, is not clear on its face (cf. Decter v. Stevenson Properties, Inc., 39 Cal.2d 407, 416, 247 P.2d 11) and is fairly susceptible of either of the two constructions advanced. In such a situation,

extrinsic evidence including the meaning given by the parties to the contract since its execution, is admissible. Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co., 46 Cal.2d 517, 527, 297 P.2d 428; Union Oil Co. v. Union Sugar Co., 31 Cal.2d 300, 306, 188 P.2d 470. Cicinelli's testimony was not admitted to vary or modify the terms of the lease but to aid the court in ascertaining the true intent of the parties, and as stated in Beneficial Fire & Casualty Ins. Co. v. Kurt Hitke & Co., supra, 46 Cal.2d 517, 524, 297 P.2d 428, 431, "'"* * * a construction given the contract by the acts and conduct of the parties with knowledge of its terms, before any controversy has arisen as to its meaning, is entitled to great weight and will, when reasonable, be adopted and enforced by the court." Woodbine v. Van Horn, 29 Cal.2d 95, 104, 173 P.2d 17, 22 * * *.' Barham v. Barham, 33 Cal.2d 416, 422, 202 P.2d 289, 293."

Appellants also complain that the trial court erred in striking certain testimony of Nagano to the effect that he did *not* intend to exercise the option to renew under the Kurtzman lease. On direct examination appellants' counsel propounded the following question: "Mr. Nagano, at the time you sent that $1,040 check to Mr. Cicinelli, did you intend by that act to renew your lease?" After the witness had answered the question in the negative, the court granted a motion to strike the answer and sustained an objection "to the form of the question". However, the court thereupon allowed appellants' counsel to reframe the question, and the witness was allowed to testify fully as to his intent and purpose in sending the check. Later the trial judge stated his understanding of the purport of Nagano's testimony on this point which was to the effect that the $1,040 check was given as an advance payment of rent on the lease which was in process of negotiation between appellants and the Cicinellis. In this state of the record, appellants' assignment of error must be rejected.

[22] Finally, appellants' contention that the court committed prejudicial error in consolidating the two cases for trial must be rejected. The order was within the court's discretion (Code Civ.Proc., § 1048) and appellants have failed to establish an abuse of that judicial discretion, or, if it occurred, how it might be remedied on this appeal.

The appeal from the judgment in the Cicinelli case (No. 23412) is dismissed; the judgment in the Anfa case (No. 23413) is affirmed.

FOX, P. J., and ASHBURN, J., concur.

ALLIED PROPERTIES, dba Plaza Hotel, Clift Hotel and Biltmore Hotel, Petitioner and Respondent,

v.

BOARD OF EQUALIZATION of State of California, Respondent and Appellant.*

No. 18342.

District Court of Appeal, First District, Division 1, California.

May 18, 1959.

As Corrected May 25, 1959.

As Corrected on Denial of Rehearing June 9, 1959.

Hearing Granted July 10, 1959.

Mandamus proceedings against Department of Alcoholic Beverage Control by liquor retailer to compel Department to vacate its decision imposing a 15-day suspension against retailer. The Superior Court, City and County of San Francisco, Albert C. Wollenberg, J., ordered issuance of writ and Department appealed. The District Court of Appeal, Bray, P. J., held that Alcoholic Beverage Control Act requiring manufacturer of distilled spirits to file fair trade contracts and requiring that all distilled spirits and wines be sold at retail level pursuant to fair trade contracts or schedules filed with Department, is not unconstitutional on ground that it delegates legislative power or violates due process.

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* Opinion vacated 346 P.2d 737.

Reversed.

Hanson, J. pro tem., dissented.

1. Constitutional Law 🔑64, 298(1)
Intoxicating Liquors 🔑15

Statute requiring manufacturer or his agent, wholesaler or rectifier to file fair trade contracts and requiring that all distilled spirits and wines must be sold at retail only pursuant to fair trade contracts or schedules filed with Department of Alcoholic Beverage Control is not unconstitutional on ground that it constitutes an unlawful delegation of legislative power or is a violation of due process. West's Ann. Bus. & Prof.Code, §§ 24750, 24757, 24850, 24881; West's Ann.Const. art. 1; art. 4, § 1; U.S.C.A.Const. Amend. 14.

2. Intoxicating Liquors 🔑6

Power of Legislature to regulate liquor business is much greater than its power to regulate types of business which are not regarded as possessing the possibilities for evil and ill effects upon the public welfare as is the liquor business, and Legislature may even prohibit the manufacture and sale of intoxicating liquors, so that if business is permitted its regulation may be drastic, provided only that regulations are reasonable. West's Ann.Const. art. 20, § 22.

3. Intoxicating Liquors 🔑110

Test of reasonableness of regulations over intoxicating liquor business is not that test applicable to ordinary business but that applicable to liquor business which requires far more restrictions.

4. Constitutional Law 🔑48

Courts presume that legislative acts are valid and will not declare them unconstitutional unless they are repugnant to the organic law.

5. Constitutional Law 🔑253

A statute regulating commercial transactions does not violate due process clause of either the federal or California Constitutions unless it is so unreasonable as to dispel presumption that it rests upon some rational basis within the knowledge and experience of the legislators. West's Ann.Const. art. 1; art. 4, § 1; U.S.C.A.Const. Amend. 14.

6. Intoxicating Liquors 🔑15

In making sale of distilled spirits pursuant to fair trade contracts mandatory, Legislature has acted within the police power of the state and within constitutional authority. West's Ann.Const. art. 20, § 22.

7. Intoxicating Liquors 🔑110

While under the California Fair Trade Act manufacturer makes two decisions, that is, whether his product should be fair traded and what the price shall be, under Alcoholic Beverage Control Act liquor manufacturer can make the second decision only. West's Ann.Bus. & Prof.Code, §§ 16900–16905, 24750 et seq.

8. Intoxicating Liquors 🔑15

Legislature is not bound in dealing with liquor business to apply the same penalties for violation of fair trade contracts as they apply to other types of business. West's Ann.Bus. & Prof.Code, §§ 24750, 24757, 24850, 24881; West's Ann.Const. art. 1; art. 4, § 1; U.S.C.A.Const. Amend. 14.

9. Intoxicating Liquors 🔑106(1)

Suspension of retail liquor dealer's license is not penal, but disciplinary.

10. Intoxicating Liquors 🔑15

Fact that under statute manufacturers of distilled spirits are required to enter fair trade contracts whereas manufacturers and producers of wine have option of submitting retail price lists with Department of Alcoholic Beverage Control, rather than entering fair trade contracts, does not invalidate requirement that retailers of intoxicating liquors and wines sell at fair trade prices only. West's Ann.Bus. & Prof.Code, §§ 24750–24757, 24850–24881, 25000–25010.

Stanley Mosk, Atty. Gen., Charles A. Barrett, Deputy Atty. Gen., for appellant.

Steinhart, Goldberg, Feigenbaum & Ladar, San Francisco, for respondent.

Athearn, Chandler, Hoffman, San Francisco, Emmett E. Doherty, Los Angeles, Arden & Arden, Beverly Hills, Brobeck, Phleger & Harrison, Pillsbury, Madison & Sutro, Heller, Ehrman, White & McAuliffe, J. Albert Hutchinson, San Francisco, amici curiae on behalf of appellant.

Samuels, Jacobs & Sills, San Francisco, amici curiae on behalf of respondent.

BRAY, Presiding Justice.

The Board of Equalization of the State of California and its constitutional successor, the Department of Alcoholic Beverage Control, appeal from a judgment of the superior court ordering the issuance of a writ of mandate commanding the department to vacate its decision imposing a 15-day suspension against the off-sale general licenses of petitioner Allied Properties and that certain accusations against said petitioner be dismissed.[1, 2]

Questions Presented.

Are sections 24750, 24757, 24850 and 24881, Business and Professions Code (formerly sections 55.5, 55.6 and 55.65 of the Alcoholic Beverage Control Act (Stats. 1935, p. 1123, as amended Stats.1937, p. 2126) and rule 99 of the Department of Alcoholic Beverage Control, which require the manufacturer or his agent, wholesaler or rectifier to file fair trade contracts, unconstitutional in that they delegate legislative power and authority in violation of article IV, section 1, California Constitution, and the due process clause of the Fourteenth Amendment of the United States Constitution and of article I of the California Constitution? Primarily the question is whether the state may lawfully provide that all distilled spirits and wines be sold at the retail level only pursuant to fair trade contracts or schedules filed with the department.

Record.

Petitioner Allied Properties owns the Plaza and Clift Hotels in San Francisco and the Santa Barbara Biltmore in Santa Barbara. In 1953 accusations were filed against petitioner charging it with violation of the then sections 55.5, 55.6 and 55.65, A.B.C. Act, and department rule 99. These sections prohibit the sale of distilled spirits by an off-sale license holder except at the prices established by fair trade contracts filed as therein required, and also prohibits the sale of wines unless sold at the fair trade contract prices or at the price set in price schedules filed as therein required. The wholesalers, distributors or rectifiers of the alcoholic beverages that are within the purview of the statute must file price schedules with the authority and the retailer to whom they sell must comply with these price schedules or be faced with the penal sanctions of the act. At the hearing of the accusation petitioner stipulated to the facts as charged in the accusations, and readily admitted the sale at less than the fair trade prices. Petitioner's licenses were suspended for 15 days. Thereupon petitioner filed a petition for writ of mandate in the superior court. That court held that the statute requiring retail sales of distilled spirits at fair trade prices is unconstitutional.

Is There an Unlawful Delegation of Legislative Power?

Petitioner and the amicus curiae in support of petitioner concede that the Legislature, in the proper exercise of the police power of the state, has the right to fix retail prices of distilled liquors and wines for the protection of the general welfare. They contend that in doing so, however, (1) the Legislature cannot delegate the power to fix such prices to private

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[1] Subsequent to the filing of the writ of mandate proceeding in the superior court against the Board of Equalization, the Department of Alcoholic Beverage Control, by constitutional amendment, succeeded the Board of Equalization. Herein "department" refers to whichever entity was acting at the time.

[2] Four amici curiae briefs were filed in support of appellant, one in support of respondent.

individuals or groups, and (2) that it cannot delegate that power without establishing ascertainable standards as a guide for the exercise thereof. They further contend that the statute in question here violates both of those principles.

As said in Scovill Mfg. Co. v. Skaggs etc. Drug Stores, 45 Cal.2d 881, 887, 291 P.2d 936, 940 "It is beyond question that this state has aligned itself with the great majority of its sister states and with the decisions of the federal courts in sustaining the constitutionality of fair trade laws * * *" In that case the defendant was selling products at retail below the fair trade prices established by the plaintiff manufacturer in contracts made by the plaintiff with its buyers and wholesalers. The contracts complied with section 16902, Business and Professions Code, the general fair trade contracts section. The defendant was not a party to any of these contracts. Section 16904, Business and Professions Code, provided: "Wilfully and knowingly advertising, offering for sale or selling any commodity at less than the price stipulated in any contract entered into pursuant to this chapter, whether the person so advertising, offering for sale or selling is or is not a party to such contract, is unfair competition and is actionable at the suit of any person damaged thereby." The constitutionality of those sections was there attacked upon the same grounds that the constitutionality of the statute in question here is attacked. The court said, 45 Cal.2d at pages 884–885, 291 P.2d at page 938: "All of the constitutional objections raised by the defendant have been expressly or by necessary implication decided against it. In Max Factor & Co. v. Kunsman (1936), 5 Cal.2d 446, 55 P.2d 177, this court held that the Fair Trade Act, and in particular the provision as to nonsigners, was a proper exercise of the police power; that it was not arbitrary nor unreasonable legislation, and that it was not a denial of due process of law nor of the equal protection of the laws. That decision, see also Pyroil Sales Co., Inc. v. Pep Boys, M.M. & J., 5 Cal.2d 784, 55 P.2d 194, 1186, was in effect affirmed unanimously by the United States Supreme Court in Pep Boys, Manny Moe & Jack v. Pyroil Sales Co., 1936, 299 U.S. 198, 57 S.Ct. 147, 81 L.Ed. 122, on the authority of Old Dearborn Distributing Co. v. Seagram Distillers Corp. (1936), 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109 [106 A.L.R. 1476]. The last case cited upheld the validity of the Illinois Fair Trade Act S.H.A. ch. 121½, § 188 et seq., which is substantially identical with the California act." It then discussed the California cases and those in other states and the federal cases on the subject, and said (45 Cal.2d at pages 885, 888, 291 P.2d at page 939): "From the foregoing it also appears that the question whether the Fair Trade Act is a reasonable and non-discriminatory exercise of the police power in the field of interstate commerce has been covered by the federal and state legislation and settled by court decisions. * * * Nor is there a delegation of legislative power to fix prices in the present case. The act is only a legislative declaration that contracts between private parties establishing certain retail prices is not against public policy.

"Although the question of delegation of legislative power was not expressly considered in the Max Factor case, the United States Supreme Court in Old Dearborn Distributing Co. v. Seagram Distillers Corp., supra, 299 U.S. 183, 194, 57 S.Ct. 139, 144, 81 L.Ed. 109, rejected the contention that in fair trade acts 'there is an unlawful delegation of power to private persons to control the disposition of property of others'. The contention that such delegation does not accord due process of law or violates provisions of state constitutions which vest legislative power in the legislature only (similar to art. IV, sec. 1 of the California Constitution) has been rejected in several state courts. Triner Corp. v. McNeil, 363 Ill. 559, 2 N.E. 2d 929; Goldsmith v. Mead Johnson & Co., 176 Md. 682, 7 A.2d 176; Johnson & Johnson v. Weissbard, 121 N.J.Eq. 585, 191 A. 873; Lilly & Co. v. Saunders, 216

N.C. 163, 4 S.E.2d 528, 125 A.L.R. 1308; Weco Products Co v. Reed Drug Co., supra, 225 Wis. 474, 274 N.W. 426; see also 11 Am.Jur., Const.Law, § 221, p. 933. Here the acts of private parties in entering into contracts for the sale of commodities constitute the facts in contemplation of which the legislature acted, and upon the existence of which the provisions of the enactment were to be applicable. The private contracts are no more legislative in character than are other acts or conduct of private parties undertaken as a prerequisite to the application of a statute. The consequence that the statute has become applicable, and conduct in violation thereof has become actionable is in no way due to the exercise of any assumed legislative power on the part of the contracting parties. See Weco Products v. Reed Drug Co., supra, 225 Wis. 474, 224 N.W. 426. We conclude that there is no delegation of the legislative function in violation of constitutional prohibitions." See also Old Dearborn Distributing Co. v. Seagram Distillers Corp., 1936, 299 U.S. 183, 57 S.Ct. 139, 81 L.Ed. 109, upholding an Illinois Fair Trade Act similar to the California one.

People v. Dunn, 80 Cal. 211, 22 P. 140, held that the provisions in an act giving the board of trustees of the California Home for the Feeble Minded and two citizens authority to select a site for such a public home did not constitute a delegation of legislative functions or powers. In Trinity County v. Mendocino County, 151 Cal. 279, at page 286, 90 P. 685, 687, an act declaring in advance of the work that the line which might be surveyed and marked by a surveyor selected in accordance with its provisions should be the boundary line between the two counties, was held not to be an unlawful delegation of legislative power, the court saying: "The case is similar in principle to those cases where it is held it is not a delegation of legislative power to commit to some officer, person, or board the power to determine the fact that an applicant for some license or privilege is or is not of good character, or possesses or does not possess some other qualification necessary to entitle him, under the law, to the license or privilege, and empowering such officer, person, or board, if it shall determine that such person has the necessary qualifications, to forthwith issue the license. In such cases the law declares that a certain class of persons are entitled to the license. The determination of the fact that a particular applicant is of the class described in the law as so entitled is not a legislative act, but one which is either ministerial or judicial, and hence to commit the power to make such determination to any other person or body is not a delegation of legislative power."

[1-5] Under the other Fair Trade Laws of the state (Bus. and Prof.Code §§ 16900-16905) the Legislature has given to private parties the right to sue persons who wilfully and knowingly sell any commodity at less than the price stipulated in a fair trade contract, even though such persons are not parties to the contract. In the case of the A.B.C. Fair Trade Act the Legislature gives the department the right to discipline licensees violating the terms of such contracts. As it has been held in Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra, 45 Cal.2d 881, 888, 291 P.2d 936, that there is no unlawful delegation of legislative power in the other Fair Trade Laws, we can see no reason why the A.B.C. Fair Trade Act should be interpreted differently from the other. Petitioner contends that there is a difference in that in the other Fair Trade Laws the contract between the manufacturer and the retailer is a voluntary one, whereas under the A.B.C. Act the contract is compulsory. But even under the other Fair Trade Laws, so far as they affect nonsigners of contracts which have been entered into between the manufacturer and its buyers and wholesalers, there is a compulsory feature. The nonsigner, if he has knowledge of such contracts, is compelled to charge the prices listed therein. Moreover, the power of the Legislature to regulate the liquor business is much greater than its

power to regulate types of business which are not regarded as possessing the possibilities for evil and ill effects upon the public welfare as is the liquor business. Section 22 of article XX of the California Constitution gives the state broad and comprehensive powers to regulate all phases of the liquor business. It provides: "The Legislature may authorize, subject to reasonable restrictions, the sale in retail stores of alcoholic beverages contained in the original packages." The Legislature may even prohibit the manufacture and sale of intoxicating liquors. If the business is permitted, its regulation may be drastic, provided only that the regulations are reasonable. See Cooper v. State Board of Equalization, 137 Cal.App.2d 672, 679–680, 290 P.2d 914. Of course, it could not be reasonable if it were for any reason unconstitutional. The test of reasonableness is not that applicable to ordinary businesses but to the liquor business which requires far more restrictions than the former. See Cooper v. State Board of Equalization, supra, 137 Cal.App.2d 672, 679, 290 P.2d 914. The courts presume that legislative acts are valid and will not declare them unconstitutional unless they are clearly repugnant to the organic law. (See 45 Cal.Jur.2d 624.) Also a statute regulating commercial transactions does not violate the due process clause of either the federal or California Constitutions unless it is proved so unreasonable as to dispel the presumption that it rests upon some rational basis within the knowledge and experience of the legislators. United States v. Carolene Products Co., 304 U.S. 144, 154, 58 S.Ct. 778, 82 L.Ed. 1234; In re Fuller, 15 Cal.2d 425, 428, 102 P.2d 321. It is obvious that the purpose of the provisions requiring sale of distilled spirits and wines pursuant to fair trade contracts is to discourage price cutting at the retail level, and thereby prevent the attendant threat of over-indulgence by the public who might be enticed into buying particular brands of liquor because of bargain prices offered by a retailer. One of the objects of the A.B.C. Act as set forth in section 1 (now Bus. and Prof.Code § 23001) is "to promote temperance in the use and consumption of alcoholic beverages." Again it is to insure to the public the fact that when brand liquor is purchased the purchaser will know that his retailer is selling it at the same price as it is sold elsewhere and hence eliminates discrimination against the consumer. The section further states: "It is hereby declared that the subject matter of this division involves in the highest degree the economic, social, and moral well-being and the safety of the State and of all its people. All provisions of this division shall be liberally construed for the accomplishment of these purposes." The restriction is one more aid in the promotion of temperance.

[6] In making the sale of distilled spirits pursuant to fair trade contracts mandatory the Legislature has acted within the police power of the state and within the authority granted by article XX, section 22, California Constitution. We cannot say that the legislative assumption that price stability at the retail level of comparable brands will prohibit price wars and bargain sales and thereby will encourage and promote moderation and temperance in the use of alcoholic beverages is unfounded. On the contrary, it appears that the restriction which prevents use of particular brands of distilled spirits as "loss leaders" which use might increase the consumption of such beverages is a reasonable one.

Petitioner relies heavily on State Board of Dry Cleaners v. Thrift-D-Lux Cleaners, 40 Cal.2d 436, 254 P.2d 29. There the Legislature created a State Board of Dry Cleaners, Business and Professions Code, § 9560 et seq., consisting of seven members, six of whom must be engaged in the dry cleaning business, the seventh a member of the general public. The board was empowered to establish minimum price schedules for the various items of cleaning, dyeing and pressing services. The act provided that violations of the minimum price schedule could be prevented by injunctive relief. The statute was held unconstitutional because it (1) dealt with a business which in nowise was affected with a public interest and the price fixing provision was in nowise an enactment providing for the public health, safety, morals or general welfare and hence there was an improper exercise of the police power; (2) attempted to delegate legislative powers to an administrative board comprised of persons directly interested in the operation of the regulatory rule with no guide for the exercise of the delegated authority. The court held that the delegation was clearly arbitrary. Obviously the first ground could not apply in our case as the liquor business is one affected with a public interest and the restriction here is for the public health, safety, morals and general welfare, and the regulation is a proper exercise of the police power. As the court in Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra, 45 Cal.2d at page 887, 291 P.2d 936, pointed out, the California Fair Trade Act is completely dissimilar to the price fixing statute of the Thrift-D-Lux Cleaners case. The court said (45 Cal.2d at pages 887–888, 291 P.2d at page 940): "As held in the Max Factor case and here confirmed the Fair Trade Act is a proper exercise of the police power by the legislature in the protection of private contractual rights relating to the manufacture and sale of certain classified commodities deemed by the legislature to require freedom from governmental interference in the economic field. The Dry Cleaners case expressly recognized that to be the basis for the decision in the Max Factor case, 40 Cal.2d 436 at page 447, 254 P.2d 29. Nor is there a delegation of legislative power to fix prices in the present case. The act is only a legislative declaration that contracts between private parties establishing certain retail prices is not against public policy."

The method of interpreting the A.B.C. Act cannot be the same as that used in interpreting the statute involved in the Thrift-D-Lux case. So long as some public interest is found (which of course it is in the liquor business) the method to be used in testing the statute's constitutionality is not that used in the Thrift-D-Lux case, but that used in such cases as Serve Yourself Gasoline Stations Ass'n v. Brock, 39 Cal.2d 813, 249 P.2d 545, and In re Fuller, supra, 15 Cal.2d 425, 102 P.2d 321.

[7] Under the California Fair Trade Act the manufacturer makes two decisions, (1) whether his product should be fair traded, and (2) what the price shall be. Under the A.B.C. Act he can make the second decision only. The Legislature has determined the first decision. As it has been held that there is no delegation of legislative authority to the manufacturer where he has two decisions to make, how can there be such delegation where he has only one of those decisions to make? While the voluntary aspect of the contract under the Fair Trade Act is stressed by petitioner, it should be remembered that it is compulsory that nonsigners of the contract comply with it. In holding such compulsion to be valid the principle of compulsion in fair trade contracts has been established. In the interests of the public welfare it is more important that compulsion be applied to the liquor business than to the ordinary business where strict regulation is not required. In Levine v. O'Connell, 1949, 275 App.Div. 217, 88 N.Y.S.2d 672, affirmed 300 N.Y. 658, 91 N.E.2d 322, cited by petitioner, and which condemned a New York statute not because the Legislature required liquor to be fair traded, but because the Legislature had delegated to an administrative board the authority to determine whether resale prices should be determined by fair trade contracts, the court said (88 N.Y.S.2d at page 674): "We assume, but without deciding, that it would be within the competence of the legislature to determine that mandatory price-fixing in the sale of alcoholic beverages would be a proper exercise of the police power. The important point for this case is that the legislature has not done so * * *"

The A.B.C. Act does not fix, or authorize anyone to fix, uniform prices for alcoholic beverages, while the dry cleaners' statute did fix uniform prices for the services involved. Section 16720, Business and Professions Code, expressly forbids any agreement or combination to fix uniform prices. The fair trade provisions merely provide for the orderly marketing of distilled spirits by requiring that each brand be fair traded. Each brand owner sets the retail price for his brand alone and for no other brand. Such price is required to be fixed "in fair and open competition with alcoholic beverages of the same general class produced by others * * *"

[8, 9] The fact that, as contended by petitioner, the general Fair Trade Laws leave the discretion of fair trade prices to each brand owner while the A.B.C. Act requires that all brands of distilled spirits be fair traded, and the fact that the general law gives a right of action to a person damaged by a violator's breach of the fair trade contract while the A.B.C. Act provides for disciplinary action of a licensee violating such contract, do not convert the legislative determination of policy in favor of fair trading liquor into a delegation of legislative power. As it has the right to do in regulating the liquor business, the Legislature provided mandatory price fixing by the distillers, etc., with disciplinary action by the state for failure to comply. The mandatory feature proves to some extent that there is no unlawful delegation of authority. The manufacturer has no discretion, as in the general fair trade situation, in determining whether fair trade prices shall prevail. Nor is the Legislature bound in dealing with the liquor business to apply the same penalties for violation of fair trade contracts as are applied to other types of business. Actually, suspension or revocation of a liquor license is not penal, but disciplinary. Cornell v. Reilly, 127 Cal. App.2d 178, 184, 273 P.2d 572. Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra, 45 Cal.2d 881, 291 P.2d 936, stated, in effect, that fair trade statutes were not primarily designed for the regulation of prices, but were principally designed to protect the property and contract rights of the manufacturer. In the A.B.C. Act this is not the primary purpose. As pointed out before, the primary purpose is to prevent price cutting in the interests of temperance, to regulate the liquor business. The fact that it also protects the property rights of the manufacturer does not make the statute unreasonable nor unconstitutional. Nor is it a price fixing statute any more than the general fair trade statutes are.

Nelson v. Reilly, 88 Cal.App.2d 303, 198 P.2d 694, assumed the legality of the then section 55.5, A.B.C. Act. (Apparently its legality was assumed by the parties as it was not challenged except as to the application of the Cartwright Law which the court held could not apply.) There it was contended that at the time rule 99 was amended to make fair trade contracts mandatory, section 55.5, A.B.C. Act, provided that they were permissory. The court pointed out that in 1947 section 55.6 was added to make such contracts mandatory and held that as now a retailer's duty arose from the statute, and as the rule now imposed the same duty as the statute the question of its previous situation was moot, and the rule could now be enforced.

In Levine v. O'Connell, supra, 88 N.Y.S. 2d 672, affirmed 91 N.E.2d 322, it was held that a legislative act which gave a liquor board the discretion to determine whether or not fair trade liquor contracts should be mandatory, was invalid. However, the court indicated that if the Legislature had made fair trading mandatory, the act would have been valid. Thus, the New York court felt that the exercise of the legislative function was in the making of fair trade contracts mandatory, and not in the setting of the price. See Schwartz v. Kelly, 140 Conn. 176, 99 A.2d 89, upholding a Connecticut statute requiring the manufacturer to place on its brand label a statement that a minimum consumer retail price had been filed with the liquor control commission, and which made a violation punishable by suspension or revocation of the violator's permit. Even though there were, as contended by petitioner, a delegation of power to the manufacturer, nevertheless such delegation would not be without standards provided by the Legislature. The price set by the manufacturer is what the market will bear, and is determined by the standards present in any market where goods are competing with each other. The standards are those which control prices in any free market. This distinguishes the "price fixing" in the Thrift-D-Lux case. There prices were fixed on a horizontal level for the whole industry. The cost to the consumer was predetermined and no matter to what dry cleaning shop he went the cost would be the same. Under the instant act the cost to the consumer of a bottle of a certain brand will be the same wherever he goes. But the consumer may find that the cost of a comparable brand is not the same as that of the first mentioned brand. The manufacturer of the latter brand may not control the price of the competing brand. The manufacturer's determination of the price of his product will, of course, be affected by other manufacturer's prices for comparable brands, but this is true in any free market, and, in fact, is the crux of free competition. Unquestionably, the Legislature could have set minimum prices for various types of alcoholic beverages. It did not do so. It undoubtedly felt that it is more in the public interest that the prices be not so strictly controlled, and that the prices set in open competition by the manufacturer will be of more benefit to the public than by the Legislature rigidly controlling the price. These standards have controlled our American economy in the past, and presumably have aided the economy in becoming as prosperous as it is. We see no reason why the Legislature may not adopt these standards in the regulation of the liquor business. Here there is no setting of prices multilaterally as in the Thrift-D-Lux case. In fact, the setting of prices among competing manufacturers is made illegal. Retailers are not permitted either under permissive fair trade, or under mandatory fair trade to set their own prices to compete with other retailers. One of the purposes of the regulation is to prevent monopoly by large liquor retailers, particularly multiple unit retailers ("chains") to the ultimate destruction of the smaller neighborhood store. This is in the interest of the public welfare.

While it is true that in leaving competition free at the manufacturing level and the manufacturers may cut prices, it is reasonable to assume that the Legislature believed that such competition would not cause such drastic reductions in prices as might occur at the retail level, there being vastly more retailers than manufacturers.

The means adopted by the Legislature to bring about an orderly distribution of liquor at the retail level and to obtain temperance is not arbitrary or discriminatory. For this purpose the Legislature has made mandatory the use of fair trade contracts. The Legislature knew the effect of fair trade contracts when it made fair trade contracts permissible. This legislation has been upheld by the California Supreme Court twice. Max Factor & Co. v. Kunsman, 5 Cal.2d 446, 55 P.2d 177; Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra, 45 Cal.2d 881, 291 P.2d 936. The Legislature to accomplish the same effect, although perhaps for a different purpose (see supra), saw fit to make fair trade contracts mandatory in the liquor industry. It cannot be said that this course, to accomplish a desired result, was unreasonable.

Other state courts faced with the problem of the constitutionality of price regulation in the liquor industry have generally held such statutes valid. See Schwegman Bros. v. Louisiana Board, etc., 216 La. 148, 43 So.2d 248, 14 A.L.R.2d 699; Gaine v. Burnett, 122 N.J.L. 39, 4 A.2d 37 (an administrative rule by the state liquor commissioner which required that alcoholic beverages be fair traded, and that retailers sell at the prices so established, held valid); Nocera Bros. Liquor Mart v. Liquor Control Hear. Bd., 81 R.I. 186, 100 A.2d 652 (statute allowing liquor board to fix prices on a cost plus percentage mark up, held valid); Reeves v. Simons, 289 Ky. 793, 160 S.W.2d 149 (same); Gipson v. Morley, 217 Ark. 560, 233 S.W.2d 79 (same).

In Schwartz v. Kelly, supra, 99 A.2d 89, at pages 91–93, contentions similar to most of those made in our case were made and well answered:

"In passing upon the constitutionality of a statute, a court is bound to make every presumption and intendment in favor of the statute and to sustain it unless it is clearly invalid. [Citations.] * * * The court's only function is to determine whether the object of the enactment is within the power of the legislature and, if so, whether the particular statute bears a reasonable and substantial relation to the object sought to be accomplished and is neither arbitrary nor discriminatory. Carroll v. Schwartz, 127 Conn. 126, 129, 14 A.2d 754.

"Although the act here in question does not contain a statement of the objects sought to be accomplished, the purposes which the General Assembly had in mind in adopting it are easily discernible. They were both to promote temperance in the consumption of intoxicating liquor and, by stabilizing the industry, to encourage observance of the Liquor Control Act by those who are permitted to sell liquor not to be consumed on the premises. It may reasonably be presumed that, without the establishment of a minimum retail price for branded liquor, price wars among retail dealers are apt to occur. The cutting of prices which occurs during such wars may induce persons to purchase, and therefore consume, more liquor than they would if higher prices were maintained. Moreover, the cutthroat competition which ensues is apt to induce the retailers to commit such infractions of the law as selling to minors and keeping open after hours in order to withstand the economic pressure. To prevent the occurrence of such conditions promotes public health, safety and welfare. Like all reasonable restrictions on the liquor traffic, such a purpose is well within the police power of the state. [Citations.]

"To accomplish this purpose, the General Assembly has, in this instance, adopted the method of permitting wholesalers to fix minimum prices at which each brand of liquor may be sold at retail. Price fixing is well recognized as a method reasonably suited to effectuate such purpose and, therefore, is not a violation of due process. [Citations.] Clearly, the act which requires wholesalers as a condition of doing business in this state to schedule minimum prices at which their brands of liquor may be sold and prohibits permittees from selling at retail for less than those prices is within the police power of the state. * *

"The second broad claim of the plaintiffs is that the act is unconstitutional because it delegates legislative powers both to the wholesalers of intoxicating liquor and to the liquor control commission without prescribing standards to control the exercise of those powers. [Citations.] The act affects the wholesalers in only two ways. In the first place, it prohibits their doing business in this state until they have filed their schedules of retail prices. In the second place, it protects the property rights which they have in their respective brand names by prohibiting the sale of their branded liquors at cut rates. In filing the schedule of minimum retail prices to be charged for their liquor, they are not legislating. They are merely complying with the law enacted by the General Assembly. Their fixing of prices, by itself, does not have the force of law. It is the General Assembly that has directed that retailers shall not sell for less than the established prices. There has been no delegation of legislative powers to the wholesalers. Old Dearborn Distributing Co. v. Seagram Distillers Corporation, 299 U.S. 183, 194, 57 S.Ct. 139, 81 L.Ed. 109."

Schwegmann Bros. v. Louisiana Board, etc., 216 La. 148, 43 So.2d 248, 14 A.L.R.2d 680, and Scarborough v. Webb's Cut Rate Drug Co., 150 Fla. 754, 8 So.2d 913, have held price regulation to be unconstitutional. They are against the weight of authority. Moreover, we deem the reasoning of the majority cases better, particularly in view of the attitude of the California Supreme Court as expressed in Scovill Mfg. Co. v. Skaggs etc. Drug Stores, supra, 45 Cal.2d 881, 291 P.2d 936.

[10] Under Business and Professions Code sections 24750 through 24757, manufacturers of distilled spirits (liquor) are required to enter fair trade contracts whereas under sections 24850 through 24881 manufacturers and producers of wine have the option of submitting retail price lists with the Department of Alcoholic Beverage Control, rather than entering fair trade contracts. This difference would not seem controlling since under either scheme the manufacturers are the ones who "fix" the retail prices. If fair trading is legal (and it is concluded that it is), the optional requirement of submitting price lists would also seem allowable. The sections relating to beer (§§ 25000–25010) are inapposite to this litigation because petitioner was not charged with violations of these sections.

The fact that the Legislature has not seen fit to apply fair trade requirements to the sale of beer and over the bar drinks does not invalidate the restrictions which the Legislature did impose. Historically there has always been a distinction in the manner of regulating the sale of beer as compared to other alcoholic beverages. As far as fair trading over the bar drinks is concerned, the obviously many practical difficulties of making and enforcing such regulations could well have actuated the Legislature. The answer to somewhat similar contentions made in Miller v. Wilson, 236 U.S. 373, 383–384, 35 S.Ct. 342, 344, 59 L.Ed. 628, is applicable here: "The contention as to the various omissions which are noted in the objections here urged ignores the well-established principle that the legislature is not bound, in order to support the constitutional validity of its regulation, to extend it to all cases which it might possibly reach. Dealing with practical exigencies, the legislature may be guided by experience. Patsone v. Pennsylvania, 232 U.S. 138, 144, 34 S.Ct. 281, 58 L.Ed. 539, 543. It is free to recognize degrees of harm, and it may confine its restrictions to those classes of cases where the need is deemed to be clearest. As has been said, it may 'proceed cautiously, step by step,' and 'if an evil is specially experienced in a particular branch of business' it is not necessary that the prohibition 'should be couched in all-embracing terms'."

The judgment is reversed.

FRED B. WOOD, J., concurs.

HANSON, Justice pro tem.

I dissent from the opinion and judgment of the court in this case, and wish simply to state the grounds of my dissent, with a few observations thereon, without any attempt to do more. I concede, of course, that the result reached by the majority of the court probably is a desirable one if the aim is to achieve temperance, but I have difficulty in understanding how it can be deduced that the ruling does not trench upon constitutional principles. We must never forget that decisions which are classed as desirable must nevertheless meet and square with those principles embodied in our constitutions—state and federal. In 1919 temperance was sought to be achieved by legislation taking the form of a constitutional amendment which made the manufacture, sale, or transportation of intoxicating liquors illegal. That amendment, the 18th, did not reach the objective, in the view of the majority of the citizens of our nation, and hence was repealed in 1933. We now have a statute before us for interpretation purporting to have much the same objective in view. That it restricts free enterprise cannot be gainsaid; that it may, if upheld, create a measure of greater temperance, as the Legislature hoped, is possible; but that we should not whittle down constitutional safeguards to achieve a single desirable result seems to me equally clear. What is more, or so it seems to me, is that our free enterprise system should not enrich a small minority at the expense of the great majority. In the statute before us the "brand" liquor dealer is benefited and the consumer is harmed so far as "price" is concerned.

Turning to the legal aspects of the case we find that under the statute here involved no distiller or brand owner of distilled liquors can sell his product in California unless he schedules the minimum price at which the retailer may sell his products within the state, and, having done so, a retailer must avide by the price so set. This then gives to the original purveyor a price monopoly; that is, he not only must set his own minimum price to the retailer on his product regardless of its intrinsic value but require the retailers to sell at or above the retail price he names as the minimum price. But this is not all; it is the further duty of the state through the Alcoholic Beverage Control Act to enforce the scheduled price through its penal sanctions, one of which is to suspend the retail dealer's liquor license, if and when he violates the act. Granted, for the sake of argument that the trend of judicial decisions in this state and elsewhere favors the view of the majority of this court, no decision is extant in this state that goes as far as the majority does in this case.

In the legislative act before us, for interpretation and decision, the Legislature has delegated the right to fix the minimum price at which a retail liquor dealer, with a valid license, can sell a "brand" or "nonbrand" bottle of liquor, not to a board or officer of the state, but to a private individual. Thus, the very person or corporation that manufactures or distributes the product sets the price at which the retailer may and must sell without any right of any kind or character on the part of any representative of the state to challenge it for price, quality, or otherwise. This to me is uncontrolled monopoly run riot with state sanction.

Rehearing denied; HANSON, J. pro tem., dissenting.

Hearing granted; DRAPER, J. pro tem., participating in place of TRAYNOR, J.